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CASES REPORTED

	Vol.		Page
Abelleira v. California Employment Commission, Sup.	113	P.2d	217
Adams; People v., App.	114	P.2d	77
Albania v. Kovacevich, App.	113	P.2d	251
American Trust Co.; Easterday v., App.	114	P.2d	669
Angeles Credit Co.; Springer v., App.	113	P.2d	7
Angeles Credit Co.; Springer v., App.	113	P.2d	10
Armstrong; Raentsch v., App.	114	P.2d	78
Arnold v. Universal Oil Land Co., App.	114	P.2d	408
Arrow Mill Co.; California Employment Commission v., App.	114	P.2d	727
Asbury Rapid Transit System v. Railroad Commission, Sup.	114	P.2d	573
Atkinson; Rabbit v., App.	113	P.2d	14
Axelrad; Colombo v., App.	114	P.2d	425
Badger v. Homan, App.	113	P.2d	925
Bank of America Nat. Trust & Savings Ass'n v. National Funding Corporation, App.	114	P.2d	49
Bank of America N. T. & S. A.; Bernhard v., App.	114	P.2d	661
Bank of America N. T. & S. A. v. Katz, App.	113	P.2d	759
Bardeen; Commander Oil Co. v., App.	113	P.2d	266
Barron v. Board of Dental Examiners of State of California, App.	113	P.2d	247
Bastajian v. Brown, App.	113	P.2d	454
Baumbaugh v. San Diego County, App.	113	P.2d	218
Beal v. Dunn, App.	113	P.2d	242
Beck; Whittier Union High School Dist. v., App.	114	P.2d	731
Bekins Van Lines v. Johnson, App.	114	P.2d	684
Benson; Jones v., App.	114	P.2d	631
Bente v. Department of Water and Power of City of Los Angeles, App.	114	P.2d	699
Bernhard v. Bank of America N. T. & S. A., App.	114	P.2d	661
Berntsen; Coker v., App.	113	P.2d	735
Berntsen; Johnson v., App.	113	P.2d	735
Berntsen; Sparks v., App.	113	P.2d	735
Besoyan; People v., App.	114	P.2d	18
Billiwhack Stock Farms; Schwindt v., App.	113	P.2d	902
Black; People v., App.	113	P.2d	746
Blaylock v. Coates, App.	113	P.2d	256
Blaylock v. Coates, App.	113	P.2d	258
Board of Civil Service Com'rs of City of Los Angeles; Rubio v., App.	114	P.2d	700
Board of Dental Examiners of State of California; Barron v., App.	113	P.2d	247
Board of Sup'rs of Los Angeles County; McCoy v., Sup.	114	P.2d	569
Bogunovic, In re, Sup.	114	P.2d	581
Bogunovic v. United States Department of Labor, Sup.	114	P.2d	581
Booge v. Reinicke, App.	114	P.2d	427
Bosworth; Lanfried v., App.	113	P.2d	23
Bosworth; Lanfried v., App.	114	P.2d	406
Bowers v. Stubblefield, App.	114	P.2d	641
Brandenburg v. Los Angeles County Flood Control Dist., App.	114	P.2d	14
Braue's Estate, In re, App.	114	P.2d	386
Brown; Bastajian v., App.	113	P.2d	454
Brown v. Oxtoby, App.	114	P.2d	622
Bruder; Security-First Nat. Bank of Los Angeles v., App.	113	P.2d	3
Brunton v. Superior Court of Los Angeles, App.	114	P.2d	45
Burgess v. Security-First Nat. Bank of Los Angeles, App.	113	P.2d	298
Caletti v. State, App.	114	P.2d	9

	Vol.		Page
California Employment Commission; Abelleira v., Sup.	113	P.2d	217
California Employment Commission v. Arrow Mill Co., App.	114	P.2d	727
California Growers Wineries; Mile v., App.	114	P.2d	651
Campbell; Dallapi v., App.	114	P.2d	646
Carson; People v., App.	114	P.2d	619
Carter; Hochwender v., App.	114	P.2d	401
Castillo v. Warren, App.	113	P.2d	232
Cathcart v. Gregory, App.	113	P.2d	894
Citizens State Bank of Long Beach v. Hoffman, App.	113	P.2d	221
City and County of San Francisco; Davis v., App.	114	P.2d	359
City and County of San Francisco; S. & G. Gump Co. v., Sup.	114	P.2d	346
City of Long Beach; Womar v., App.	114	P.2d	704
City of Los Angeles v. Railroad Commission, Sup.	114	P.2d	573
City of Los Angeles; Southern California Tel. Co. v., App.	113	P.2d	773
Civil Service Board of City of Long Beach; Lewis v., App.	114	P.2d	634
Clarke v. Fiedler, App.	113	P.2d	275
Coates; Blaylock v., App.	113	P.2d	256
Coates; Blaylock v., App.	113	P.2d	258
Coca Cola Bottling Co. v. Feliciano, App.	114	P.2d	604
Coker v. Berntsen, App.	113	P.2d	735
Colombo v. Axelrad, App.	114	P.2d	425
Colusa County; Griffin v., App.	113	P.2d	270
Commander Oil Co. v. Bardeen, App.	113	P.2d	266
Consolidated Shippers v. Pacific Employers Ins. Co., App.	114	P.2d	34
Cousins Inv. Co. v. Hastings Clothing Co., App.	113	P.2d	878
Cowell Lime & Cement Co. v. State, Sup.	114	P.2d	331
Cragun v. Krossoff, App.	114	P.2d	431
Curtis; Limited Mut. Compensation Ins. Co. v., App.	114	P.2d	404
Dallapi v. Campbell, App.	114	P.2d	646
Davis v. City and County of San Francisco, App.	114	P.2d	359
Davis v. Krossoff, App.	114	P.2d	431
Department of Finance; Noce v., App.	113	P.2d	716
Department of Water and Power of City of Los Angeles; Bente v., App.	114	P.2d	699
Department of Water and Power of City of Los Angeles; Little v., App.	114	P.2d	701
Dodge; La Laguna Ranch Co. v., Sup.	114	P.2d	351
Dodson; People v., App.	113	P.2d	904
Doyle v. Loyd, App.	114	P.2d	398
Dunn; Beal v., App.	113	P.2d	242
Dutton v. Interstate Inv. Corporation, App.	113	P.2d	492
Eagle Oil & Refining Co. v. Prentice, App.	114	P.2d	382
Easley; Grady v., App.	114	P.2d	635
Easterday v. American Trust Co., App.	114	P.2d	669
Easterday's Estate, In re, App.	114	P.2d	669
Elson v. Nyhan, App.	113	P.2d	474
E & J Mfg. Co.; Johnstone v., App.	114	P.2d	658
Farrar; Randall Discount Corporation v., App.	113	P.2d	11
Feliciano; Coca Cola Bottling Co. v., App.	114	P.2d	604
Fenton; Sovereign Oil Corporation v., App.	114	P.2d	18
Fernandez; People v., App.	113	P.2d	914
Fiedler; Clarke v., App.	113	P.2d	275
Finkel & Lasarow; Union Liquors v., App.	113	P.2d	19
Flint; People v., App.	113	P.2d	924
Food and Grocery Bureau of Southern California v. Garfield, Sup.	114	P.2d	579
Forger; Van Cauteren v., App.	114	P.2d	6
Fresno City Lines; Nance v., App.	113	P.2d	244
Garcia v. Superior Court in and for San Bernardino County, App.	113	P.2d	470
Gardiner; Kandjounzeff v., App.	114	P.2d	643

	Vol.		Page
Gardiner's Estate, In re, App.	114	P.2d	643
Garfield; Food and Grocery Bureau of Southern California v., Sup.	114	P.2d	579
Gates v. McKinnon, Sup.	114	P.2d	576
Gilchrist v. Harrah, App.	113	P.2d	712
Giminiani; People v., App.	114	P.2d	392
Giovanni; People v., App.	113	P.2d	912
Gogo v. Los Angeles County Flood Control Dist., App.	114	P.2d	65
Gordon; People v., App.	114	P.2d	698
Grady v. Easley, App.	114	P.2d	635
Gregory; Cathcart v., App.	113	P.2d	894
Griffin v. Colusa County, App.	113	P.2d	270
Griffith; Siedletz v., Sup.	114	P.2d	598
Guilliams v. Hollywood Hospital, Sup.	114	P.2d	1
Gump Co. v. City and County of San Francisco, Sup.	114	P.2d	346
Guzman, In re, App.	114	P.2d	46
Hacienda Homes v. Peck, App.	113	P.2d	487
Hammond v. McDonald, App.	113	P.2d	899
Hansen v. Town of Antioch, Sup.	114	P.2d	329
Harnett; Rognier v., App.	114	P.2d	654
Harrah; Gilchrist v., App.	113	P.2d	712
Harrell; Lynch v., App.	113	P.2d	261
Hastings Clothing Co.; Cousins Inv. Co. v., App.	113	P.2d	878
Hatch v. Penzner, App.	113	P.2d	295
Hatch; Schwarz v., App.	114	P.2d	677
Henry Cowell Lime & Cement Co. v. State, Sup.	114	P.2d	331
Hercules Glue Co. v. Littooy, App.	113	P.2d	490
Heywood v. Sooy, App.	114	P.2d	361
Hickman, In re, Sup.	113	P.2d	1
Hill; Robinson v., App.	114	P.2d	626
Hilton; Kott v., App.	114	P.2d	666
Hochwender v. Carter, App.	114	P.2d	401
Hoffman; Citizens State Bank of Long Beach v., App.	113	P.2d	221
Hollywood Hospital; Guilliams v., Sup.	114	P.2d	1
Hollywood Turf Club; Suttles v., App.	114	P.2d	27
Homan; Badger v., App.	113	P.2d	925
Houze v. Kovacevich, App.	113	P.2d	255
Howaldt v. Superior Court, Sup.	114	P.2d	333
Hugon; People v., Super.	114	P.2d	84
Hurwit v. Prudential Ins. Co. of America, App.	113	P.2d	691
Huston; People v., App.	114	P.2d	607
Industrial Accident Commission; Southern Pac. Co. v., App.	113	P.2d	763
Industrial Accident Commission; Southern Pac. Co. v., App.	113	P.2d	768
Industrial Accident Commission; Southern Pac. Co. v., App.	113	P.2d	770
Interstate Inv. Corporation; Dutton v., App.	113	P.2d	492
Irvine; People v., App.	113	P.2d	904
Italiani v. Metro-Goldwyn-Mayer Corporation, App.	114	P.2d	370
Jaffe v. Stone, Sup.	114	P.2d	335
Jalof v. Robbins, App.	113	P.2d	728
Janss Inv. Corporation; Rothstein v., App.	113	P.2d	465
Jentick v. Pacific Gas & Electric Co., Sup.	114	P.2d	343
Joffe; People v., App.	113	P.2d	901
Johnson; Bekins Van Lines v., App.	114	P.2d	684
Johnson v. Berntsen, App.	113	P.2d	735
Johnson v. Western Air Exp. Corporation, two cases, App.	114	P.2d	688
Johnstone v. E & J Mfg. Co., App.	114	P.2d	658
Jones v. Benson, App.	114	P.2d	631
Jones v. Pleasant Valley Canal Co., App.	113	P.2d	289
Jones v. Universal Pictures Co., App.	114	P.2d	723

	Vol.		Page
Jones v. Yuma Motor Freight Terminal, App.	114	P.2d	438
Juneau v. Juneau, App.	113	P.2d	463
Kabakoff; People v., App.	113	P.2d	760
Kandjounzeff v. Gardiner, App.	114	P.2d	643
Katz; Bank of America N. T. & S. A. v., App.	113	P.2d	759
King Lumber Co.; Safeway Stores v., App.	113	P.2d	483
King's Estate, In re, App.	113	P.2d	282
Knight; People v., App.	113	P.2d	226
Kott v. Hilton, App.	114	P.2d	666
Kovacevich; Albania v., App.	113	P.2d	251
Kovacevich; Houze v., App.	113	P.2d	255
Kovacevich; State Compensation Ins. Fund v., App.	113	P.2d	251
Krossoff; Cragun v., App.	114	P.2d	431
Krossoff; Davis v., App.	114	P.2d	431
La Laguna Ranch Co. v. Dodge, Sup.	114	P.2d	351
Lanfried v. Bosworth, App.	113	P.2d	23
Lanfried v. Bosworth, App.	114	P.2d	406
Lee; Rich v., App.	113	P.2d	235
Lewis v. Civil Service Board of City of Long Beach, App.	114	P.2d	634
Limited Mut. Compensation Ins. Co. v. Curtis, App.	114	P.2d	401
Lissauer v. Union Bank & Trust Co. of Los Angeles, App.	114	P.2d	367
Little v. Department of Water and Power of City of Los Angeles, App.	114	P.2d	701
Littooy; Hercules Glue Co. v., App.	113	P.2d	490
Long v. Thompson, App.	113	P.2d	698
Los Angeles, City of, v. Railroad Commission, Sup.	114	P.2d	573
Los Angeles County; Southern California Tel. Co. v., App.	113	P.2d	773
Los Angeles County Flood Control Dist.; Brandenburg v., App.	114	P.2d	14
Los Angeles County Flood Control Dist.; Gogo v., App.	114	P.2d	65
Loyd; Doyle v., App.	114	P.2d	398
Luckenbach; Supple v., App.	114	P.2d	734
Lynch v. Harrell, App.	113	P.2d	261
Macart v. San Joaquin Building & Loan Ass'n, App.	114	P.2d	395
McCarthy; People v., App.	114	P.2d	24
McCoy v. Board of Sup'rs of Los Angeles County, Sup.	114	P.2d	569
McDonald; Hammond v., App.	113	P.2d	899
McKinnon; Gates v., Sup.	114	P.2d	576
McMillan; People v., Super.	114	P.2d	440
Maloney v. Massachusetts Bonding & Insurance Co., App.	114	P.2d	417
Marr; People v., App.	113	P.2d	22
Marre's Estate, In re, Sup.	114	P.2d	586
Marre's Estate, In re, Sup.	114	P.2d	591
Marvich; People v., App.	113	P.2d	223
Massachusetts Bonding & Insurance Co.; Maloney v., App.	114	P.2d	417
Massachusetts Bonding & Insurance Co.; State Athletic Commission v., App.	113	P.2d	720
Massanet; Stockton Savings & Loan Bank v., Sup.	114	P.2d	592
Merron v. Title Guarantee & Trust Co., App.	113	P.2d	481
Metro-Goldwyn-Mayer Corporation; Italiani v., App.	114	P.2d	370
Metropolitan Life Ins. Co.; Richards v., App.	113	P.2d	703
Meyberg v. Superior Court in and for Los Angeles County, two cases, App.	113	P.2d	473
Meyberg v. Superior Court in and for Los Angeles County, two cases, App.	113	P.2d	474
Michel; Richardson v., App.	113	P.2d	916
Mile v. California Growers Wineries, App.	114	P.2d	651
Milgate v. Wraith, App.	113	P.2d	503
Minetti; Piuma v., Sup.	114	P.2d	586
Minetti; Piuma v., Sup.	114	P.2d	591
Moore; Slater v., App.	113	P.2d	716

	Vol.		Page
Mullen; People v., App.	114	P.2d	11
Nance v. Fresno City Lines, App.	113	P.2d	244
National Funding Corporation; Bank of America Nat. Trust & Savings Ass'n v., App.	114	P.2d	49
National Holding Co. v. Title Insurance & Trust Co., App.	113	P.2d	906
Nelson v. San Francisco Bank, App.	113	P.2d	258
Noce v. Department of Finance, App.	113	P.2d	716
Noland v. Noland, App.	113	P.2d	11
Nowell; People v., Super.	114	P.2d	81
Nyhan; Elson v., App.	113	P.2d	474
Oxtoby; Brown v., App.	114	P.2d	622
Pacific Employers Ins. Co.; Consolidated Shippers v., App.	114	P.2d	34
Pacific Gas & Electric Co.; Jentick v., Sup.	114	P.2d	343
Papineau v. Security-First Nat. Bank of Los Angeles, App.	114	P.2d	629
Park v. Union Mfg. Co., App.	114	P.2d	373
Parker v. Riley, Sup.	113	P.2d	873
Peck; Hacienda Homes v., App.	113	P.2d	487
Peerless Automatic Staple Mach. Co.; Washam v., App.	113	P.2d	724
Penzner; Hatch v., App.	113	P.2d	295
People v. Adams, App.	114	P.2d	77
People v. Besoyan, App.	114	P.2d	18
People v. Black, App.	113	P.2d	746
People v. Carson, App.	114	P.2d	619
People v. Dodson, App.	113	P.2d	904
People v. Fernandez, App.	113	P.2d	914
People v. Flint, App.	113	P.2d	924
People v. Giminiani, App.	114	P.2d	392
People v. Giovanni, App.	113	P.2d	912
People v. Gordon, App.	114	P.2d	698
People v. Hugon, Super.	114	P.2d	84
People v. Huston, App.	114	P.2d	607
People v. Irvine, App.	113	P.2d	904
People v. Joffe, App.	113	P.2d	901
People v. Kabakoff, App.	113	P.2d	760
People v. Knight, App.	113	P.2d	226
People v. McCarthy, App.	114	P.2d	24
People v. McMillan, Super.	114	P.2d	440
People v. Marr, two cases, App.	113	P.2d	22
People v. Marvich, App.	113	P.2d	223
People v. Mullen, App.	114	P.2d	11
People v. Nowell, Super.	114	P.2d	81
People v. Photo, App.	114	P.2d	71
People v. Pianezzi, App.	114	P.2d	601
People v. Soldavini, App.	114	P.2d	415
People v. Stowell, App.	114	P.2d	614
People v. Thomas, App.	113	P.2d	706
People v. United States Fidelity & Guaranty Co., App.	114	P.2d	389
People v. Vanderpool, App.	114	P.2d	608
People v. Van Meter, App.	114	P.2d	733
Photo; People v., App.	114	P.2d	71
Pianezzi; People v., App.	114	P.2d	601
Piuma v. Minetti, Sup.	114	P.2d	586
Piuma v. Minetti, Sup.	114	P.2d	591
Pleasant Valley Canal Co.; Jones v., App.	113	P.2d	289
Prentice; Eagle Oil & Refining Co. v., App.	114	P.2d	382
Prudential Ins. Co. of America; Hurwit v., App.	113	P.2d	691
Rabbit v. Atkinson, App.	113	P.2d	14
Raentsch v. Armstrong, App.	114	P.2d	78
Raentsch's Estate, In re, App.	114	P.2d	78

	Vol.		Page
Railroad Commission; Asbury Rapid Transit System v., Sup.	114	P.2d	573
Railroad Commission; City of Los Angeles v., Sup.	114	P.2d	573
Randall Discount Corporation v. Farrar, App.	113	P.2d	11
Reinicke; Booge v., App.	114	P.2d	427
Reiss v. Reiss, App.	114	P.2d	718
Reuss; Risco v., App.	113	P.2d	914
Reynolds v. Vidor, App.	114	P.2d	617
Rice v. Lee, App.	113	P.2d	225
Richards v. Metropolitan Life Ins. Co., App.	113	P.2d	703
Richardson v. Michel, App.	113	P.2d	916
Riley; Parker v., Sup.	113	P.2d	873
Risco v. Reuss, App.	113	P.2d	914
Robbins; Jalof v., App.	113	P.2d	728
Roberts; Vaughan v., App.	113	P.2d	884
Robinson v. Hill, App.	114	P.2d	626
Robinson's Estate, In re, App.	114	P.2d	626
Rognier v. Harnett, App.	114	P.2d	654
Rosebrook v. Utz, App.	114	P.2d	715
Rosenfield v. Vosper, App.	114	P.2d	29
Rothstein v. Janss Inv. Corporation, App.	113	P.2d	465
Rubio v. Board of Civil Service Com'rs of City of Los Angeles, App.	114	P.2d	700
Rule; Sears v., App.	114	P.2d	57
Safeway Stores v. King Lumber Co., App.	113	P.2d	483
Safeway Stores; Stansell v., App.	113	P.2d	264
Sager's Estate, In re, App.	114	P.2d	641
San Diego County; Baumbaugh v., App.	113	P.2d	218
San Francisco Bank; Nelson v., App.	113	P.2d	258
San Joaquin Building & Loan Ass'n; Macart v., App.	114	P.2d	395
Schmidt v. Schmidt, App.	114	P.2d	702
Schwarz v. Hatch, App.	114	P.2d	677
Schwindt v. Billiwhack Stock Farms, App.	113	P.2d	902
Sears v. Rule, App.	114	P.2d	57
Security-First Nat. Bank of Los Angeles v. Bruder, App.	113	P.2d	3
Security-First Nat. Bank of Los Angeles; Burgess v., App.	113	P.2d	298
Security-First Nat. Bank of Los Angeles; Papineau v., App.	114	P.2d	629
Siedletz v. Griffith, Sup.	114	P.2d	598
Simmons v. Simmons, App.	114	P.2d	659
Simmons v. Simmons, App.	114	P.2d	660
Slater v. Moore, App.	113	P.2d	716
Smith v. Smith, App.	113	P.2d	892
Soldavini; People v., App.	114	P.2d	415
Sonnicksen v. Sonnicksen, App.	113	P.2d	495
Sontag Chain Stores Co. v. Superior Court in and for Los Angeles County, Sup.	113	P.2d	689
Sooy; Heywood v., App.	114	P.2d	361
Southern California Tel. Co. v. City of Los Angeles, App.	113	P.2d	773
Southern California Tel. Co. v. Los Angeles County, App.	113	P.2d	773
Southern Counties Gas Co. of California; Van Rennes v., App.	113	P.2d	238
Southern Pac. Co. v. Industrial Accident Commission, App.	113	P.2d	763
Southern Pac. Co. v. Industrial Accident Commission, App.	113	P.2d	768
Southern Pac. Co. v. Industrial Accident Commission, App.	113	P.2d	770
Sovereign Oil Corporation v. Fenton, App.	114	P.2d	18
Sparks v. Berntsen, App.	113	P.2d	735
Springer v. Angeles Credit Co., App.	113	P.2d	7
Springer v. Angeles Credit Co., two cases, App.	113	P.2d	10
Stanford University School of Medicine; Wennerholm v., App.	113	P.2d	736
Stansell v. Safeway Stores, App.	113	P.2d	264
State; Caletti v., App.	114	P.2d	9
State; Henry Cowell Lime & Cement Co. v., Sup.	114	P.2d	331

	Vol.		Page
State Athletic Commission v. Massachusetts Bonding & Insurance Co., App.	113	P.2d	720
State Compensation Ins. Fund v. Kovacevich, App.	113	P.2d	251
Stockton Savings & Loan Bank v. Massanet, Sup.	114	P.2d	592
Stone; Jaffe v., Sup.	114	P.2d	335
Stowell; People v., App.	114	P.2d	614
Stubblefield; Bowers v., App.	114	P.2d	641
Superior Court; Howaldt v., Sup.	114	P.2d	333
Superior Court in and for Alameda County; Tulley v., App.	113	P.2d	477
Superior Court in and for Los Angeles County; Meyberg v., App.	113	P.2d	473
Superior Court in and for Los Angeles County; Meyberg v., App.	113	P.2d	474
Superior Court in and for Los Angeles County; Sontag Chain Stores Co. v., Sup.	113	P.2d	689
Superior Court in and for Los Angeles County; Whitley v., Sup.	113	P.2d	449
Superior Court in and for San Bernardino County; Garcia v., App.	113	P.2d	470
Superior Court of Los Angeles; Brunton v., App.	114	P.2d	45
Supple v. Luckenbach, App.	114	P.2d	734
Suttles v. Hollywood Turf Club, App.	114	P.2d	27
S. & G. Gump Co. v. City and County of San Francisco, Sup.	114	P.2d	346
Texas Co.; Wieczorek v., App.	114	P.2d	377
Thomas; People v., App.	113	P.2d	706
Thompson; Long v., App.	113	P.2d	698
Tillis v. Western Fruit Growers, App.	113	P.2d	267
Title Guarantee & Trust Co.; Merron v., App.	113	P.2d	481
Title Insurance & Trust Co.; National Holding Co. v., App.	113	P.2d	906
Town of Antioch; Hansen v., Sup.	114	P.2d	329
Tulley v. Superior Court in and for Alameda County, App.	113	P.2d	477
Union Bank & Trust Co. of Los Angeles; Lissauer v., App.	114	P.2d	367
Union Liquors v. Finkel & Lasarow, App.	113	P.2d	19
Union Mfg. Co.; Park v., App.	114	P.2d	373
United States Department of Labor; Bogunovic v., Sup.	114	P.2d	581
United States Fidelity & Guaranty Co.; People v., App.	114	P.2d	389
Universal Oil Land Co.; Arnold v., App.	114	P.2d	408
Universal Pictures Co.; Jones v., App.	114	P.2d	723
Utz; Rosebrook v., App.	114	P.2d	715
Van Cauteren v. Forger, App.	114	P.2d	6
Vanderpool; People v., App.	114	P.2d	608
Van Meter; People v., App.	114	P.2d	733
Van Rennes v. Southern Counties Gas Co. of California, App.	113	P.2d	238
Vaughan v. Roberts, App.	113	P.2d	884
Vidor; Reynolds v., App.	114	P.2d	617
Vosper; Rosenfield v., App.	114	P.2d	29
Warren; Castillo v., App.	113	P.2d	232
Washam v. Peerless Automatic Staple Mach. Co., App.	113	P.2d	724
Wear's Estate, In re, App.	113	P.2d	732
Wennerholm v. Stanford University School of Medicine, App.	113	P.2d	736
West; Wilcox v., App.	114	P.2d	39
Western Air Exp. Corporation; Johnson v., App.	114	P.2d	688
Western Fruit Growers; Tillis v., App.	113	P.2d	267
Whitehead v. Whitehead, App.	114	P.2d	403
Whitley v. Superior Court in and for Los Angeles County, Sup.	113	P.2d	449
Whittier Union High School Dist. v. Beck, App.	114	P.2d	731
Wieczorek v. Texas Co., two cases, App.	114	P.2d	377
Wilcox v. West, App.	114	P.2d	39
Winder v. Winder, Sup.	114	P.2d	347
Womar v. City of Long Beach, App.	114	P.2d	704
Wraith; Milgate v., App.	113	P.2d	503
Yuma Motor Freight Terminal; Jones v., App.	114	P.2d	438

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113 PACIFIC REPORTER
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18 Cal.2d 71

In re HICKMAN.
S. F. 16452.

Supreme Court of California.
May 14, 1941.

1. Criminal law 🔑1182

Where an appeal was noticed from judgment as well as from order denying motion for new trial, but judgment had not been entered, the determination of appeal was deemed to have been limited to affirmance of order denying new trial.

2. Criminal law 🔑1023(13)

In prosecution for attempted grand theft, denial of motion for a new trial was an "appealable order". Pen.Code, § 1237.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

3. Criminal law 🔑1182

Where no judgment had been entered, and appeal was thus limited to an order denying new trial, order of affirmance could not be effective to create or supply a judgment when, in fact, none had ever been entered.

4. Attorney and client 🔑39

Order of Supreme Court suspending attorney from office as attorney and reciting that a certified copy of judgment of conviction had been filed in Supreme Court could not serve to supply judgment of conviction where record showed that only a certified copy of record of conviction had been presented. St.1939, p. 357, § 6101.

5. Attorney and client 🔑39

A verdict of guilty in prosecution for attempted grand theft was a "conviction" which, when duly certified to the Supreme Court, was conclusive evidence authorizing a suspension of the accused attorney from the practice of law until judgment in case should become final. St.1939, p. 357, § 6101.

See Words and Phrases, Permanent Edition, for all other definitions of "Conviction".

6. Attorney and client 🔑39

Where attorney was prosecuted for attempted grand theft, verdict of guilty was returned, denial of motion for new trial was affirmed, attorney was placed on probation, and court subsequently found that attorney had faithfully complied with conditions of probation, ordered verdict of guilty changed to not guilty, and dismissed indictment, in view of fact that no judgment of conviction was ever entered, there was no authority for an order of disbarment. Pen.Code, § 1203.4; St.1939, p. 357, § 6102.

7. Attorney and client 🔑39

Where attorney was prosecuted for attempted grand theft, verdict of guilty was returned, denial of motion for new trial was affirmed, attorney was placed on probation, and court subsequently found that attorney had faithfully complied with conditions of probation, ordered verdict of guilty changed to not guilty, and dismissed indictment, in view of fact that no criminal proceeding was pending against attorney, there was no authority for the continued suspension of attorney from practice of law. Pen.Code, § 1203.4; St.1939, p. 357, § 6101.

8. Attorney and client 🔑46

Where attorney was prosecuted for attempted grand theft, verdict of guilty was returned, denial of motion for new trial was affirmed, attorney was placed on probation, and court subsequently found that attorney had faithfully complied with conditions of probation, ordered verdict of guilty changed to not guilty, and dismissed indictment, the fact that the absence of judgment of conviction precluded disbarment, and the absence of pending criminal proceeding required termination of the suspension of attorney from practice of law, did not absolve the attorney from consequences of unprofessional conduct which could be inquired into independently of the criminal proceeding.

◆

In Bank.

Proceedings in the matter of the suspension of George W. Hickman, from the practice of law, on a petition to vacate and set aside the suspension.

Petition granted and suspension terminated.

Louis R. Deadrich, of Oakland, for petitioner.

Claude Minard, of San Francisco, for respondent.

PER CURIAM.

This is a petition to vacate and set aside the suspension of George W. Hickman, a member of the State Bar.

The petitioner was convicted in Alameda county of attempted grand theft, a crime involving moral turpitude. The verdict of guilty was returned and filed on February 26, 1937. The petitioner's motion for a new trial was denied whereupon he applied for probation. On March 17, his application was granted.

The order of probation contained the provision that "imposition of judgment and sentence be suspended for a period of five years, during which time the defendant is placed on probation". Then followed the conditions of the probation, including confinement in the county jail for the first fifteen months of the probationary period. On the day the order of probation was entered the petitioner gave oral notice of appeal from the order denying his motion for a new trial and also from the judgment. The determination of that appeal, in form an affirmance of the judgment and order, is found in People v. Hickman, 31 Cal.App.2d 4, 87 P.2d 80.

Theretofore and on March 12, 1937, an order was made reciting that a "certified copy of judgment" was filed in this court, from which it appeared that petitioner, an attorney at law, had been convicted of the crime of attempted grand theft. Wherefore it was ordered that petitioner be "suspended from his office as such attorney until said judgment shall become final". It was further ordered that "should said judgment be affirmed on appeal, or otherwise become final, said George W. Hickman shall thereafter be deemed removed from said office, and that his name be stricken from the roll of attorneys and counsellors at law, but in case such conviction be set aside, he shall be deemed fully restored to his office as attorney at law".

On November 24, 1939, the superior court found that the petitioner had faithfully complied with all of the terms and conditions of probation; ordered that the verdict of guilty be changed to not guilty, and that the indictment charging the offense against the petitioner be dismissed, all pursuant to the provisions of section 1203.4 of the Penal Code.

Shortly after the entry of the order last above described the petitioner made an ex parte application to this court for an order setting aside the order of suspension, which was not granted. Later the petitioner filed the present petition and the matter came on regularly for hearing on an order to show cause, directed to the State Bar, why the petition should not be granted.

It is the contention of the petitioner that the recent decision of this court in the matter of the Petition of Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, January 17, 1941, is favorable to the granting of his petition. The factual situation in the Phillips case was not the same as in the present matter. In the Phillips case the order of probation was made after the pronouncement of sentence and the execution of the judgment was then suspended. In the present matter the "imposition of judgment and sentence" was suspended, and the defendant then placed on probation. In other words, the criminal proceedings were suspended prior to and without the imposition of judgment and sentence and no judgment of conviction was ever entered.

Under both the majority and the minority views expressed in the Phillips matter, there is no authority for an order of disbarment of petitioner under the circumstances here presented. And there appears to be no justification for a continuation of the order of suspension of petitioner, unless required by the order of affirmance of the District Court of Appeal above noted or the order of suspension made by this court on March 12, 1937.

[1-3] It is true that the petitioner noticed an appeal from the judgment as well as from the order denying his motion for a new trial, but as no judgment had been entered, the determination of the District Court of Appeal must be deemed to have been limited to an affirmance of the order denying the motion for a new trial, which was an appealable order under section 1237 of the Penal Code. The order of affirmance could not be effective thus to create or supply a judgment when, in fact, none had ever been entered.

[4, 5] Likewise the order of this court of March 12, 1937, cannot serve to supply a judgment of conviction by a recitation in the order that a certified copy of a judgment had been filed in this court, when in truth the record shows that only a certified copy of a record of conviction had been presented. Under section 288 of the Code of Civil Procedure (now section 6101 of the State Bar Act, St.1939, p. 357) the verdict of guilty was the conviction which, duly certified to this court, was the conclusive evidence authorizing a suspension "until judgment in the case becomes final".

[6, 7] It is the inevitable conclusion from the circumstances in this matter that, since no judgment was ever entered, the statutory authority for an order of disbarment, as provided in section 6102 of the State Bar Act, is lacking; and that since there is now no criminal proceeding pending against the petitioner, the authority for the continued suspension of the petitioner, pursuant to section 6101 of the same act, is likewise lacking.

[8] This conclusion, however, does not absolve the petitioner from the consequences of unprofessional conduct which may be inquired into by or under the direction of the board of governors of the state bar independently of the criminal proceedings, which inquiry, as stated by counsel for the State Bar on oral argument herein, is pending.

The petition is therefore granted and the suspension of petitioner from the practice of the law in this state, as ordered March 12, 1937, is terminated.

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44 Cal.App.2d 767

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. BRUDER et al.

Civ. 2742.

District Court of Appeal, Fourth District, California.

May 13, 1941.

Hearing Denied July 11, 1941.

1. Fraudulent conveyances ⇨300(1)

Evidence sustained judgment setting aside conveyance and subjecting land conveyed to satisfaction of a deficiency judgment obtained against the grantor in a mortgage foreclosure proceeding, on ground that the conveyance was made without consideration in order to hinder, delay, and defraud the mortgagee. Civ.Code, § 3439.

2. Appeal and error ⇨994(3), 1012(1)

Credibility of witnesses and weight of their testimony are for determination of the trier of facts.

3. Appeal and error ⇨996, 1011(1)

In absence of error of law, conflicting evidence or conflicting inferences are not to be resolved on appeal if some substantial evidence or reasonable inference supports the conclusion of the trier of facts.

4. Appeal and error ⇨1011(1)

On appeal neither should a preference of conflicting theories of fact be expressed nor should conflicting evidence be weighed.

5. Fraudulent conveyances ⇨64(1)

Fraudulent intent as to creditors in making conveyance may be inferred from circumstances surrounding transactions, and parties' relationship and interests.

6. Fraudulent conveyances ⇨271

In action to set aside conveyance allegedly fraudulent as to mortgagee which obtained deficiency judgment on foreclosure of mortgage, wherein evidence established existence of actual fraud, mortgagee was not required to prove value of the property upon which the mortgage was foreclosed. Civ. Code, § 3439.

7. Fraudulent conveyances ⇨66

Where there is actual fraud in making a conveyance which is subsequently sought to be set aside by a mortgagee which has obtained a deficiency judgment against grantor on foreclosure of mortgage, value of the mortgaged property is immaterial, as is also question concerning whether challenged conveyance was prior or subsequent to entry of deficiency judgment and whether the grantor stripped himself of assets. Civ.Code, § 3439.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by the Security-First National Bank of Los Angeles against Emil A. Bruder and others to set aside a conveyance made by named defendant to defendant Alice E. Coulter, as a conveyance made with intent to hinder, delay, and defraud creditors of the defendant Emil A. Bruder. From an adverse judgment, the defendants Emil A. Bruder and Alice E. Coulter appeal.

Affirmed.

Jerrell Babb, of Los Angeles, for appellants.

Thorpe & Bridges, of Los Angeles, for respondent.

KELLY, Justice, pro tem.

On the 16th day of February, 1935, the appellant Emil A. Bruder executed and delivered to the appellant Alice E. Coulter a grant deed whereby he conveyed to her certain property in Culver City, Los Angeles county. In the year 1930 Bruder made and executed a promissory note to one Alice Steele Ammerman to secure which he shortly thereafter executed a mortgage to the payee covering a ranch in San Fernando valley. Thereafter the note and mortgage were assigned to the respondent Security-First National Bank of Los Angeles. On July 13, 1935, the bank filed its complaint praying for a foreclosure of the mortgage. Bruder defaulted and a decree of foreclosure was entered on September 18, 1935. The property was sold and the proceeds of the sale applied in partial satisfaction of the foreclosure judgment. The plaintiff in said action, respondent here, bid in the property for the sum of $5,728.85. The principal sum specified in the note and mortgage was $7,640. With accumulated interest, costs and counsel fees the foreclosure judgment was in the sum of $9,946.38. After applying the proceeds of the sale in partial satisfaction as aforesaid, a deficiency remained in the sum of $4,372.28, for which judgment was duly entered.

In addition to the San Fernando property foreclosed on as aforesaid, Bruder owned at the time of the conveyance to Coulter two other parcels of land, one on Jefferson street, Los Angeles, encumbered for approximately $2,600, and one on East 47th place, Los Angeles, encumbered for approximately $2,500. There is evidence in the record that the property foreclosed on was as of February 16, 1935, of the value of $31,350. The Jefferson street property was of the value of $10,316, and the East 47th place property of the value of $6,680, making a total of $48,346. The total encumbrances amounted to approximately $12,500 which, subtracted from the gross value of the three several parcels, left an equity as of the date indicated in the amount of $35,846. Thereafter, and on September 17, 1936, the Security-First National Bank filed its complaint against Emil A. Bruder and Alice E. Coulter, together with certain fictitiously named defendants, wherein and whereby it was alleged that the conveyance by Bruder to Coulter on the 16th day of February, 1935, was without consideration and with the intent to hinder, delay and defraud the creditors of Bruder, and that the defendant Bruder was at such time insolvent or contemplating insolvency, and that the defendant Coulter accepted said conveyance from Bruder with the intent to hinder, delay and defraud the creditors of Bruder and claimants against his property. The complaint was answered by the defendants Emil A. Bruder and Alice E. Coulter, and issues having been joined, the case was tried by the court without a jury.

As to the issue of fraud, the trial court found as follows: "That it is true that on the 16th day of February, 1935, said defendant Emil A. Bruder, without consideration and with the intent to hinder, delay and defraud his creditors, including the plaintiff herein, and claimants against his property, transferred and conveyed the above-described real property and the whole thereof to defendant Alice E. Coulter. That it is true that the defendant Alice E. Coulter accepted the transfer and conveyance of said real property from the defendant Emil A. Bruder on the 16th day of February, 1935, with the intent to hinder, delay and defraud the creditors of the said Emil A. Bruder, including plaintiff herein and the claimants against the property of said defendant Emil A. Bruder."

Findings of fact and conclusions of law having been settled, judgment was accordingly entered in favor of the plaintiff and against the defendants Bruder and Coulter, describing the property covered by the mortgage as aforesaid, and as described in the complaint of the bank, adjudging the conveyance fraudulent and void as to the plaintiff and subjecting the property, so far as necessary, to the satisfaction of the plaintiff's judgment for the deficiency as aforesaid. From that judgment this appeal is taken by Emil A. Bruder and Alice E. Coulter, the defendants.

In their specifications the appellants charge that the court erred in its findings sustaining the allegations of fraud as alleged in the complaint and in its conclusions of law pursuant to the findings, and further that the court erred in ordering and rendering its judgment on the ground that the evidence does not support the findings of fact and conclusions of law upon which the judgment is based.

[1] (1) We find no merit in the appellants' contention as to the insufficiency of the evidence to sustain a finding, conclusion and judgment of actual fraud in the conveyance from the appellant Bruder to the appellant Coulter as of February 16, 1935. The appellant Coulter testified that she was a business friend of the appellant Bruder; that she loaned him money from time to time, taking promissory notes therefor; that the conveyance of February 16, 1935, was in payment of indebtedness evidenced by three promissory notes, one dated February 4, 1934, due one year after date in the principal sum of $2,200; one in the principal sum of $750, dated March 8, 1932, payable one day after date; and one in the principal sum of $16,100.85, dated January 1, 1930, due two years after date. The respective notes were received in evidence. The defendants further testified that neither of the parties kept any record of the several loan transactions other than the notes themselves, and from time to time, on renewals, the original promissory notes were destroyed. The $2,200 note was made up of two or three other notes including principal and interest. The $750 note represented another note plus cash loaned. The $16,100.85 note was for loans made since 1925, as evidenced by many promissory notes. Both Bruder and Coulter were extremely hazy as to the dates and amounts of the several loans which, in accumulation, produced the sum for which the three specified notes were made. As to the source of the moneys acquired by Coulter and loaned to Bruder, the evidence is most unsatisfactory, improbable and vague, and may indeed be characterized as fantastic.

Appellant Coulter testified that she engaged in clerical work; that prior to 1928 or 1929, she was permanently employed, and subsequent to those years she was employed only part time. When permanently employed she received as compensation for her labor, at times $25 per week and at times $115 per month. For eight years she was employed by a life insurance company doing clerical work at $27 per week. Since 1925 she did not receive any money or property from any source other than her pay. She made application for relief to the SE RA and for a few months in 1935 she worked for the WPA. Prior to 1933 she had only been employed intermittently for a period of five years and did not earn enough to support herself. She had no income from any property to amount to anything. The money she loaned Bruder was given her by her sister's husband in 1923. In that year the generous brother-in-law gave her $15,000 in currency mostly in $20 bills. There were no witnesses to the transaction. He told her to take it and put it in her safe deposit box and not to say anything to anyone about it. She testified that she received some $3,500 from her sister's estate. It also appears from her testimony that she had some few liberty bonds which in her years of need she sold from time to time to cover living expenses. Having received the gift of $15,000 she made no report to the assessor and never made an income tax report. It appears abundantly from her testimony that the appellant Coulter was often in need and almost, if not quite destitute.

[2-5] Apparently the trial court did not believe either Bruder or Coulter and concluded that the conveyance of February 16, 1935, was wholly without consideration. The credibility of the witnesses and the weight of their testimony are committed for determination to the trier of facts. It is not necessary to cite authority for the often reiterated rule that in the absence of error of law, conflicting evidence or conflicting inferences are not to be resolved on appeal if some substantial evidence or reasonable inference supports the conclusion of the trier of facts. On appeal neither should a preference of conflicting theories of fact be expressed nor should conflicting evidence

be weighed. The rule cannot be otherwise for many incidents usually attend the reception of evidence, such as the manner of a witness while testifying, his evident embarrassment, his hesitation, the tones of his voice, his manifest bias or prejudice, and his appearance generally when on the witness stand, all of which are properly noted by the trier of facts and may materially contribute to the conclusion reached. These incidents are by their nature not susceptible of record in a phonographic report and cannot be transmitted by any known practical science to an appellate tribunal. "From the very nature of the action, direct proof of the fraudulent intent of the parties is an impossibility. For this reason and because the real intent of the parties and the facts of the transactions are peculiarly within the knowledge of those sought to be charged with the fraud, proof indicative of fraud must come by inference from the circumstances surrounding the transaction, the relationship and interests of the parties." Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350, 354.

It may be further noted that Bruder testified that he made the challenged conveyance to Coulter because he was "threatened". In further explanation of his meaning he said that the appellant Coulter was pressing him for the payment of the debts due her. In this the appellant Coulter in her testimony failed him, for while destitute, or nearly so, she said she was confident Bruder would pay her when he had the money and did not press him. The trial court having disregarded the testimony of Bruder and Coulter as to the consideration and purpose of the transfer, was further justified in drawing a reasonable inference from what must now be deemed a fabricated situation. We may add that we have not attempted to recite in toto the improbable testimony of Bruder and Coulter. Added to that is the testimony of a handwriting expert which casts further doubt upon their testimony as to the dates of execution of the promissory notes and the cancellation thereof upon the execution of the conveyance of February 16, 1935. It seems reasonable for the court to have inferred that that conveyance was not only without consideration but for a purpose sinister and shameful, which the parties to the transaction sought to conceal by fabrication and falsehood. In this purpose the evident collaboration of both grantor and grantee is apparent. Their approximately parallel tales indicate a community of dishonest enterprise. It well may be inferred that while the deficiency judgment was not entered until sometime subsequent to the questioned conveyance, nevertheless interest was found due and unpaid and pressure for payment was being applied by the bank. As the record is silent as to pressure from any other source, the conclusion is valid that the conveyance was made to hinder, delay and defraud the bank as holder of the note and mortgage subsequently sued upon.

[6, 7] (2) The appellant contends that it was incumbent upon the judgment creditor to prove the value of the property upon which the mortgage was foreclosed, and relies on Norton v. Blenkiron, 138 Cal.App. 66, 31 P.2d 807. In that case, however, the plaintiff attacked the conveyance as void under section 3442 of the Civil Code, which has to do with fraud presumed by law. The later case of Fross v. Wotton, supra, isolates the earlier case and interprets section 3439 of the Civil Code which has to do with actual fraud. It appears then that if actual fraud exists, the value of the property is immaterial as is also the question as to whether the challenged conveyance was prior or subsequent to the entry of the deficiency judgment, and whether or not the fraudulent grantor stripped himself of assets. The rule stated in the later case is in no wise modified by the case of Costa v. Neves, 12 Cal.2d 121, 82 P.2d 600, relied upon by the appellant in argument. In the instant case the property fraudulently conveyed was placed beyond the reach of the judgment creditor. Hence, section 3441 of the Civil Code has no application. Our reference to the code sections is to them as they existed prior to the amendments of 1939.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

44 Cal.App.2d 712

SPRINGER v. ANGELES CREDIT CO., Limited, et al.

Civ. 12781.

District Court of Appeal, Second District, Division 2, California.

May 7, 1941.

1. Fraud ⚿58(1)

Evidence warranted purchaser's recovery of damages resulting from false representations in sale of fixtures and stock in trade of a drugstore on ground that amount of business transacted was misrepresented.

2. Appeal and error ⚿989

The power of an appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support findings of fact.

3. Fraud ⚿66

Where from the evidence and findings it is clear that a plaintiff relied upon false representations made by defendant in entering into an agreement, if the findings recite that plaintiff was induced to enter into an agreement by the false representations of defendant, such findings will support a judgment in favor of plaintiff, and it is not necessary that findings specifically state that representations relied upon by plaintiff were material.

4. Fraud ⚿66

Where trial court found that purchaser believed and relied upon false representations and that, induced thereby, he entered into an agreement to purchase a business and fixtures of a drugstore, purchaser was entitled to recover for the false representations notwithstanding that the trial court did not make an express finding that false representations were of material facts.

5. Appeal and error ⚿295

The point that damages are excessive cannot be raised for the first time on appeal, but must be presented to the lower court on motion for new trial before reviewing court will consider whether damages are excessive.

6. Appeal and error ⚿891

An application to have reviewing court take additional testimony pursuant to statute was denied where no showing was made as to why evidence was not presented to the trial court. Code Civ.Proc. § 956a.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge pro tem.

Action for fraud and to rescind a contract by H. H. Springer against Angeles Credit Company, Limited, and others. From a judgment for the plaintiff, defendants appeal.

Affirmed.

J. Everett Blum and John Moore Robinson, both of Los Angeles (Ralph W. Smith, of Los Angeles, of counsel), for appellants.

Dailey S. Stafford and William H. Haupt, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment awarding damages in favor of plaintiff, after trial before the court without a jury, in an action based upon fraud and to rescind a contract, defendants appeal.

Defendants rely for reversal of the judgment on these propositions:

First: There is no substantial evidence to sustain the following findings of the trial court:

(a) Plaintiff purchased a business including the fixtures and stock in trade of defendant Palmer's drug store.

(b) "It is true that for the purpose of inducing plaintiff to purchase the said business, its fixtures, and stock in trade, as aforementioned, and with intent to deceive and defraud the plaintiff, the said defendants in the preceding paragraph named and Angeles Credit Company did falsely and fraudulently represent to plaintiff that the said drug store and soda fountain business as then and theretofore conducted by the defendant Walter E. Palmer had been and was then a profitable business, and had theretofore and was then and there doing such a volume of business that the gross income therefrom had for some time prior thereto been, and was then and there of the amount of not less than the daily average of Sixty ($60.00) Dollars, from the sales of goods, wares and merchandise and resulting from the operating of the soda fountain in said store and place of business. And the court finds that for the further

purpose of inducing plaintiff to purchase the said business, its fixtures and stock in trade, as aforementioned, and with intent to deceive and defraud the plaintiff and to prevent him from making inquiry of the falsity of said representations aforementioned, the said defendants did cause, procure and induce the plaintiff to make no inquiry of the persons then in possession of the said business but to rely solely upon the statements and representations of the said defendants. And the court finds that for the further purpose of inducing plaintiff to purchase the said business, its fixtures and stock in trade, as aforementioned, the said defendants did knowingly, willfully, and fraudulently and with intent to deceive and defraud the plaintiff, withhold from the plaintiff knowledge which they then and there had, and well known to them, that the said business was not then and had not for a long time prior thereto been a profitable business, but to the contrary was then and there and for a long time prior thereto had been losing money and making no profit, unable to meet its current obligations, and in debt to the defendants Brunswig Drug Company and Angeles Credit Company, Ltd., in an amount in excess of Ten Thousand ($10,000.00) Dollars."

(c) "It is true that the plaintiff was without knowledge of the fact that the aforementioned representations were false and had no means of ascertaining that said representations were false, but to the contrary believed that the representations so made to plaintiff by the said defendants were true."

*(d) "It is true that the plaintiff believed and relied upon the said representations and that, induced thereby and on or about the 21st day of November, 1938, entered into an agreement with Walter E. Palmer, at the place of business of defendant Brunswig Drug Company, for the purchase of said business, including its fixtures and stock in trade, a copy of which said agreement being attached to the complaint herein and marked Exhibit 'A'; and further executed an agreement with the Angeles Credit Company, Ltd., a corporation, at its place of business located in the premises occupied by the defendant Brunswig Drug Company, on or about the 12th day of January, 1939, a copy of which agreement is attached to the complaint herein and marked Exhibit 'D'; * * *"*

(e) The representations as above found were made by defendants Brunswig Drug Company, Angeles Credit Company, Ltd., A. W. Woodmancy, and Walter E. Palmer, with full knowledge of their falsity.

(f) "That by reason of the misrepresentations on the part of the defendants, as aforesaid, the plaintiff has been damaged in the sum of Three Thousand Five Hundred Sixty-eight and 53/100 ($3,568.53) Dollars."

Second: Since the trial court did not make an express finding that the representations of defendants were of material facts, the judgment cannot be supported.

Third: The amount of damages is not supported by the evidence.

Defendants' first proposition is untenable. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the trial court may have reasonably drawn therefrom to sustain each and every material finding of fact set forth above. For example, plaintiff testified that he purchased the drug store in question as a paying drug store, that defendant Woodmancy stated to him, "It is a good paying store doing $65.00 a day"; that he relied on such representation; and that the same defendant said to him: "You can depend on me because you are—I am representing a many million dollar concern, and you are not dealing with a private individual. You have dealt with us for the past ten years. Why do you hesitate to do anything we would tell you."

[1, 2] In addition there was evidence that the drug store in fact had transacted in November, 1938, only an average business of $46.63 and in December an average business of $50.81. In addition it was admitted that defendant Woodmancy was the location man and seller of drug stores for defendant Brunswig Drug Company and that the defendants Angeles Credit Co., Ltd., and Brunswig Drug Company were one and the same. There was also evidence given by defendant Woodmancy that he had made arrangements with defendant Palmer relative to the sale of the store. Further discussion of the evidence is unnecessary, in view of the repeatedly announced rule of the appellate courts of this state that the power of an appellate court begins and ends with a determination as to whether there is any sub-

stantial evidence contradicted or uncontradicted which will support the findings of fact (In re Estate of Winzeler, 42 Cal.App. 2d 246, 108 P.2d 720).

Defendants' second proposition is likewise untenable. The trial court made the following finding: "It is true that the plaintiff believed and relied upon the said representations and that induced thereby and on or about the 21st day of November, 1938, entered into an agreement with Walter E. Palmer * * *."

[3, 4] The law is established in California that where from the evidence and findings it is clear that plaintiff relied upon false representations made by defendant in entering into an agreement, if the findings do recite that plaintiff was induced to enter into an agreement by the false representations of defendant, such a finding will support a judgment in favor of plaintiff. It is not necessary under such circumstances that the findings specifically state that the representations relied upon by plaintiff were material (Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; Hamilton v. French, 78 Cal.App. 289, 292, 248 P. 281). Beckley v. Archer, 74 Cal.App. 598, 241 P. 422, is not contrary to the rule just announced.

[5] Defendants' final proposition will not be considered by us, for the reason that the law is established in California that the point that damages are excessive cannot be raised for the first time on appeal but must be presented to the lower court on a motion for a new trial before an appellate court will consider whether the damages are excessive or not. Bate v. Jolin, 206 Cal. 504, 508, 274 P. 971; see, also, 2 Cal.Jur. (1921) 302, sec. 101. In the instant case defendants did not comply with the foregoing rule.

[6] Both plaintiff and defendant have made application to have this court take additional testimony pursuant to the provisions of section 956a of the Code of Civil Procedure. Neither party has made any showing why the evidence which they now seek to present to this court was not presented to the trial court. For example, defendants seek to introduce the testimony of Harry M. Folsom, vice-president and manager of defendant Brunswig Drug Company, who they allege was in New York at the time of the trial. No reason is given why his deposition was not taken and his testimony thus presented to the trial court. The applications for the taking of additional testimony are denied and for the reasons above stated the judgment is affirmed.

I concur: WOOD, J.

MOORE, Presiding Justice (concurring).

I concur. In view of the challenge of the sufficiency of the evidence to support the findings with respect to the amount of damage suffered, in affirming the decision, it should be pointed out that the record contains evidence in support of the damages awarded as well as of the misrepresentations made by defendants. The declaration in the findings that by reason of the misrepresentations plaintiff has been damaged is not a finding of fact. To comply with the codal provisions with respect to findings, they must set forth the extent of the detriment suffered by defendants' wrongful acts, to be followed by a statement of the consequential damages. In this case, the documents attached to the complaint and not denied show that the cost of the fixtures was $2,500 and that the cost of the merchandise was $2,372. The testimony of plaintiff was that Mr. Woodmancy, an agent of defendants, stated to him that they would give him $800 for the fixtures if they took the store back and would allow him 30 per cent of the value of the merchandise. Based upon that evidence, the loss on the fixtures was $1,700 while the loss on the merchandise was $1,661, making a total of $3,361.60.

Since the measure of damages under section 3343 Civil Code is the difference between the purchase price and the actual value of the property received plus special damages (Carter v. Carr, 139 Cal.App. 15, 33 P.2d 852), it would then appear that the damages suffered by plaintiff was $3,361.60, the difference between the price paid and the true value of the property purchased under the influence of the fraud. This is a loss definitely established. Since the judgment exceeds such loss in the sum of $207, it might be contended that the judgment is not supported to the extent of the last mentioned sum. But since "there is no rule that the injury must be of such a nature that it can be accurately measured in money" (Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011, 1014), and since no request was made of the trial court to modify the judgment, we are in no position to decide that there was a "miscarriage of justice" in the judgment. Constitution, Art. VI, sec. 4½. Motion for a new trial was the proper remedy, as suggested in the main opinion.

44 Cal.App.2d 711

SPRINGER v. ANGELES CREDIT CO., Limited, et al.

Civ. 12967.

District Court of Appeal, Second District, Division 2, California.

May 7, 1941.

Appeal and error 🔑816

Where appeal of respondents with which appellant sought to consolidate his appeal was dismissed for failure to comply with court rule requiring filing of points and authorities within 30 days after filing transcript, motion to consolidate appeals was "moot" and would be denied. Rules for the Supreme Court and District Court of Appeal, Rule 1, § 4, and Rule 5, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot".

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge pro tem.

Action by H. H. Springer against the Angeles Credit Company, Limited, and others. From an adverse judgment, H. H. Springer appeals. On motion to consolidate the appeal.

Motion denied.

Dailey S. Stafford and William H. Haupt, both of Los Angeles, for appellant.

J. Everett Blum and John Moore Robinson, both of Los Angeles (Ralph W. Smith, of Los Angeles, of counsel), for respondents.

McCOMB, Justice.

This is a motion to consolidate with this appeal the appeal of the respondents in the same case, 113 P.2d 7.

In view of the fact that we have this day dismissed appellant's appeal 113 P.2d 10 for failure to comply with the requirements of Rule I, section 4, and Rule V, section 1, of the Rules for the Supreme Court and District Courts of Appeal, the present motion is moot and is therefore denied.

We concur: MOORE, P. J.; WOOD, J.

44 Cal.App.2d 933

SPRINGER v. ANGELES CREDIT CO., Limited, et al.

Civ. 12967.

District Court of Appeal, Second District, Division 2, California.

May 7, 1941.

Appeal and error 🔑773(1)

Where appellant did not file points and authorities within 30 days of filing of transcript as required by court rule and did not obtain an extension of time within which to file points and authorities, appeal was dismissed for failure to comply with requirements of court rule. Rules for the Supreme Court and District Courts of Appeals, rule 1, § 4; rule 5, § 1.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge pro tem.

Action by H. H. Springer against the Angeles Credit Company, Limited, and others. From an adverse judgment, plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

See, also, 44 Cal.App.2d 933, 113 P.2d 10.

Dailey S. Stafford and William H. Haupt, both of Los Angeles, for appellant.

J. Everett Blum and John Moore Robinson, both of Los Angeles (Ralph W. Smith, of Los Angeles, of counsel), for respondents.

McCOMB, Justice.

This is a motion to dismiss the appeal on the ground that appellant has not filed points and authorities within the time prescribed by law (see Rule V, sec. 1, Rules for the Supreme Court and District Courts of Appeal, 213 Cal. XLIII).

The facts are:

February 16, 1940, appellant filed his notice of appeal. June 1, 1940, he filed a clerk's transcript. Since that time appellant has not filed his printed points and authorities, nor has he obtained an extension of time within which to file the same. Section 4, Rule I of Rules for the Supreme Court and District Courts of Appeal provides that such points and authorities shall be filed within thirty days after the filing of the transcript. Therefore, since appellant has failed to comply with the requirements of the last mentioned rule, his appeal should be (Cleghorn v. Hegarty, 22 Cal.App.2d 208, 70 P.2d 679) and it is hereby dismissed.

We concur: MOORE, P. J.; WOOD, J.

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44 Cal.App.2d 780

NOLAND v. NOLAND et al.

RANDALL DISCOUNT CORPORATION v. FARRAR.

Civ. 12425.

District Court of Appeal, Second District, Division 1, California.

May 14, 1941.

1. Appeal and error 🔑994(3)

Where respondent's testimony was not inherently improbable, credibility of respondent as a witness was for the trial court.

2. Appeal and error 🔑1011(1)

Where trial court considered respondent's testimony credible, it could not be said that respondent's testimony failed to create a substantial and real conflict on the issue before the court.

3. Appeal and error 🔑1011(1)

Where court found upon conflicting evidence that levy of execution was made before alleged sale, such finding could not be disturbed on appeal.

4. Judgment 🔑780(1)

Where levy of execution on automobile was made prior to alleged sale, the lien of the judgment attached to judgment debtor's equity in automobile.

5. Execution 🔑150

Where automobile was in a garage directly adjoining third party claimant's place of business and was already being held by third party claimant to secure lien of chattel mortgage, levy of execution was not invalid because automobile was not taken into custody but an employee of third party claimant was made keeper of automobile. Code Civ.Proc. § 689.

6. Execution 🔑129

To accomplish a levy of execution on automobile, it was not necessary to remove automobile from premises.

7. Attachment 🔑163

A taking by the attaching officer may be either actual or constructive, dependent upon the nature and situation and the location of the property attached.

8. Appeal and error 🔑931(1)

Every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the judgment, and it could not be presumed that finding of trial court that a proper tender had been made was erroneous.

9. Appeal and error 🔑717

Opinion of trial court not a part of the record could not be considered on appeal.

10. Appeal and error 🔑1071(4)

That findings prepared by respondent were not served on appellant as provided by section of Code of Civil Procedure, and were signed before time provided by such section, furnished no ground for setting aside or vacating judgment, since such section of Code was "directory" and not "mandatory". Code Civ.Proc. § 634.

See Words and Phrases, Permanent Edition, for all other definitions of "Directory" and "Mandatory".

11. Execution 🔑201

In proceeding to determine title to automobile registered in name of judgment debtor upon which levy of execution had been made, judgment that levy of execution was valid, that third party claimant take nothing over amount of $381, its mortgagee's interest, that judgment creditor was entitled to all amounts over that sum, and that, if automobile had been sold, all amounts in excess of that sum should be turned over to respondent, and that if there had been no sale the automobile should be sold under execution for a sum not less than the amount of the mortgagee's interest, was not so vague that the effect thereof could not readily be determined. Code Civ.Proc. § 689.

12. Execution ⚷201

In proceeding to determine title to automobile registered in name of judgment debtor upon which a levy of execution had been made, fact that no provision was made for costs of mortgagee on sale of automobile was immaterial. Code Civ.Proc. § 689.

13. Appeal and error ⚷1078(1)

Exceptions not treated in briefs are "waived".

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

14. Appeal and error ⚷110

No appeal lies from order denying motion for new trial. Code Civ.Proc. § 963.

◆

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by William Doster Noland against Vyola Bubb Noland and others, wherein judgment was entered and execution levied upon an automobile and proceedings pursuant to Code Civ.Proc. § 589, wherein the Randall Discount Corporation was third party claimant, opposed by Wilfred L. Farrar, etc., in order to determine title to an automobile registered in the name of the judgment debtor. From an adverse judgment and from an order denying motion for new trial, the third party claimant appeals.

Judgment affirmed, and appeal from order denying motion for new trial dismissed.

Maurice C. Sparling, of Los Angeles, for appellant.

William A. Reppy, of Oxnard, for respondent.

DORAN, Justice.

The third party claimant appeals from a judgment rendered against it in a proceeding pursuant to section 689 of the Code of Civil Procedure to determine title to a certain automobile registered in the name of the judgment debtor and upon which a levy of execution had been made. An appeal is also attempted from an order denying appellant's motion for a new trial, "to vacate the judgment, to strike the cost bill, to strike the findings of fact and conclusions of law and to tax costs".

Appellant, the legal owner and chattel mortgagee of the car in question, claims title by virtue of a pledge sale of the car held after default of the judgment debtor in his payments thereon. The trial court found that even if the sale were held the levy had been made prior thereto. Appellant contends that this and other findings of the court are unsupported by the evidence.

[1] At the hearing appellant produced witnesses who stated they were present at the sale and who testified as to the time and place of the sale and the manner in which it was conducted. Among these witnesses was the employee of appellant who had conducted the sale. Respondent, in his own behalf, testified that on the date the sale was to take place he went personally to the garage, where appellant's witnesses stated the sale was held, and stationed himself just outside the door to the garage in a position where he had a clear view of the interior; that he saw no one enter or leave the garage and that he saw no such sale take place. The sale was noticed for 9:00 a. m. of the day in question. Appellant's witnesses all testified that the sale was held at approximately that hour. Respondent's testimony as to the time he arrived at the garage was somewhat equivocal and self contradictory, and his assertions as to the care he took to keep his watch accurate were contradicted by another witness produced by appellant. However, his testimony was not inherently improbable and respondent's credibility as a witness was for the determination of the trial court. The time of the levy was definitely established as about 9:20 or 9:25 a. m. of the day in question. Respondent's own testimony produced the only conflict as to the sale.

[2-4] The court in finding as it did must have chosen to believe respondent's testimony and relied thereon. Considered by the trial court as credible evidence, it cannot be said that respondent's testimony failed to create a substantial and real conflict as to the time of the pledge sale of the car. See the sections upon conflict-

ing evidence, 2 Cal.Jur. 921, et seq., and 10 Cal.Jur. 1172, 1173. The court having found upon conflicting evidence that the levy of execution was made before the pledge sale, such finding may not be disturbed upon appeal. The finding as to priority of the levy disposes of all further questions regarding the pledge sale and title to the car. The levy having been found to be made prior to the pledge sale, the lien of the judgment attached to the debtor's equity in the car. See, Harper v. Gordon, 128 Cal. 489, 492, 61 P. 84; Podrat v. Oberndorff, 207 Cal. 457, 459, 278 P. 1035, 63 A.L.R. 1308.

Upon this appeal, however, appellant for the first time challenges the validity of the levy and the jurisdiction of the trial court to proceed to determine title to the car under the third party claim. No such objection was made in the court below, and appellant filed its third party claim without raising the question.

[5-7] Lack of jurisdiction is claimed on the ground that the levy was no more than a garnishment and it was therefore improper to try the question of title to the property in a proceeding under section 689, supra. Such a claim is based upon the contention that the sheriff did not take the car into custody. The record reveals that the sheriff's deputy made an employee of appellant keeper of the car. The car was in a garage directly adjoining appellant's place of business and was already being held by appellant to secure the lien of the chattel mortgage. Under the circumstances, the levy was properly made. Rogers v. Gilmore, 51 Cal. 309. To accomplish the levy, it was not necessary to remove the car from the premises (Ross v. O'Brien, 9 Cal.App.2d 1, 4, 48 P.2d 718), and "the taking by the attaching officer may be either actual or constructive, dependent upon the nature and the situation and the location of the property attached". Colver v. W. B. Scarborough Co., 73 Cal.App. 441, 448, 238 P. 1104, 1107, citing Rogers v. Gilmore, supra, and Sinsheimer v. Whitely, 111 Cal. 378, 43 P. 1109, 52 Am.St.Rep. 192. The manner of appointing a keeper was proper under the circumstances. "A levying officer should make the expense of keeping property levied upon as light as possible consistent with its safekeeping." 15 Cal.Jur. 1066. It should be pointed out that the car in question was already in safekeeping, since, as already seen, the finding must be adopted that the pledge sale had not been held. Ruskin v. Cheney, 25 Cal.App.Supp.2d 753, 70 P.2d 278, cited by appellant, is not applicable to the facts of the instant case. In the Ruskin case no attempt was made to appoint a keeper of the property.

[8] Appellant contends that the levy was invalid because the sheriff failed to tender appellant the amount due under its mortgage, in accordance with the requirements of section 2969 of the Civil Code. However, appellant has failed to indicate wherein the transcript on appeal shows that no such tender was made, and no such showing has been found on examination of the transcript. The question was apparently not raised by appellant in the court below, and the trial court has found that a proper tender was made. Since every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the judgment, it may not be here presumed that the finding of the court in that respect was in error. 2 Cal.Jur. 852, 856.

[9, 10] Appellant complains that the findings signed by the court are not the true findings of fact and refers to a written opinion of the trial court previously prepared, which appellant states is at variance with the signed findings and which, having been prepared and filed first, constitutes the true findings of the court herein. Appellant points out that no findings are required in a proceeding under section 689, Code of Civil Procedure. However that may be, the opinion referred to is not a part of the record before this court and may not here be considered. Appellant also complains that the findings prepared by respondent were not served on appellant as provided in section 634 of the Code of Civil Procedure, and were signed before the time provided in that section. This failure, however, furnishes no ground for setting aside or vacating the judgment. The section of the code in question, even since its amendment in 1933, is held to be merely directory and not mandatory. Treat v. Superior Court, 7 Cal.2d 636, 639, 62 P.2d 147.

[11] It is also contended that the judgment is too indefinite and uncertain and contrary to law. As may be seen above, the judgment cannot be held contrary to law. The judgment decrees that the levy of execution was valid; that appellant take nothing over the amount of $381, its mort-

gagee's interest; that the judgment creditor is entitled to all amounts over that sum; that if the car has been sold, all amounts in excess of that sum should be turned over to respondent; and that if there had been no sale, the car should be sold under execution for a sum not less than the amount of the mortgagee's interest. It cannot be said that the judgment is so vague and uncertain that the effect thereof may not readily be determined.

[12] Appellant complains that no provision is made for the costs of the mortgagee on the sale of the car. It does not appear that appellant is entitled to such costs under the circumstances of this case. No authority has been cited or referred to in support of such a contention.

[13] Other exceptions were not treated in the briefs and will therefore be deemed waived.

[14] No appeal lies from the order denying the motion for a new trial. See sec. 963, Code Civ.Proc.

For the foregoing reasons the judgment appealed from is affirmed, and the appeal from the order is dismissed.

We concur: YORK, P. J.; WHITE, J.

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44 Cal.App.2d 752

RABBIT v. ATKINSON et al.

Civ. 2646.

District Court of Appeal, Fourth District, California.

May 12, 1941.

1. Appeal and error 🔑930(1)

On appeal, respondents are entitled to have facts of case viewed in most favorable light in support of judgment appealed from.

2. Appeal and error 🔑927(2)

On appeal from judgment rendered in favor of certain defendants after reopening of case for trial following its submission to court, where record does not show whether motion, which judgment recites that plaintiff filed in clerk's office after such reopening to dismiss action as to such defendants, was presented to court for consideration or acted on, and no entry of dismissal was made in clerk's register, appellate court must presume that purported dismissal was not effective.

3. Execution 🔑273, 290

Where record title to realty, purchased by judgment creditor at execution sale, was not in judgment debtors' names at time of creditor's subsequent delivery of deed thereof to another, and creditor knew that debtors denied any interest in property by their pleadings in action wherein judgment was rendered and in supplementary proceedings before execution sale, such creditor and grantee were placed on inquiry as to existence of some right or title in conflict with that purchased and charged with notice of all facts which could have been ascertained by proper inquiry, especially where value of property greatly exceeded amount of judgment.

4. Vendor and purchaser 🔑229(1)

While mere inadequacy of consideration may not be sufficient to deprive real estate purchaser of position as "purchaser for value", an offer by vendor to sell for grossly inadequate price should place purchaser on guard and may require that he make reasonable inquiry as to vendor's title not disclosed by records, and purchaser neglecting to prosecute such inquiry diligently may not be awarded standing of "bona fide purchaser".

> See Words and Phrases, Permanent Edition, for all other definitions of "Bona Fide Purchaser" and "Purchaser for Value".

5. Execution 🔑274

In action to quiet title to realty conveyed to plaintiff by judgment creditor after purchasing it at execution sale, where neither plaintiff nor judgment creditor testified as to whether they had notice or knowledge of certain defendants' rights in or claims to property or that plaintiff was purchaser in good faith without notice for valuable consideration, plaintiff failed to sustain burden of proving that conveyance to him was taken in good faith and without at least constructive knowledge of such defendants' interests.

6. Execution 🔑283

In action to quiet title to realty conveyed to plaintiff by judgment creditor of certain defendants after purchasing it at execution sale, it was trial court's exclusive province to determine witnesses' credibility and weight and effect of their evidence, consider inferences reasonably deducible therefrom, and determine disputed fact as to whether one of such defendants was trustee for other defendants as equitable owners of property from conflicting evidence as to terms of claimed trust.

7. Appeal and error 🔑1011(1)

The district court of appeal cannot interfere on appeal with trial court's conclusion, sustained by substantial evidence, as to fact concerning which evidence was conflicting.

8. Execution 🔑274, 290
Trusts 🔑44(2)

In action to quiet title to realty conveyed to plaintiff by certain defendants' judgment creditor after purchasing it at execution sale, evidence *held* sufficient to support trial court's finding that other defendants were equitable owners of property at time of sale, that judgment debtors took title thereto in their names merely as trustees for such owners, and that plaintiff and judgment creditor knew or had notice of such fact and were not bona fide purchasers for value without notice.

9. Execution 🔑264

A purchaser of realty at execution sale acquires only such interest as judgment debtor had in property.

10. Execution 🔑265

A judgment creditor, purchasing at execution sale realty to which judgment debtors held only naked legal title, subject to trust imposed in them for equitable owners thereof, and one to whom such creditor subsequently conveyed property acquired no interest therein, except possible naked legal title subject to such trust, with duty to convey title to beneficiaries.

11. Appeal and error 🔑882(5)

In action to quiet title to realty, conveyed to plaintiff by judgment creditor after purchasing it at execution sale, where plaintiff's attorney asked for, and court granted him, time to plead to amended answer, alleging that one of defendant judgment debtors held legal title to property as trustee for other defendants as equitable owners thereof and that judgment creditor was not purchaser for value without notice, and such attorney said in opening statement at trial that defendants evidently claimed some kind of trust, plaintiff cannot claim on appeal that he was misled, taken by surprise, or prejudiced by permitted amendment to answers.

12. Pleading 🔑236(5)

The allowance of amendments to pleadings to conform to proof generally rests in trial court's discretion.

13. Pleading 🔑258(4), 265

Amendments of answers to conform to proof might be allowed after submission of cause and would be deemed denied without further pleading.

14. Pleading 🔑236(5)

Before allowance of amendment to pleading to conform to proof can be held an abuse of trial court's discretion, it must be shown that adverse party was prejudiced thereby.

15. Appeal and error 🔑192(1)

Where no demurrer to pleadings was interposed or objection made thereto in trial court, and case was tried and pleadings treated by all parties as sufficient to raise issues presented, objections to verbiage thereof cannot be raised for first time on appeal.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Murray L. Rabbit against Robert W. Atkinson, Alvin Stubenvoll, Helen Stubenvoll, and others, to quiet title to realty and cancel a mortgage and certain deeds. From a judgment quieting title in defendants Stubenvoll, plaintiff appeals. Affirmed.

Morris McLaughlin and Leslie S. Bowden, both of Los Angeles, for appellant.

Benjamin Hansen, of Los Angeles and Francis W. Bunnett, of South Gate (Stanley M. Arndt, of Los Angeles, of counsel), for respondents.

GRIFFIN, Justice.

This is an action brought by plaintiff and appellant to quiet title to certain real property in the city of Los Angeles and to cancel certain instruments. Respondents Alvin Stubenvoll and Helen Stubenvoll filed separate answers denying the material allegations of the complaint. Defendants Robert W. Atkinson and Margaret Atkinson filed a disclaimer to any right or title in the property. The action against Lewis W. Osborne, Inc., and E. R. Gelberg and E. C. Agnew, doing business as Technical Neon Laboratories, was dismissed by appellant.

The other named defendants failed to answer plaintiff's complaint and default was regularly entered. Trial of the action was had without a jury, and after plaintiff rested respondents introduced evidence in defense.

[1] The facts of the case, which respondents are entitled to have viewed in the most favorable light in support of the judgment (2 Cal.Jur. p. 879, § 515) may be thus summarized: On April 1, 1935, Theodore and Waldo Wiems, doing business under the name of Advance Plumbing and Heating Company (hereinafter called Advance), recovered a judgment for certain work and material furnished on the property herein involved, in the municipal court of Los Angeles county against Robert W. Atkinson and Margaret Atkinson, his wife, for $136.79 principal, and $10.85 costs. Thereafter, the judgment creditor, Advance, caused execution to be levied upon the interest of the judgment debtors Robert and Margaret Atkinson in and to the real estate referred to in the evidence as the Crenshaw property. This property was worth $35,000 at the time of the trial. On December 3, 1935, Advance, the judgment creditor, purchased the interest of the judgment debtors Robert and Margaret Atkinson in the Crenshaw property at execution sale, for $184.74. Thereafter, the marshal's deed was issued to Advance. Advance then executed and delivered to appellant herein a deed to the property. This deed was recorded September 8, 1937, three days before the complaint herein was verified and filed. The deed recites a consideration of $10, and bears only the minimum amount of federal revenue stamps, i. e., fifty cents. No evidence was offered that any consideration ever passed and no claim is made by appellant that any consideration whatsoever was paid in connection with the deed. At the time of the execution sale, and at the time of the issuance of the marshal's deed, and at the time of the delivery of the deed from the judgment creditor to appellant herein, record title to the property in dispute was not in the name of the judgment debtors but was in the name of respondent Alvin Stubenvoll subject to a $25,000 mortgage to respondent Helen Stubenvoll.

The record further shows that Jacob Stubenvoll was the father of Margaret Atkinson, Helen Stubenvoll and Alvin Stubenvoll. He turned over $10,000 in cash and security to his son-in-law Robert Atkinson, the husband of his daughter, Margaret Atkinson, to invest and reinvest for the benefit of his three older children, Margaret, Helen and Alvin. He considered that Robert was quite clever in buying stocks and he wanted to see that his three oldest children were taken care of. He intended to take care of his wife and other children in other ways. Robert accepted the trust and carried on operations as trustee, but in his own name. He was quite successful in the stock market. By 1927, the $10,000 trust fund mounted to $35,000. Early in 1927, Robert and his wife Margaret came to California. When he left New York the $35,000 trust fund was in the hands of a New York brokerage firm. After the Atkinsons reached California the money was transferred to Hutton & Company in Los Angeles and from there sent to the Bank of America in downtown Los Angeles. From this $35,000, the land here involved was bought as a vacant lot and the building erected and various other pieces of property were purchased and buildings erected thereon. Subsequently and prior to the execution sale, a settlement took place between the three beneficiaries whereby Mrs. Margaret Atkinson received certain cash and certain real property other than the property here involved, while respondents were given the Crenshaw property as their share. The record title to the property here involved still remained in the name of Robert Atkinson, who it is claimed was actually a mere trustee for the three children.

In an attempt to have the record show respondents' interest in the disputed property, Robert and Margaret Atkinson, on November 28, 1934, executed a mortgage in the sum of $25,000 on the property to Helen Stubenvoll and then executed and recorded a deed from them to one Rose Murphy, under the name of Grose, subject to the mortgage, without her knowledge, and without delivery of the deed, and later had her make a deed of the property to respondent Alvin Stubenvoll.

[2] On February 23, 1938, the case was submitted to the court. Two days later the court made an order reopening the case for trial and suggested or ordered that a certain amended answer be filed alleging "that Atkinson, although he was the legal owner of the property, or held the legal title, he was, in fact, the trustee for Margaret, Helen and Alvin Stubenvoll * * * that they * * * were the equitable owners, and, therefore, the real owners at the

time, and * * * to show, in addition to the other allegations of the present answers now on file, that the Advance Plumbing and Heating Company, at the time the sale was conducted by the marshal, were not purchasers for value and without notice". The court then found in accordance with the defense set forth in the amended answer. The judgment recites that after the case was reopened, appellant filed in the clerk's office a "motion for dismissal" as to Helen Stubenvoll. Whether this motion was presented to the court for consideration or whether it was acted upon is not shown by the record. No entry of dismissal was made in the clerk's register. We must presume, therefore, that the purported dismissal was not effective. Hauptman v. Heebner, 34 Cal.App.2d 600, 94 P.2d 48.

The judgment was signed March 25, 1938, and quieted title in respondents but awarded appellant judgment for $147.64, and declared this sum to be a lien upon the property involved. Respondents were declared the equitable owners of the property involved subject to the lien mentioned; the deeds from the Atkinsons to Grose and from Grose to Alvin Stubenvoll were declared void. On May 2, 1938, when a motion for new trial was heard, a signed stipulation between the attorneys for Alvin Stubenvoll and appellant was filed, agreeing that the portion of the judgment entered in favor of appellant may be amended and increased to $184.74, plus 12 per cent interest, and $270.50 costs. The motion for new trial was then denied. Thereafter, on June 22, 1938, the original judgment was interlineated in accordance with the stipulation. On May 9, 1938, appellant appealed from the original judgment.

Appellant contends that he is entitled to have title quieted in him to the property of the value of $35,000, in payment of the $184.74 obligation of his grantor under the theory that Robert and Margaret Atkinson actually owned the property; that they permitted the sale to proceed and did not redeem within the time allowed by law, and that, therefore, they forfeited all rights to the property, and that the appellant and appellant's grantor, because of the default of Robert and Margaret Atkinson, should be enriched with $35,000 worth of property in payment of the obligation of $184.74, and that equity should aid in this enrichment; that the story of the trust established by the father of the respondents was "a myth" and that respondents' testimony was untrue, not to be believed, and insufficient to establish a trust.

Respondents argue that at no time did Robert Atkinson ever hold title to the property but merely held bare legal title as trustee for respondents herein; that the purchaser at execution sale could not take better title than the judgment debtors had unless he proved that he was a bona fide holder for valuable consideration in good faith and without knowledge.

[3, 4] It is clear from the evidence that the record title, at the time of the delivery of the deed from the judgment creditor herein to appellant, was not in the name of the judgment debtor; both had constructive notice of the record title; appellant's grantor knew that the judgment debtor denied any interest in the property in his pleadings in the municipal court and that they had, in supplementary proceedings prior to execution sale, denied any interest in the property. They were placed upon inquiry as to the existence of some right or title in conflict with that which the judgment creditor was about to purchase and were charged with notice of all facts which could have been ascertained by proper inquiry. Pellissier v. Title Guarantee, etc., Co., 208 Cal. 172, 184, 280 P. 947; Olson v. Cornwell, 134 Cal.App. 419, 428, 25 P.2d 879; 25 Cal.Jur. p. 837, sec. 283. The fact that appellant was purchasing property of a value of $35,000 in satisfaction of a judgment for $184.74, must be considered in support of the court's finding in this respect. While mere inadequacy of consideration may not be sufficient to deprive one of his position as a purchaser for value, an offer by a vendor to sell for a grossly inadequate price is a circumstance which should place the purchaser on his guard and may be such as to require that he make a reasonable inquiry as to the title of the vendor not disclosed by the records. If the sum which the vendor is willing to take is grossly disproportionate to the value of the thing which is the subject of the negotiation, it is strong proof of a defective title, and sufficient to put a prudent person upon inquiry, and if the purchaser neglects to prosecute such inquiry diligently, he may not be awarded the standing of a bona fide purchaser. Dunn v. Barnum, 8 Cir., 51 F. 355; Witty v. Clinch, 207 Cal. 779, 783, 279 P. 797; Bernstein v. Pacific States, etc., 19 Cal.App.2d

679, 682, 66 P.2d 699; 27 R.C.L., pp. 712, 713, par. 477; 2 Pomeroy's Equity Jurisprudence, 4th Ed., § 600, p. 1126.

[5] Neither the appellant nor his grantor took the witness stand to testify as to whether or not they had notice or knowledge of respondents' rights or claims or that appellant was a purchaser in good faith, without notice, and for a valuable consideration. Appellant failed to sustain the burden of proof that the conveyance to him was taken in good faith and without constructive knowledge, at least, of the interests of the respondents. Chapman v. Ostergard, 73 Cal.App. 539, 545, 238 P. 1081; Lindley v. Blumberg, 7 Cal.App. 140, 93 P. 894; Black Eagle Oil Co. v. Belcher, 22 Cal.App. 258, 262, 133 P. 1153.

[6-8] Although the evidence was conflicting as to the terms of the claimed trust and not free from ambiguity, it was the exclusive province of the trial court to determine the credibility of the witnesses, the weight and effect to be given to the evidence, to consider inferences reasonably deducible from it, and from the conflicting evidence determine the disputed fact. All the considerations urged here by appellant respecting the evidence in this case were properly addressed to and considered by the trial court, and out of the conflicting evidence that court has determined the fact and there is substantial evidence to sustain it. This court on appeal cannot interfere with its conclusion. Thom v. Stewart, 162 Cal. 413, 122 P. 1069. We have examined the voluminous record and find that there is substantial evidence supporting the finding of the trial court that the respondents were, at the time of the execution sale, equitable owners of the property involved; that the Atkinsons took title to the property in their names merely as trustees for respondents; that appellant and appellant's grantor knew or had notice thereof; and that they were not bona fide purchasers for value and without notice.

[9, 10] The record establishes the fact that the Atkinsons held only the naked legal title subject to the trust imposed and that they had no other interest therein. Under the execution sale, only such interest as the judgment debtor may have had in the property was acquired by the purchaser. Appellant's grantor as well as appellant, acquired no interest in the property except a possible naked legal title subject to the trust imposed with the duty to convey title to the beneficiary or beneficiaries. McAlvay v. Consumers' Salt Co., 112 Cal.App. 383, 297 P. 135; North v. Evans, 1 Cal.App.2d 64, 36 P.2d 133; Anglo-California Trust Co. v. Oakland Rys., 193 Cal. 451, 225 P. 452.

[11-13] The only remaining question involved pertains to the claimed error of the court in directing or allowing an amendment to the answers at the time above mentioned, setting up the defenses related and whether that defense conformed to the proof in the case. It was claimed that appellant not only objected to the filing of the amended answers but was denied an opportunity to further plead thereto and was prejudiced by a change in the nature of the defense alleged.

The record does not substantiate this claim for, after the court directed the amendments to be filed Mr. McLaughlin stated: "I would like to have time to plead to it. The Court: All right. But the case is settled * * * it is not open for further hearing, for the production of any further testimony. * * *" The record also disclosed the fact that appellant's attorney stated in detail in his opening statement at the trial what he expected to prove, i. e., "This action is to quiet title, and to declare, of course, that the plaintiff herein is the owner of the premises, and to cancel the mortgage and the two deeds. I expect they will say the consideration for the mortgage is that in 1923 or 1924, the sum of $10,000 was given by the father of Margaret Atkinson to three of his children, he then having five children, I believe, and they, in turn, turned it over to Mr. Atkinson for investment in New York City; that he did invest it, and made $35,000 which he brought out to California in 1927, and that he invested the money out here. They claim, evidently, some kind of a trust."

Appellant cannot claim to have been misled, taken by surprise, or prejudiced by the permitted amendment to the answers. Appellant's objection to the amendment was based on the theory that "the plea raises a question that has not been on trial in this case * * *". The allowance of amendments to conform to proof generally rests in the discretion of the trial court. Such amendments may be allowed after the submission of the cause and may be deemed denied. Richards v. Tavares, 105 Cal.App. 261, 269, 287 P. 552; M. J. Ryan Co. v. Brown, 138 Cal.App. 176, 31 P.2d 1076;

Murnane v. Le Mesnager, 207 Cal. 485, 495, 279 P. 800.

[14] In the instant case it is not contended that all the facts relative to the issue were not adduced at the trial. Before it can be held that the allowance of such an amendment was an abuse of discretion it must be shown that the adverse party has been prejudiced thereby, and no reasonable ground for this conclusion appears in the present case. McClure v. Alberti, 190 Cal. 348, 212 P. 204.

[15] Certain other objections to verbiage of the pleadings are now made for the first time on appeal. No demurrer was interposed or objection made in the trial court to such pleadings. The case was tried and the pleadings treated by all parties as sufficient to raise the issues presented. Those objections cannot be raised now for the first time on appeal. Southside Spiritualist Church v. National Federation, etc., 119 Cal.App. 11, 5 P.2d 657. Other similar points raised are not meritorious.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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44 Cal.App.2d 706

UNION LIQUORS, Inc., v. FINKEL & LASAROW, Inc., et al.

Civ. 12761.

District Court of Appeal, Second District, Division 2, California.

May 7, 1941.

1. Sales 🔑347(1)

Where lessee agreed to open and equip on leased premises a liquor and drug sundries store and to conduct it for a period "not to exceed sixty days", and lessor agreed to purchase store fixtures and incidental equipment and all stock in trade, and lessee thereafter equipped store and operated it until lessor refused to receive an inventory of stock or to discuss matter of purchase further, after which lessee removed stock from store, lessee's right to recover for fixtures and equipment could not be defeated on ground that it failed to operate store for full sixty days, since contract did not require lessee to do so.

See Words and Phrases, Permanent Edition, for all other definitions of "Not to Exceed Sixty Days".

2. Sales 🔑347(1)

Where lessee agreed to open and equip on leased premises a liquor and drug sundries store, and to conduct it for a period not to exceed sixty days, and lessor agreed to buy stock in trade and fixtures and equipment, and after lessee had equipped store and conducted business for some time, lessor informed lessee that it could do what it wanted with stock and lessee disposed of the entire stock, lessee's right to recover for fixtures and equipment could not be defeated on ground that contract did not give lessee the right to remove stock in trade.

3. Evidence 🔑461(1)

In action to recover purchase price of fixtures and equipment under a written contract for sale of drug store stock and fixtures installed by lessee, exclusion of letter and statements made by parties prior to execution of the written agreement was proper, where the language of the agreement was clear and the intention of the parties could be ascertained from the writing alone.

4. Evidence 🔑461(1)

Where the language in an agreement is explicit, the intention of the parties must be ascertained from the writing alone, and extrinsic evidence is inadmissible to determine what the writing means.

5. Sales 🔑340

Where contract to deliver property and render services has been performed, and purchaser fails to comply with the terms of the contract, contract price is the measure of damage as it accurately represents the vendor's loss.

6. Sales 🔑340

Where lessee agreed to open and equip on leased premises a liquor and drug sundries store, and to conduct it for a period not to exceed sixty days, and lessor agreed to purchase fixtures and equipment and stock in trade, and lessee thereafter performed his obligation, but lessor refused to purchase the stock in trade and fixtures and equipment, lessee properly instituted action to recover purchase price of fixtures and equipment, and was not required to bring an action for damages. Civ.Code, §§ 1784, 3302.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action for purchase price of certain fixtures and equipment by the Union Liquors, Inc., against Finkel & Lasarow, Inc., and others, wherein a cross-complaint was filed. From an adverse judgment, Finkel & Lasarow, Inc., appeal.

Affirmed.

Vincent A. Marco and Blase Bonpane, both of Hollywood, for appellant.

Max Fink and Ray Sandler, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover the purchase price of certain fixtures and equipment sold to defendant pursuant to a written agreement, defendant appeals.

Viewing the evidence most favorable to plaintiff (respondent), the essential facts are:

September 15, 1938, plaintiff and defendant entered into an agreement reading in part as follows:

"III

"It is agreed that Lessee will enter in and upon said premises hereinabove described in Division (a) and (b) hereof and will erect fixtures and fittings and will install therein stock-in-trade consisting of alcoholic beverages, beers and wines, drug sundries and miscellaneous supplies and will operate, maintain and conduct the said business for a period of not to exceed sixty days from and after the date hereof.

"IV.

"It is specifically agreed that on or before sixty days from and after the date hereof, Lessee will sell to Lessor or its assigns, and Lessor will purchase the said store fixtures and incidental equipment and all of the said stock in trade consisting, among other things, of alcoholic beverages, beers and wines, drug sundries and miscellaneous supplies, from Lessee, at the actual cost thereof to Lessee; that is to say, that on or before sixty days from and after this date an inventory will be taken and Lessor will pay to Lessee the actual cost to Lessee of each and every and all items on hand in said store at said time; provided, however, that the total price to be paid by said Lessor for said fixtures, equipment, stock in trade and miscellaneous supplies shall not exceed the sum of Six Thousand Dollars ($6,000.00) and provided, further, that Lessor may reject from such items any damaged items, together with any part of said stock in trade which is not of a brand or type commonly sold in liquor and drug stores in Los Angeles County, California. Provided, however, that Lessee may remove stock in trade or miscellaneous supplies at will prior to such sale, and it is specifically understood that Lessee may remove such portions of such inventory as Lessee may desire to remove in order that the same may not exceed in all Six Thousand Dollars ($6,000.00) as hereinabove provided.

* * * * * *

"It is specifically understood that until said sale is consummated and until Lessee is paid in full the sums herein provided to be paid by Lessor to Lessee, Lessee shall retain title to all fixtures, fittings, alcoholic beverages, beers and wines, drug sundries and miscellaneous supplies. * * *

"VII

"At the time of the aforementioned sale by Lessee to Lessor, said Lessee shall cause to be transferred to Lessor any and all liquor permits issued to Lessee in connection with the operation of the aforementioned business, in so far as Lessee shall have the power so to do. In this respect, Lessor agrees to pay to Lessee the *pro-rata* cost of the unexpired portion thereof.

"VIII

"Without in any manner limiting the foregoing, and in addition to any and all sums hereinbefore provided to be paid, Lessor agrees to pay to Lessee interest to be computed at the rate of six per cent (6%) per annum for the time intervening from the date hereof to the date of the consummation of the said sale upon the total sum of Lessee's investment in fixtures, stock in trade and inventories, as will be reflected by the total amount of the sum which will be found to be due to Lessee at the time of the consummation of said sale."

Thereafter plaintiff went into possession of the leased premises and equipped a portion thereof as a liquor store, stocked it with alcoholic beverages, beers, wines, sundry drugs, etc., and opened the store for business and operated the same for a period.

The first part of November, 1938, plaintiff through its president asked the president of respondent what he intended to do about the merchandise and fixtures in the store, to which defendant's president replied that he did not care what plaintiff did with them; that defendant had nothing to do with the business. At this time the store was fully stocked with merchandise, but defendant refused to receive an inventory of the stock or to discuss the matter further with plaintiff.

Thereafter plaintiff removed all of the merchandise and stock from the store but left the fixtures and equipment on the premises. It is for the value of the fixtures and equipment that the present action was instituted.

Defendant urges for reversal of the judgment the following propositions:

First: Plaintiff failed to comply with the terms of the contract on its part to be performed.

Second: The trial court erred in dismissing defendant's cross-complaint for damages, since plaintiff had not performed the conditions of the contract upon its part to be performed.

Third: The contract between the parties did not give the plaintiff the right to remove the stock in trade from the store.

Fourth: The trial court erred in excluding evidence relative to the meaning of phrases in the agreement between the parties.

Fifth: Plaintiff has mistaken its remedy and should have sued for damages and not for the purchase price of the fixtures.

[1] Defendant's first and second propositions are untenable. Under the terms of the agreement between the parties plaintiff was required to open and equip on the leased premises a liquor and drug sundries store and to conduct the same for a period "not to exceed sixty days". There is ample evidence to sustain the court's finding that the plaintiff performed this obligation. Defendant's contention that, because plaintiff failed to operate the business for a full sixty days, plaintiff breached the contract, is devoid of merit, for there was no requirement in the contract that plaintiff operate the business for sixty days.

[2] There is no merit in defendant's third proposition. After the president of defendant stated to the president of plaintiff that plaintiff could do what it wanted to with the merchandise and stock in trade which had been placed in the store on the leased premises, plaintiff disposed of the entire stock in trade. This was strictly within the rights of plaintiff under the contract, which provided in paragraph IV thereof that "Lessee may remove stock in trade or miscellaneous supplies at will prior" to the sale of the property to the defendant.

[3, 4] Defendant's fourth proposition is likewise untenable. The trial court excluded evidence offered by the defendant consisting of a letter and statements made by the parties prior to the execution of the written agreement, the material parts of which are set forth above. This ruling was correct. Where the language in an agreement is clear and explicit, as in the instant case, the intention of the parties is to be ascertained from the writing alone and extraneous evidence is inadmissible for the purpose of determining what the writing means. (First Bond & Mortgage Co. v. Malouf, 37 Cal.App.2d 74, 80, 98 P.2d 824.)

[5, 6] Defendant's final proposition is also untenable. Where a contract to deliver property and render services has been performed and the purchaser fails to comply with the terms of the contract, the contract price is the measure of damages, as it accurately represents the extent of the vendor's loss (Connell v. Higgins, 170 Cal. 541, 549, 150 P. 769; 8 Cal.Jur.[1922] 825, sec. 81.) In the present case the contract required plaintiff to perform certain services, such as opening and equipping the store on the leased premises and operating it for a period. This plaintiff did, and also delivered the fixtures and equipment to defendant when they were placed on the leased premises, in conformity with the provisions of the contract. By the terms of the contract defendant was to pay the price of the fixtures and equipment. Plaintiff having been furnished the fixtures and equipment, the extent of plaintiff's loss was, according to the contract, the value of the fixtures and equipment, and section 3302 of the Civil Code was applicable to the facts of the instant case and not section 1784 of the same Code.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

44 Cal.App.2d 760

PEOPLE v. MARR.

Cr. 613.

District Court of Appeal, Fourth District, California.

May 12, 1941.

Criminal law 🔑1110(9)

Defendant's motion for return of reporter's transcript to trial court for purposes of correction was denied, though objections to transcript and application to have it corrected were made to trial court within time allowed by the rules, where it appeared that merits of appeal would in no way be affected by the errors, if any, in transcript. Rules for the Supreme Court and District Courts of Appeal, rule 2, § 8.

◆

Warren Marr was convicted of violating the Corporate Securities Act, and he appeals. On defendant's motion for return of reporter's transcript for purposes of correction.

Motion denied.

Ben D. Frantz, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

Upon his plea of guilty to a charge of violating the Corporate Securities Act, St. 1917, p. 673, the defendant was sentenced to imprisonment in San Quentin by a judgment pronounced on September 16, 1938. On March 28, 1941, he moved to vacate that judgment on the ground that the court was without jurisdiction to enter the same. That motion was denied and he appealed from that order, and requested a transcript. A copy of the reporter's transcript was served upon his attorney on April 17, 1941, and within five days thereafter, on April 21, 1941, he filed in the trial court objections to said transcript, asking that six corrections therein be made.

Having been notified by the clerk that the reporter's transcript had already been filed in this court, the appellant made this motion for the return of the reporter's transcript to the trial court for the purpose of having his objections considered and appropriate action taken with respect to the corrections sought.

While objections to the transcript and application to have it corrected were made to the trial court within the time allowed by section 8 of rule II of the Rules for the Supreme Court and District Courts of Appeal, it does not follow that this motion should be granted under the circumstances here appearing. Each of the corrections sought to be made involves something said by appellant's counsel while arguing on points of law before the trial court. Most of them cover only a word or two, some are trivial, and in each instance it is perfectly apparent what counsel intended to say and what was the trend of his argument. The matters in question could in no way injure the appellant on the presentation of his appeal on its merits, and the sending of the transcript back for correction would be an idle act which could serve no useful purpose. The merits of the appeal, when finally presented, will in no way be affected by the errors, if any, in transcribing the arguments made in the trial court by the appellant's attorney.

The motion is denied.

We concur: MARKS, J.; GRIFFIN, J.

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44 Cal.App.2d 935

PEOPLE, Respondent, v. Warren MARR, Appellant.

Cr. 614.

District Court of Appeal, Fourth District, California.

May 12, 1941.

Motion for return of reporter's transcript for purposes of correction.

Motion denied.

Ben D. Frantz, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The facts herein are in all material respects the same or similar to those involved in the opinion this day filed in People v. Marr, 113 P.2d 22.

In this case only one objection to the transcript was made and only one correction sought. It involves only the correction of one word, and is immaterial here for the reasons given in the opinion referred to.

The motion is denied.

We concur: MARKS, J.; GRIFFIN, J.

LANFRIED v. BOSWORTH et al.

Civ. 12902.

District Court of Appeal, Second District, Division 2, California.

May 12, 1941.

Rehearing Granted June 11, 1941.

See 114 P.2d 406.

1. Automobiles 🔑242(6)

In absence of evidence of the relationship between driver and owner of automobile, presumption that driver was innocent of crime or wrong warranted finding that driver operated automobile with owner's consent so as to make owner liable for damages occasioned by negligence of driver. Vehicle Code, § 503, St.1935, p. 174; Code Civ.Proc. § 1963.

2. Automobiles 🔑192(1)

A registered automobile owner selling and delivering automobile and not notifying department of motor vehicles of sale and transfer, and not indorsing certificate of ownership to buyer until after accident, invested buyer with the same authority to consent to use of automobile by another as owner had in the first instance, and hence owner was liable for damages occasioned by negligence of driver operating automobile with buyer's consent, notwithstanding that owner was not acquainted with driver and was ignorant of driver's use of automobile. Vehicle Code, §§ 177(a), 178, 402, St.1935, pp. 115, 153.

Appeal from Superior Court, Los Angeles County; Kurtz Kaufmann, Judge, pro tem.

Action by Maurice Lanfried against Wallace Bosworth and others, for injuries sustained in an automobile accident. From the judgment, the plaintiff appeals.

Judgment in favor of one defendant reversed, and order granting motion of another defendant for a new trial reversed with directions.

Max Fink and Ray Sandler, both of Los Angeles, for appellant.

Charles E. Taintor, of Los Angeles, for respondent Wallace Bosworth.

Sam Wolf and Leo Shapiro, both of Los Angeles, for respondent Martha J. Like.

WOOD, Acting Presiding Justice.

Plaintiff commenced this action to recover damages for injuries which he suffered when the automobile which he was driving collided with an automobile driven by defendant Dolores Davis, which was owned by defendant Bosworth and registered in the name of defendant Like. The accident occurred on April 6, 1938, on Los Feliz boulevard near its intersection with Griffith Park boulevard in the city of Los Angeles.

A joint answer was filed by defendants Davis and Bosworth but neither of these defendants appeared at the trial either in person or by counsel. A separate answer was filed by defendant Like, who appeared at the trial and contested plaintiff's claim. The trial court found against defendants Davis and Bosworth and rendered judgment against them in the sum of $2,137. The judgment was entered on January 6, 1939, and on the same date judgment was entered in favor of defendant Like. On February 16, 1939, plaintiff caused to be served and filed a notice of motion to set aside and vacate the judgments and to enter a judgment under sections 663 and 663a of the Code of Civil Procedure against all three defendants. On February 28, 1939, defendant Bosworth caused to be served and filed a notice of intention to move for a new trial. On March 8, 1939, and prior to the hearings on the two motions just mentioned, plaintiff caused to be served and filed his notice of appeal from that portion of the judgment which ordered and adjudged that defendant Like have judgment against plaintiff. A minute order was entered on April 18, 1939, denying plaintiff's motion to vacate the judgment and to enter a new judgment against the three defendants. A minute order was entered on April 17, 1939, amending the original findings by inserting a provision that the automobile in question was driven by defendant Davis without the consent and permission of defendant Bosworth. By the same minute order the judgment against Bosworth was vacated and a new trial was granted to him on the grounds of insufficiency of the evidence to support the judgment and that the judgment as to Bosworth was contrary to law. Thereafter plaintiff appealed from the above-mentioned minute orders affecting defendant Bosworth.

The trial court found that plaintiff's injuries were suffered as the result of the negligence of defendant Davis in driving the automobile in question; that the automobile was originally sold to defendant Like, who became its registered owner; that in December, 1937, defendant Like sold and delivered the automobile to defendant Bosworth, giving him a bill of sale covering all of her right, title and interest in it; that defendant Like did not notify the department of motor vehicle of this sale and transfer; that on May 7, 1938 (a month after the accident), endorsements were made on the certificate of ownership of the automobile by defendant Like, as transferor, and defendant Bosworth, as transferee. The court further found that defendant Like at no time had any dealings with defendant Davis with reference to the use of the automobile and had no knowledge that she was operating it.

[1] It is a criminal offense for any person to drive an automobile not his own without the consent of the owner and in the absence of the owner (Vehicle Code, sec. 503, St.1935, p. 174). Section 1963 of the Code of Civil Procedure enumerates disputable presumptions, among them being the presumptions that a person is innocent of crime or wrong and that the law has been obeyed. The record before us is barren of any evidence concerning the relationship between defendants Bosworth and Davis unless it be that some mutual relationship was shown by their filing a joint answer. In determining whether defendant Davis was driving the automobile with the consent of defendant Bosworth the court was confronted with the presumption that defendant Davis was innocent of crime or wrong. This presumption is sufficient to support a finding that defendant Davis operated the car with the consent of defendant Bosworth. Indeed, no contrary finding could be supported by the evidence. The code section provides that the presumption is "satisfactory" unless controverted by other evidence, but no other evidence was presented to the court. In Prickett v. Whapples, 10 Cal.App.2d 701, 52 P.2d 972, 973, it was held that "the presumption arises that one operating the automobile of another has the necessary consent to make his act lawful". Manifestly the trial court erred in concluding that the findings should be amended, that the evidence was insufficient to support the original judgment against defendant Bosworth and that it was contrary to law.

[2] Under the facts shown in the record defendant Like is also liable for the damages occasioned by the negligence of defendant Davis. Section 402 of the Vehicle Code, St.1935, p. 153, provides for liability of the owner of an automobile for the negligence of any person who operates it with the permission of the owner, express or implied. Sections 177(a) and 178 of the Vehicle Code, St.1935, p. 115, provide that one who sells an automobile shall immediately give written notice of the transfer to the department of motor vehicles and that a seller who has made proper endorsement and delivery of the certificate of ownership shall not be deemed the owner so as to be subject to civil liability for the operation of the vehicle by another. The trial court found that defendant Like did not notify the motor vehicle department and did not endorse the certificate of ownership of the automobile in question until after the accident. In Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744, 747, the question of the liability of the owner arose under statutes substantially the same as those in effect at the time of the accident under discussion and it was there held that the seller may relieve himself from liability either by notifying the department or by endorsement and delivery of the certificate of ownership to the purchaser and that until one or the other of these things be done the seller continues to be the owner "so far as liability to a third person is concerned".

Defendant Like cannot escape liability by reason of her testimony that she was not acquainted with defendant Davis and was ignorant of her use of the car. When defendant Like transferred and delivered the car to defendant Bosworth she invested him with the same authority to consent to its use by another as she had in the first instance. Haggard v. Frick, 6 Cal.App.2d 392, 44 P.2d 447; Sutton v. Tanger, 115 Cal.App. 267, 1 P.2d 521.

The order made on April 17, 1939, amending the findings of fact and conclusions of law and vacating the judgment against defendant Bosworth and granting him a new trial is reversed. The superior court is directed to enter judgment in favor of plaintiff and against defendant Like in the sum of $2,137 as of January 6, 1939.

I concur: McCOMB, J.

ABELLEIRA et al. v. CALIFORNIA EMPLOYMENT COMMISSION et al.

S. F. 16585.

Supreme Court of California.

April 17, 1941.

Rehearing Denied May 17, 1941.

Mandamus ⚿154(2)

A petition for an alternative writ of mandate to require the California Employment Commission to show cause why it should not be ordered to make benefit payments to petitioners for period following decision of referee affirming an award of benefits to petitioners in accordance with the Unemployment Act was denied by Supreme Court. St.1939, pp. 3010, 3013, §§ 67, 72.

GIBSON, C. J., TRAYNOR, J., and PETERS, J., pro tem., dissenting.

In Bank.

Proceeding by Frank Abelleira, etc., and others against the California Employment Commission and others, for an alternative writ of mandate to require respondent Commission to show cause why it should not be ordered to make benefit payments to petitioners for period following decision of the referee affirming an award of benefits to petitioners in accordance with St.1939 p. 3010.

Petition denied.

Gladstein, Grossman & Margolis and George Olshausen, all of San Francisco, for petitioners.

Brobeck, Phleger & Harrison, of San Francisco, for respondents.

PER CURIAM.

Application for mandate denied.

No opinion.

On Application for Rehearing.

Rehearing denied.

GIBSON, Chief Justice, TRAYNOR, Justice, and PETERS, Justice pro tem.

We dissent from the order denying a rehearing of petitioners' application for an alternative writ of mandate.

Petitioners filed with the California Unemployment Commission a claim for unemployment benefits for November, 1939, and January, 1940, when they were out of work, and assertedly entitled to unemployment benefits. The claim was referred to the adjustment unit which awarded benefits to petitioners. This determination was affirmed by the referee. From this decision of the referee an appeal was taken to the Commission by certain employers of the petitioners. Section 67 of the Unemployment Act, St.1939, p. 3010, provides in part: "If a referee affirms an initial determination allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such determination is finally reversed no employer's account shall be charged with benefits so paid as to each such determination so reversed." Pending the determination of the appeal to the Commission, the employers secured a writ of mandate from the District Court of Appeal restraining the Commission from making benefit payments to petitioners on the ground that petitioners were not entitled to such benefits under the act. This court in Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715, issued a writ of prohibition restraining the District Court of Appeal from interfering with the payment of benefits after decision by the referee as provided in section 67. Four months after the determination of the referee and while the Abelleira case was still pending in this court, the Unemployment Commission, purporting to act pursuant to section 72 of the act, St.1939, p. 3013, entered an order setting aside the referee's decision and bringing the matter directly before itself for a hearing. Section 72 provides in part: "The commission may on its own motion affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence. The commission may remove to itself or transfer to another referee the proceedings on any claim pending before a referee." Rule 69.3 promulgated by the Commission provides that the Commission must act within seven days after the decision by the referee to vacate such decision. Following the setting aside of the referee's decision, the Commission refused to make any benefit payments to petitioners. The case is still pending before the Commission. That body has not yet passed upon the questions presented on the appeal, or by the case as taken over by it. Petitioners petitioned this court for an alternative writ of mandate ordering the respondent Commission to show cause why it should not be ordered to make benefit payments to petitioners for the period following the decision of the referee as required by section 67 of the act. This petition was denied without opinion and petitioners now petition for a rehearing.

The allegations set forth in the petition are sufficient to warrant the issuance of the alternative writ. The petition is based upon the decision of this court in the Abelleira case and seeks to make effective what petitioners assert to be the judgment therein. The points of law raised are novel, difficult of solution, and of great importance to employers, employees, and all others who are affected by the operation of the Unemployment Act.

It is impossible at this time to suggest the correct decision which should ultimately be reached, but a few of the more important issues involved may be mentioned:

(1) Are the provisions of section 67 of the act requiring immediate payment of benefits after affirmance of an award by the referee subject to any implied exceptions?

(2) Does the setting aside of the decision of the referee by the Commission pursuant to section 72 nullify the requirement of continued payments under section 67? If it does, may the Commission exercise this power long after the time specified in the rules of the Commission has expired and long after the time at which the right to benefits would otherwise become fixed?

(3) If illegal payments are wrongfully ordered by the referee, does the Commission possess an inherent power, despite the provisions of section 67, to withhold these payments or to seek their recovery after payment?

(4) In view of the fact that the Commission, after taking the case over on its own motion, has not yet determined the facts upon which the claims of petitioners must rest, are petitioners by virtue of section 67 entitled to payments pending that determination?

These are questions of great significance in view of the general adoption of such laws throughout the United States. The denial by the majority of this court of an alternative writ without revealing the grounds on which section 67 of the act has been held inoperative in the present situation not only casts doubt upon the views expressed in the Abelleira case but leaves the Commission, employers, and employees uncertain as to the meaning and effect of this crucial provision. A hearing should therefore be had and a decision rendered on the merits of the case after careful consideration of the issues.

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44 Cal.App.2d 898

BAUMBAUGH v. SAN DIEGO COUNTY et al.

Civ. 2724.

District Court of Appeal, Fourth District, California.

May 19, 1941.

1. Constitutional law 🔑**13**

A constitutional provision which is ambiguous and susceptible to two constructions will be interpreted by the courts in such manner as to give effect to intent of the voters adopting it.

2. Constitutional law 🔑**16**

Where a constitutional provision is ambiguous and susceptible to two constructions, the court may properly resort to record of debates in constitutional conventions, or to arguments made to electors in submission of propositions for adoption, in order to ascertain which of alternatives and admissible meanings should be ascribed to the language used.

3. Constitutional law 🔑**13**

The courts should carry out intent of the voters in adopting constitutional amendments.

4. Taxation 🔑**219**

Under constitutional provision which as amended exempted from taxation under certain conditions property to amount of $1,000 of every resident who had served in the Army, Navy, Marine Corps or Revenue Marine Service of the United States in time of war and received an honorable discharge or who after such service in time of war had continued therein, or who had been released from active duty because of disability from such service in time of peace, or under other honorable conditions, one who had not served during time of war but had served in navy during time of peace and had been released from service under honorable conditions because of a service connected disability was entitled to the exemption. Const. art. 13, § 1¼.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Mandamus proceeding by William M. Baumbaugh against the County of San Diego and others to compel defendants to give plaintiff the $1000 exemption on his property provided for in the constitution. From a judgment ordering that a writ issue, defendants appeal.

Affirmed.

James B. Abbey, Dist. Atty., and Victor C. Winnek, Deputy Dist. Atty., both of San Diego, for appellants.

Sanders & Kahn, of San Diego, for respondent.

Henry Jacobsen, Jr., of San Francisco, amicus curiae.

MARKS, Justice.

This is an appeal from a judgment ordering that a writ of mandate issue directing the County of San Diego and certain of its officers to give plaintiff the one thousand dollar exemption on his property provided for in section 1¼ of Article XIII of the Constitution.

The facts are not in dispute. Plaintiff enlisted in the United States Navy on November 20, 1932. On April 19, 1934, he was released from the service under honorable conditions because of a service connected disability and on June 28, 1934, he was awarded a pension "on account of disability resulting from peace-time service".

Petitioner and his wife own property of a value less than $5,000. It consists of real estate and improvements having an assessed value of $1,610, and personal property having an assessed value of $100. Petitioner took all the legal steps necessary to secure the exemption if he were entitled to it.

The sole question presented for decision is this: Is petitioner entitled to his exemption, he not having served during time of war, but having served during time of peace and having been released from the service under honorable conditions because of a service connected disability?

We are not cited to any case deciding this question. It was not presented, considered nor decided in Kaiser v. Hopkins, 6 Cal.2d 537, 58 P.2d 1278. This case merely determined when the War of 1917-1918 ended. Chesney v. Byram, 15 Cal.2d 460, 101 P.2d 1106, merely holds that a veteran must follow the provisions of section 3612 of the Political Code in order to obtain his exemption.

Section 1¼ of article XIII of the Constitution was first adopted at an election held in 1911. The pertinent provisions then read: "The property to the amount of one thousand dollars of every resident in this state who has served in the army, navy, marine corps, or revenue marine service of the United States in time of war, and received an honorable discharge therefrom; * * *" was exempt from taxation, provided the veteran could meet the other requirements of the section. These provisions clearly limit the right to receive the exemption to those veterans who had served in time of war and who had received an honorable discharge from such service.

The section was amended at the election held on November 7, 1922. After such amendment the pertinent part of the section read as follows: "The property to the amount of one thousand dollars of every resident of this state who has served in the army, navy, marine corps or revenue marine service of the United States in time of war, and received an honorable discharge therefrom or who has been released from active duty under honorable conditions * * *", was exempt from taxation under certain conditions. Thus the right to the exemption was extended to include those who had served in time of war and had been released from active duty under honorable conditions but who had not been honorably discharged.

This portion of the section was again amended at the election held on November 2, 1926, as follows: "The property to the amount of one thousand dollars of every resident of this state who has served in the army, navy, marine corps or revenue marine service of the United States in time of war, and received an honorable discharge therefrom or who has been released from active duty because of disability resulting from such service in time of peace or under other honorable conditions

* * *" was exempt from taxation under certain conditions. Thus there was included still another class, namely, those who had been released from active duty from such service because of a service connected disability during time of peace.

The section was last amended at the election held on November 8, 1932. The part important here reads as follows: "The property to the amount of one thousand dollars of every resident of this State who has served in the army, navy, marine corps or revenue marine service of the United States in time of war, and received an honorable discharge therefrom, or who after such service of the United States in time of war has continued in such service, or who has been released from active duty because of disability resulting from such service in time of peace or under other honorable conditions, * * *" was exempt from taxation under certain conditions. This amendment extended the right to the exemption to still another class, namely, those who had served in time of war and who had remained in the service.

It should be observed that the phrase which must be decisive of this appeal, "or who has been released from active duty because of disability resulting from such service in time of peace or under other honorable conditions" first appearing in the 1926 amendment was retained in the 1932 amendment.

It is admitted that an ambiguity exists in the phrase by reason of the use of the words, "such service".

Defendants maintain that the words refer to the time of service and argue that they refer back to the first portion of the section and mean service in time of war.

Plaintiff contends that the words refer to the branches of the service named in the earlier part of the section and are modified by the words, "in time of peace", which follow them, so that the service, the disability and the release from the service may all occur "in time of peace".

Defendants maintain that as the section exempts property from taxation it must be strictly construed as "Grants of exemption from taxation cannot be allowed, unless the intention to do so is expressed in direct terms or is fairly inferable from the language of the instrument by which the right is claimed". Cypress Lawn C. Ass'n v. San Francisco, 211 Cal. 387, 295 P. 813, 814. is claimed". Cypress Lawn C. Ass'n v. San Diego, 26 Cal.App.2d 452, 79 P.2d 778.

[1, 2] Were this the only guide to our conclusion we might be required to adopt the construction which defendants place upon the section. However, it seems to be well settled that when a constitutional provision is ambiguous and susceptible to two constructions "that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it". Kaiser v. Hopkins, supra [6 Cal.2d 537, 58 P. 2d 1279]. In Helping Hand Home v. San Diego, supra [26 Cal.App.2d 452, 79 P.2d 781], in speaking on the same subject, it was said: "And when confronted with the latter situation, particularly in the case of constitutional provisions, the courts may properly resort to the record of debates in legislative bodies or constitutional conventions or to the arguments made to the electors in the submission of propositions for adoption, in order to ascertain which of the alternatives and admissible meanings should be ascribed to the language used. (Story v. Richardson, 186 Cal. 162, 198 P. 1057, 18 A.L.R. 750; Yosemite Lumber Co. v. Ind. Acc. Comm., 187 Cal. 774, 204 P. 226, 20 A.L.R. 994; Pasadena University v. Los Angeles County, 190 Cal. 786, 214 P. 868)."

[3, 4] Plaintiff has furnished us with a copy of that portion of the pamphlet relating to this constitutional amendment which was sent to the voters for their information concerning it, from which we quote the following:

"This proposed amendment to the constitution amends the present constitutional provision relative to the exemption of property on account of military service, by adding to the present provision three new exemptions, which are as follows:

"The first includes in the $1,000 exemption in addition to the exemptions already in the law, the provision that the soldier or sailor who is incapacitated from service when the country is not at war shall have the same exemption as is already provided for the veterans of the different wars in which the United States has engaged in the past.

"This was clearly an oversight when the original constitutional amendment was adopted and should be corrected."

The ballots furnished the voters on which to vote on the amendment contained the following: "Tax Exemption for Veterans and Others, Senate Constitutional Amendment 26. Amends Section 1¼ of article XIII of Constitution. Extends tax exemption provisions of present section to include those veterans who have been released from active duty because of disability resulting from service in time of peace, * * *"

The instructions to voters and the proposition appearing on the ballot informed the voters of the purpose of the amendment in no uncertain terms and we must conclude that the voters in adopting the amendment intended to place upon it the construction there clearly expressed, namely, to extend the exemption to all veterans who have been released from active duty because of disability resulting from service during time of peace. This release from service and right to the exemption was not made dependent on any service during time of war. We should carry out the intent of the voters in adopting the amendment. Therefore, plaintiff comes within the provisions of the amendment as explained to the voters who adopted it, and is entitled to his exemption.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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44 Cal.App.2d 854

CITIZENS STATE BANK OF LONG BEACH v. HOFFMAN et ux.

Civ. 12926.

District Court of Appeal, Second District, Division 2, California.

May 16, 1941.

1. Malicious prosecution 🔑42

In action against husband and wife for malicious prosecution in filing action for rent and levying attachment, where wife did not sign complaint or any pleading in such action, nor any instrument in connection with levy of attachment, and there was no evidence that she authorized use of her name in action or knew that it had been filed or attachment levied, no sufficient showing was made to justify judgment against her, though she was one of owners of leased realty.

2. Malicious prosecution 🔑56

In action for malicious prosecution, burden is on plaintiff to establish both malice and want of probable cause.

3. Malicious prosecution 🔑64(2)

In action for malicious prosecution, "probable cause" is established by proof that defendant consulted a lawyer in good faith, stated all facts to such lawyer, was advised that he had good cause of action, and honestly acted on such advice.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

4. Malicious prosecution 🔑64(2)

In bank's action for malicious prosecution in filing action against it for rental of bank building after expiration of term and levying attachment therein, testimony of defendant and his attorney as to defendant's disclosure of all facts to attorney and attorney's advice to commence such action and attorney's testimony that he advised defendant that holding over of bank's sub-tenant made bank liable for renewal term and that witness used his own judgment in filing action and taking subsequent steps therein established "probable cause" for prosecuting action.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by the Citizens State Bank of Long Beach against Fred Hoffman and wife for malicious prosecution. Judgment for plaintiff, and defendants appeal.

Reversed.

Denio, Hart, Taubman & Simpson, of Long Beach, for appellants.

Newton M. Todd and Frank M. Linnell, both of Long Beach, for respondent.

WOOD, Acting Presiding Justice.

[1] Respondent obtained a judgment for $2,000 against appellants in an action for alleged malicious prosecution in the filing in September, 1935, of a civil action for the recovery of the rental of real property and the levying of an attachment in the same action in January, 1937. Although appellant Helen S. Hoffman was named as plaintiff in the action filed in September, 1935, she did not sign the complaint or any pleading in the action, nor did she sign any instrument of any kind in connection with the levy of the attach-

ment. There is no evidence that she authorized her name to be used in the action, that she knew that the action had been filed or that the attachment had been levied. Apparently the only connection she had with the litigation which brought about the present action lies in the fact that she is the wife of the other appellant and is one of the owners of the property for the rental of which the criticized action was commenced. Clearly no sufficient showing has been made to justify a judgment against her in the present action. Whenever the appellant is herein mentioned reference will be made to appellant Fred Hoffman.

The business transactions of respondent and appellant began in 1928, when respondent leased from appellant a building in the city of Long Beach in which to conduct its banking business. According to its terms this lease was to terminate on March 31, 1933. Before this date appellant had reduced the stipulated rental on several occasions. Differences arose between the parties over the claim that respondent had improperly removed a safety deposit vault door from the premises, and the further claim that subtenants of respondent had damaged the building. One of respondent's subtenants, one Bernstein, retained possession of part of the premises after March 31, 1933, and appellant claimed that the holding-over by the subtenant made respondent liable for a renewal term.

An action was filed by appellant against respondent on May 25, 1933, for unpaid back rental and for rental for April, 1933, part of the period of the alleged holding-over; also for damages to the premises and for the removal of the vault door. This action, which is not the one claimed to be the basis for the malicious prosecution action, was brought to trial in June, 1934, and a memorandum opinion was filed therein on December 4, 1934. Findings of fact were signed on April 1, 1936, and corrected findings were signed on June 5, 1936, and judgment thereon entered in favor of appellant in the sum of $2,863.08, including the sum of $900 for the month of April, 1933. Appellant appealed from this judgment, contending that it should have been in a larger amount.

It will be noted that the action which constitutes the basis of the present action for malicious prosecution was filed during the pendency of the first action and before decision therein. It was filed for the purpose of recovering rentals which had accrued after the filing of the first action. On February 15, 1936, respondent bank sold certain of its assets to the Farmers and Merchants Bank of Long Beach, including all of its deposits, and thereafter ceased to receive deposits or carry on a banking business. Early in 1936 appellant read in a newspaper an item concerning this transfer and asked his attorney to investigate. The attorney corresponded with the state superintendent of banks and learned that the superintendent had given a license for the transfer to the Farmers and Merchants Bank. The attorney discussed the matter with officials of the assignee bank for the purpose of determining whether the assignee bank would be responsible for any judgment appellant might obtain against respondent. In January, 1937, the attorney filed an amended complaint and caused a writ of attachment to be levied upon sums on deposit with the Farmers and Merchants Bank and upon respondent's safety deposit box. Appellant stated that he was afraid that respondent's assets would all be dissipated, and that unless he levied the attachment the judgment which he expected to obtain would not be collectible.

[2-4] Only one of the points urged by appellant for reversal need be passed upon. It is elementary that in order to entitle a litigant to recover in an action for malicious prosecution the burden is upon him to establish both malice and want of probable cause. Richter v. Neilson, 11 Cal.App.2d 503, 54 P.2d 54. It is thoroughly settled that probable cause is established by one who is charged with malicious prosecution when he proves that he has in good faith consulted a lawyer, has stated all of the facts to him, has been advised by the lawyer that he has a good cause of action and has honestly acted upon the advice of the lawyer. Johnson v. Southern Pacific Co., 157 Cal. 333, 107 P. 611; Black v. Knight, 44 Cal.App. 756, 187 P. 89. When the evidence herein is considered in the light of this rule it at once becomes apparent that the finding on the part of the trial court that appellant prosecuted the action filed in September, 1935, and caused an attachment to be levied therein without probable cause, cannot be sustained.

During the entire period from April 12, 1933, until after the levy of the writ of attachment of which complaint is made appellant was represented by Adolph Rosenfield, an attorney at law with offices in Long

Beach. Both Mr. Rosenfield and Mr. Hoffman testified at length and in detail concerning the numerous conversations they had, the disclosure of all of the facts by appellant to the attorney and the advice given by the attorney to the client to commence both actions and to levy the writ of attachment. Rosenfield testified in particular that he had personally inspected the premises claimed to have been damaged and that he had made exhaustive study of all of the decisions available, including a research in the county law library of Los Angeles; that he had advised Hoffman that the holding-over of the subtenant made the bank liable for the renewal term; that before the action of September, 1935, was filed he had told Hoffman that the time "was getting short", because there might be a question as to whether the action was upon an oral contract; that Hoffman told him to use his own judgment and that he had done so in filing the action and in the steps thereafter taken. The testimony of Rosenfield, as also that of Hoffman, is clear-cut and stands without contradiction. Indeed, the trial court expressly found that Rosenfield had full knowledge of all of the facts and circumstances relating to the action and that he had advised appellant that he had a legal right to commence the action and to levy the writ of attachment. The further finding that appellant did not have an honest belief that he had a legal right to commence the action is not supported by the evidence.

The judgment is reversed.

I concur: McCOMB, J.

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44 Cal.App.2d 858

PEOPLE v. MARVICH et al.

Cr. 3439.

District Court of Appeal, Second District, Division 2, California.

May 16, 1941.

Hearing Denied June 12, 1941.

1. Criminal law ⚷622(5)

Where information charging defendant with robbery and information charging defendant and another with robbery were consolidated for trial by stipulation of counsel, and defendant permitted trial to proceed after consolidation without objection, defendant "waived" privilege of a separate trial. Pen.Code, §§ 954, 1098.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Criminal law ⚷780(1)

In robbery prosecution, trial court's failure of its own motion to give an instruction that a conviction could not be had upon uncorroborated testimony of an accomplice was not error, where there was an abundance of evidence to sustain conviction without testimony of witness who was alleged by defendant to have been an accomplice witness.

3. Robbery ⚷24(1)

Evidence supported conviction of robbery.

4. Criminal law ⚷1172(1)

In robbery prosecution, where defendant's defense was that of alibi, giving of instruction defining word wilfully in language of Penal Code was not prejudicial. Pen. Code, § 7, subd. 1.

5. Criminal law ⚷814(17)

In robbery prosecution, where evidence was direct, refusal to instruct jury that in case of two theories, one pointing to innocence and the other to guilt, jury should adopt theory pointing to innocence, was not error, though such instruction might have been applicable to case where evidence was circumstantial.

6. Criminal law ⚷829(7)

In robbery prosecution, refusal to give certain instructions which defendant propounded on subject of alibi was not error, where trial court properly covered subject of alibi and instructed jury that defendant was entitled to an acquittal if evidence of his alibi raised a reasonable doubt of defendant's guilt.

7. Criminal law ⚷1137(3)

In robbery prosecution, defendant could not complain of giving of certain instruction relating to his defense of alibi, where record disclosed that instruction was given at defendant's own request.

8. Criminal law ⚷811(5)

Where trial court correctly gave general instructions on subject of credibility of witnesses, refusal to single out testimony of defendant and give instructions with particular reference to it was not error.

9. Criminal law ⚷1037(2)

In robbery prosecution, defendant could not demand a new trial on ground that district attorney was guilty of misconduct in his address to jury and in propounding questions to witnesses, even if district attorney overstepped bounds of propriety, where defendant did not request trial court to instruct jury to disregard remarks or conduct of district attorney, and it did not appear that district attorney's conduct was of such character that harmful effect could not have been cured by an instruction.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Mike Marvich and another were charged with an offense, and named defendant was convicted of robbery, and he appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

WOOD, Acting Presiding Justice.

Appellant was charged by information with the crime of robbery, in that on or about March 31, 1940, he feloniously and forcibly took from the person of Charles E. Slocomb the sum of $2,300, he being armed with a deadly weapon at the time of the commission of the offense. Appellant was also charged by information, together with one James W. Gibbons, with the crime of robbery, in that on or about June 30, 1940, appellant and Gibbons feloniously and forcibly took from the person of Virgil White the sum of $850, appellant being armed with a deadly weapon at the time of the commission of the offense. In both informations appellant was charged with the prior conviction of a felony, which charge he admitted. At a jury trial appellant was found guilty on both charges of robbery and he has appealed from the judgment of conviction and from the order denying his motion for a new trial.

The two victims, Slocomb and White, were partners in the distribution of the Los Angeles Examiner in the city of Long Beach, their place of business being at 338 East Third street. At about 6:25 p. m. on March 1, 1940, appellant entered the place of business of Slocomb and White, dressed in a sailor's uniform. At the point of a revolver he compelled Slocomb to open the safe and to put money from the safe into a small suitcase which appellant placed on the floor. The amount taken by appellant on that occasion was $2,357. At about 1:30 p. m. on June 30, 1940, appellant and Gibbons went to the same establishment and found present Virgil E. White and several other persons. At the point of a revolver they were ordered to "get back to the counter and lay down on the floor". The robbers compelled one of the victims to open the safe and to dump money from it into a bag. The sum of $983 was taken at this time.

[1] Appellant contends that the court erred in consolidating the two informations for trial, claiming that sections 954 and 1098 of the Penal Code do not permit the consolidation of an action in which one defendant is named with another action in which two defendants are named. The appellant is not now in position to seek a reversal on this ground. The record shows that the two actions were consolidated by stipulation of counsel, and appellant permitted the trial to proceed after consolidation without presenting any objection. Manifestly he has waived the privilege of a separate trial.

[2, 3] Appellant contends that the witness Edward Black was an accomplice (which is denied by the prosecution), and that the trial court erred in failing of its own motion to give an instruction to the jury that a conviction cannot be had upon the uncorroborated testimony of an accomplice. There was no occasion for the giving of this instruction, for there was an abundance of evidence to sustain the conviction without the testimony of the witness Black. The victims identified appellant as a participant in each robbery.

[4] It is claimed by appellant that the court erred in giving to the jury the definition of the word "wilfully" in the language of section 7, subdivision 1, of the Penal Code, as follows: "The word 'wilfully,' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any ad-

vantage." It is argued that in the crime of robbery a specific intent to steal must be proved and that the language of the Code section was confusing to the jury. The rights of appellant could not possibly have been prejudiced by the giving of the instruction, for there can be no question whatever but that the party or parties who took the money in question from the two victims intended to steal it. Appellant did not claim at the trial and does not claim now that the money was not stolen from Slocomb and White. On the other hand, his defense was that of an alibi and he claims that he took no part in the robbery. Clearly no miscarriage of justice has resulted from the giving of the instruction in question.

[5] Complaint is made of the refusal of the court to instruct the jury that in case of two theories, one pointing to innocence and the other to guilt, they should adopt the theory pointing to innocence. Such an instruction might be applicable to a case where the evidence is circumstantial, but where, as here, the evidence is direct, there is no occasion for giving the instruction. People v. Ortiz, 63 Cal.App. 662, 667, 219 P. 1024.

[6, 7] Appellant complains of the failure of the court to give certain instructions which he propounded on the subject of his alibi, but we find that the court properly covered the subject and instructed the jury that appellant was entitled to an acquittal if the evidence of his alibi raised a reasonable doubt in the minds of the jury of appellant's guilt. Appellant asserts that the following instruction given by the court is erroneous: "The court instructs you that it is not incumbent upon the defendant to establish an alibi by testimony amounting to proof of such alibi, by a preponderance of the evidence or beyond a reasonable doubt, in order to require of you the defendant's acquittal. It is only necessary that the evidence introduced by the defendant in order to establish his alibi be of such weight as to convince you to the extent that you have a reasonable doubt that the defendant was present or took part in the commission of the offense charged. Therefore, if after you consider the evidence of the defense pertaining to the defendant's alibi, you have a reasonable doubt that the defendant was present at the commission of the offense or took part therein in any way, then you must find the defendant not guilty, even though you still have a suspicion of the defendant's innocence." Appellant is not in position to complain of the giving of this instruction, for the record discloses that it was given at his own request.

[8] Appellant contends that the court erred in failing to give the following instruction: "In considering the weight and effect to be given to the evidence of the defendant, you may consider his manner and probability of his statements taken in connection with all the evidence in the case; and in judging of the defendant who has testified before you, you are duty bound to presume he has spoken the truth, and, unless that presumption has been legally rebutted, his evidence is entitled to full credit. If his testimony, standing alone or taken in connection with other facts and circumstances of the case, raises a reasonable doubt in your minds as to his guilt, it will be your duty to act upon that doubt and acquit him." The court correctly gave general instructions on the subject of the credibility of witnesses. It has been repeatedly held that the trial court need not single out the testimony of the defendant and give instructions with particular reference to it. See People v. Barnett, 99 Cal.App. 409, 278 P. 885; People v. Khan, 92 Cal.App. 534, 268 P. 701; People v. Heath, 79 Cal.App. 20, 248 P. 1027; People v. Adams, 199 Cal. 361, 249 P. 186; People v. Harris, 128 Cal.App. 44, 16 P.2d 688; People v. Miller, 68 Cal.App. 758, 230 P. 191; People v. Langlois, 68 Cal.App. 610, 230 P. 13.

Errors are claimed in other instructions given by the court but we find that they are not of sufficient importance to call for detailed discussion herein. The principles involved in these instructions have been approved in numerous decisions of the reviewing courts of California. The court fully and fairly covered all of the points involved in its instructions to the jury.

[9] It is claimed that the district attorney was guilty of misconduct in his address to the jury and in propounding questions to certain witnesses. During the trial appellant did not request the court to instruct the jury to disregard the remarks or the conduct of the district attorney, and therefore, under the well-established rule, appellant is not in position to demand a new trial on this ground. People v. Berryman, 6 Cal.2d 331, 337, 57 P.2d 136. Even if it be considered that the prosecutor overstepped the bounds of propri-

ety, his conduct was not of such character that the harmful effect could not have been cured by an instruction from the court.

The judgment and the order denying a new trial are affirmed.

I concur: McCOMB, J.

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44 Cal.App.2d 887

PEOPLE v. KNIGHT.

Cr. 3429.

District Court of Appeal, Second District, Division 2, California.

May 19, 1941.

Hearing Denied June 18, 1941.

1. Assault and battery 🔑92
Robbery 🔑24(1)

Evidence *held* to sustain conviction of robbery with deadly weapon and assault with deadly weapon.

2. Robbery 🔑24(3)

The fact that lower part of robber's face was covered with a cloth did not nullify testimony that witnesses recognized defendant as the robber.

3. Criminal law 🔑737(1)

The strength or weakness of identification of defendant is for the jury.

4. Jury 🔑131(4)

Counsel could interrogate prospective jurors on their state of mind concerning all issues to be submitted to them.

5. Criminal law 🔑1166½(6)

In prosecution for robbery and assault with deadly weapon, with prior conviction of murder, wherein defendant's counsel asked juror whether prior conviction of murder "made no impression," court's statement after objection by opposing counsel that jury had indicated that they would not consider prior occurrence in determining whether defendant committed a crime, and that mere fact that person may have been convicted of murder does not necessarily discredit him, was favorable to defendant. Pen. Code, § 1078.

6. Criminal law 🔑811(6)

The trial court should not single out defendant's testimony and give instructions with particular reference to it.

7. Criminal law 🔑811(6)

Refusal to instruct on defendant's right to just and fair consideration of his own testimony was not error, where court gave full and fair general instructions on credibility of witnesses.

8. Criminal law 🔑829(1)

Refusal of proposed instructions was not error, where jury was fully and fairly instructed on all issues of law involved.

9. Criminal law 🔑780(1)

Where evidence was sufficient to sustain conviction without testimony of alleged accomplice, court's failure to instruct of its own motion on necessity for corroboration of accomplice was not error.

10. Criminal law 🔑730(2)

A remark by prosecutor in opening statement, that evidence would show that defendant boasted that he had killed 17 people, was not prejudicial, where objection was sustained to subsequent question about defendant's admissions of having killed others, and jury was admonished to disregard the prosecutor's statement concerning defendant's boast.

11. Criminal law 🔑726, 730(1)

Alleged misconduct of prosecutor did not require reversal, where some alleged misconduct resulted directly and naturally from statements by defense counsel, and other alleged misconduct was followed by admonition to jury to disregard them.

12. Criminal law 🔑655(1)

Remarks by trial court concerning story entitled "My Friend the Murderer", made to allay feeling of abhorrence in jury likely to result from fact of defendant's prior conviction of murder, were not improper.

13. Criminal law 🔑711

The trial court did not err in cutting short argument by defendant's counsel concerning objections to testimony, made after objections had been ruled on.

14. Criminal law 🔑699

Efforts of trial judge to conduct trial in orderly manner, brought about by improper conduct of defense counsel in interjecting comments on testimony and raising voice, were not erroneous as hostile.

15. Criminal law ⟹1128(2)

Conduct of defendant's counsel after oral argument on appeal, in sending letter to presiding justice of court of appeal, accompanied by calendars similar to calendar introduced in evidence, was improper, and the letter and calendars would be stricken from the files.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Harry Knight was convicted of robbery with a deadly weapon, and of assault with a deadly weapon, and he appeals.

Affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Gilbert F. Nelson, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and George H. Johnson, Deputy Dist. Atty., both of Los Angeles, for respondent.

WOOD, Justice.

Defendant was charged in count I of the information with the crime of robbery, with the additional charge that at the time of the commission of the offense he was armed with a deadly weapon. In count II he was charged with the crime of assault with a deadly weapon with intent to commit murder. He was also charged with the prior conviction of the crime of murder in the state of Missouri. At a jury trial he was convicted of the charges contained in count I and was also convicted of the crime of assault with a deadly weapon, an offense included in the charge contained in count II. Defendant denied the prior conviction of murder but the jury found this charge to be true. He has appealed from the judgment of conviction and from the order denying his motion for a new trial.

From the evidence presented by the prosecution it appears that defendant operated an establishment known as Boots and Saddles in the city of Los Angeles. This establishment consisted of a number of buildings, a cafe, a cocktail bar, a dwelling house, a club room and a stable containing a bunk room. Several persons lived on the premises with defendant, including Ray Marchant, who had an interest in the business, and Ella Neuhart, who was employed there as a waitress. The victim of the robbery, Emil Kast, a cousin of Ella Neuhart, arrived on the premises of Boots and Saddles on Friday, June 21, 1940, intending to stop over for a short visit on his way to Washington. He carried on his person two billfolds containing the sum of $260 or $270 in currency. The fact of his possession of this money was known by defendant, who had observed Kast assisting in the making of change for customers at the bar. The first night after his arrival Kast slept with Marchant in an attic of the house. At the suggestion of defendant Kast went on Sunday morning to Los Angeles with Marchant and Mrs. Neuhart. Upon their return on Sunday evening defendant told Marchant that there had been a fire in the attic and that he and Kast could not sleep up there but that Kast would have to sleep with a man named Alvin Cowart in the stable and that Marchant could sleep with defendant in the club room. Kast and Cowart went to the stable to sleep and defendant and Marchant went to the club room, whereupon defendant told Marchant that since there had been a fire on the premises it would be best for him to stay in the bar and "watch things". Marchant then went to bed in the club room.

Before Kast and Cowart went to bed in the double bed in the bunk room of the stable Kast put both of his billfolds inside his pillow. At about 2 a. m. in the morning Kast awakened and saw defendant running through the pockets of his coat which was lying by the bed. Kast sat up in bed and appellant left the room. Defendant returned shortly, opened the door and "waved to come out". Kast aroused Cowart, stating "your boss wants to see you outside". Cowart got up and left the room for a short period and returned to the bed. During this period Kast removed his billfolds from the pillow and placed them inside his underwear next to his body. In about ten minutes defendant returned to the bunk room and ordered Kast and Cowart to turn to the wall, threatening that he would shoot them with a pistol he held. Defendant poked Kast with the "gun" and demanded his money. Kast stated that he had given the money to Marchant but defendant replied, "Ray hasn't got the money", and began to feel about Kast's body. Kast took the billfolds in his hand while he sat up in bed and defendant struck him over the head with the gun. Kast testified: "When he kept on hitting me, I took the money—he started feeling around —felt around me in the bed, and I took the money out and held it in my hand, left hand, and I kind of sat up in bed a little, and he hit me over the head a couple of times. Then I tried to hold him off with one hand—I thought if I stalled around maybe he would go out, and then he kept on hitting me and poking me in the ribs and asking for the money. Then I sat up, and then he says, 'Lay down, you son-of-a-bitch', and then he hit me over the head, and I was kind of stunned a little and I dropped the money behind the bed, and he shot just as I laid down. Then I jumped up and grabbed for the gun—I had the gun in both hands and held it very tightly, and he was so strong he pushed me down and took the gun * * * he stooped right down, got the money and then went out". Kast went up the street a short distance to a filling station and called the sheriff's office. He was then taken to the receiving hospital.

One of the investigating officers testified that he dug a bullet from the wall in the bunk room about 2½ feet above the bed. An officer testified that he removed from the incinerator on the premises of Boots and Saddles a charred piece of burned calendar which Kast identified as having been in his possession on the day before the night of the robbery. A photograph of this calendar was introduced in evidence.

Alvin Cowart corroborated the testimony of Kast as to the occurrences at the time of the robbery. He also testified that about daylight on the morning of the robbery defendant told him to clean out the incinerator where the calendar was later found but that he did not do so. On Monday afternoon Cowart was taken into custody by the police and released. He then met defendant, who gave him $56 with instructions that the money be given to a Mrs. Snyder, saying that if the officers came he did not want it to be on his person and that defendant then said, "That dutch son-of-a-bitch didn't have but $208".

[1-3] The contention of defendant that the evidence is insufficient to justify the conviction is devoid of merit. Defendant was identified as the robber by two witnesses, whose testimony is supported by a number of circumstances, including circumstances in addition to those above set forth, from which inferences of guilt could be reasonably deduced. Defendant refers to the fact that the lower part of the robber's face was covered with a cloth. This, however, does not nullify their testimony to the effect that they recognized him as the perpetrator of the crime. The strength or weakness of the identification is a matter for the determination of the jury. People v. Farrington, 213 Cal. 459, 2 P.2d 814.

Defendant contends that upon the examination of the prospective jurors concerning their qualifications the prior conviction of defendant of the crime of murder was unduly emphasized and he was thereby prevented from having a fair trial. The record discloses the following proceedings:

"Q. By Mr. Rose: Mr. Kennick, you entertain the same belief that Mr. Thedick does, that the fact that a person has been convicted of the crime of murder makes no impression, you would not be prejudiced against him in the absence of any explanation?

"Mr. Johnson: I object to that as contrary—

"The Court: Perhaps the question should be reformed a little. I will state this to the jurors generally, however: We are trying here the question as to whether the defendant on this particular date, the 24th of June of this year, did a particular thing; what he may have done in the past, whether credible or not, does not shed any light on that. In other words, it would be wholly illogical to say that because a man did something twenty years ago it would be probable he did something today. The question of the guilt or innocence of the crime of robbery or the crime of assault, as charged in this information, is limited to evidence as to what happened on or about the 24th of June. The other matter is really a side issue. While the jury has to determine that, it should not be considered for any purpose in determining the guilt or innocence of the defendant.

"Mr. Rose: Your Honor, I take the position that it is abnormal for an individual in any walk of life, in all candor, to be uninfluenced by being informed that on some previous occasion a particular individual has suffered a conviction for the offense of murder, in the absence of some explanation of that offense. Now, I say to your Honor, and I take the legal position, that it is beyond the pale of—

"The Court: You are trying to argue the question of the admissibility of evidence as to the nature of what happened back sixteen years ago. However, I think the jury has indicated that they will not consider that in determining whether he committed a crime on the 24th of last June. The mere fact that a person may have been convicted of murder does not necessarily shed discredit upon the individual. I think it was Edgar Allan Poe who wrote a little story he called 'My Friend the Murderer'; that is my recollection; maybe my recollection fails me. The fact that a man may have been convicted of an offense, even the offense of murder, might not be discreditable, necessarily; the circumstances may be entirely otherwise. However, we are not concerned with that in this trial.

"Mr. Rose: I take the position that since that has been mentioned to the jury, I am entitled to elicit the state of mind of the juror, because it strikes me it is merely an idle act—

"The Court: You may ask him whether that allegation, whether it be established or not, could by any possibility have the slightest effect upon his determining the guilt or innocence of the defendant.

"Mr. Johnson: If your Honor please, what I had in mind was, it is proper for the jury to consider the felony conviction on the question of impeachment, regardless of this allegation.

"The Court: I don't think we had that in mind; I am sure Mr. Rose did not, and I did not. Of course, the jury has been previously instructed that a person who takes the witness stand, in person, whether it is the defendant or not, may be impeached by asking the question as to whether he has been convicted of a felony or not. If he answers he has, or it appears he has, the weight to be given to that prior felony conviction as reflecting upon his credibility, however, is a matter for the jury. The mere fact a person has been convicted, of course, does not discredit his testimony. I think we have covered that, Mr. Rose; I have tried to."

[4, 5] Before the examination of the jurors was commenced defendant had denied that he had been convicted of murder and the issue therefore was to be determined by the jury. It was proper for the counsel to interrogate the prospective jurors on their state of mind concerning all of the issues to be submitted to them. It appears that counsel for defendant was the first to interrogate on the subject of the prior conviction. His inaccurate use of the words "makes no impression" brought about an objection from opposing counsel. The court thereupon attempted to explain to the jurors the issue before them as regards the charge of the prior conviction and the fact that a prior felony conviction of a witness should be considered by the jury in passing upon his credibility. The court discharged its duty as required by section 1078 of the Penal Code and in doing so presented the issues to the jury in a manner which was fair to defendant, who was favored rather than prejudiced thereby. The knowledge that one has been convicted of murder arouses a feeling of abhorrence in the average citizen. The effect of the language of the court above quoted was to allay this feeling.

[6, 7] Defendant contends that the trial court erred in refusing to give to the jury several instructions which he had proposed. The first refused instruction of which complaint is made in defendant's brief is as follows: "The interest of a defendant in the result of the action does not deprive him of the benefit of his own testimony; the law makes him a competent witness in his own behalf, and his testimony is entitled to just and fair consideration by you, the same as that of any other witness, and is sufficient in itself, if it creates in your mind any reasonable doubt as to whether the crime charged was committed by the defendant, to entitle him to an acquittal at your hands". The court gave full and fair general instructions on the credibility of witnesses. It has been held in a number of decisions that the trial court should not single out the testimony of defendant and give instructions with particular reference to it. People v. Barnett, 99 Cal.App. 409, 278 P. 885; People v. Khan, 92 Cal.App. 534, 268 P. 701; People v. Heath, 79 Cal.App. 20, 248 P. 1027; People v. Adams, 199 Cal. 361, 249 P. 186; People v. Harris, 128 Cal.App. 44, 16 P.2d 688; People v. Miller, 68 Cal.App. 758, 230 P. 191; People v. Langlois, 68 Cal.App. 610, 230 P. 13.

[8] The contentions of defendant regarding the refusal to give other proposed instructions are not more meritorious than his contention with regard to the instruction above quoted. The jury was fully and fairly instructed by the court on all issues of law involved in the case.

[9] Defendant argues that the court should have given of its own motion an

instruction on the necessity for corroboration of the testimony of an accomplice, claiming that the witness Cowart was an accomplice. The evidence in the record is sufficient to sustain a conviction without the testimony of Cowart and, even if Cowart be considered an accomplice, which is denied by the prosecution, it is apparent that an instruction on the subject of the necessity for corroboration of an accomplice was unnecessary.

[10] A number of instances are cited by defendant in which he claims that the prosecutor was guilty of prejudicial misconduct. The most serious complaint seems to be in the opening statement made to the jury by the prosecutor in which he stated: "The evidence will show, I think, that this defendant boasted to people down there, especially to those he had working for him, that he had killed seventeen people". The statement appears to have been made in good faith, for after the witness Marchant had testified that he had changed his residence because he was afraid of defendant stating, "He had threatened to get both Emil and I," the prosecutor asked this question: "Now, Mr. Marchant, will you relate what Mr. Knight, the defendant, had told you on any occasion about his having killed anybody". An objection to this question was sustained. The jury was admonished by the court to disregard the prosecutor's statement concerning the alleged boast of defendant that he had killed anyone. In view of the court's admonition we are satisfied that no prejudice was suffered by defendant.

[11] Some of the instances of alleged misconduct resulted directly and naturally from statements which had been made by defense counsel. Other assignments of misconduct on the part of the prosecutor were, except in instances where they were without merit, followed by the admonition of the trial court to the jury to disregard them. They are not of such nature as to furnish grounds sufficient to justify a reversal of the judgment.

Defendant also contends that the trial judge was guilty of misconduct which prevented his having a fair trial. He apparently considers his most serious criticism to be that which he directs at the remarks of the court concerning the story entitled "My Friend the Murderer", for he commences his argument under this heading with the following "It is to be noted that the top of page 3 of the record reflects the trial Judge as making some facetious observations about having read a story entitled, 'My Friend the Murderer'. We especially desire to call this Honorable Tribunal's attention to some of the particular observations of the Court, which we submit engendered a prejudice against the appellant in the minds of the jury. Consider, for example the following:

" 'Q. Did you observe anything with respect to the business and the money transactions around there?

" 'Mr. Rose: Just a moment. I object to that as leading and suggestive, and calling for a conclusion and opinion of the witness.

" 'The Court: Overruled.

" 'Mr. Rose: Just a moment, your Honor.

" 'The Court: Overruled.

" 'Mr. Rose: I have not completed my objection.

" 'The Court: Let us try another one. Those were not very good.

" 'Mr. Rose: No proper foundation laid as to whom this particular business belonged, and your Honor cannot assume it merely because the prosecutor has made that statement.

" 'The Court: I overrule the objection. You may proceed.

" 'Q. By Mr. Johnson: What did you see with respect to any money transactions in the bar room or the cafe?

" 'Mr. Rose: Objected to as indefinite, vague, calling for an opinion and conclusion of the witness, on the basis of res inter alios acta.

" 'The Court: That is a good 39-cent word, but it hasn't anything to do with the question. When you ask a man what he sees, that does not call for a conclusion; that is direct testimony; it is not even circumstantial. Objection overruled.

" 'Mr. Rose: Your Honor, if you want me to—

" 'The Court: I am ruling the objection is overruled, and please understand when I overrule the objection the District Attorney may go ahead. We are wasting a lot of time. If I am wrong you have the benefit of your objection.

" 'Mr. Rose: I want to protect the record.

" 'The Court: That is all right; you can protect it, but not by continuing to argue after I have ruled. You may proceed.' "

[12, 13] As hereinabove indicated we perceive no impropriety in the court's remarks on the subject of the story referred to; nor do we find error in the court's actions in the matter set out in defendant's brief which we have just quoted.

[14] Defendant asserts that "the attitude of the trial judge was hostile throughout the trial". The record fails to bear out this assertion but it discloses a commendable effort on the part of the judge to conduct the trial in an orderly manner. During the progress of the trial defense counsel repeatedly referred to the deputy district attorney as "this so-called counsel", "this so-called attorney" and in other ways brought about admonitions from the trial court concerning his own conduct. The following appears in the reporter's transcript:

"Q. Being a seaman, you could climb a ladder, could you? A. Yes.

"Mr. Rose: Very clever.

"The Court: Mr. Rose, I am going to admonish you that I do not want any more wise cracks. If you want to make any remarks, something in the nature of objections, do so. I am not going to have any comments here, or I am going to take disciplinary action. I am getting thoroughly tired of it".

At one stage of the trial the court ordered defense counsel "to stay away from a position between counsel for the prosecution and the jury". On another occasion the court felt compelled to admonish counsel, "Mr. Rose, now, I have a perfectly good means of compelling you to modulate your voice; I do not want to utilize it. I think you should have enough self-control, at your age, to keep your voice down within a reasonable conversational tone. Standing within about an arm's length of the jury, you are shouting in a tone of voice, and I want the record to show it does happen repeatedly, which is extremely irritating not only to the court but must be extremely irritating to the jury. I think out of consideration for the jury, if you have no consideration for the court, you should desist. You may proceed".

A lack of respect toward the court breeds contempt for our system of jurisprudence. It is the duty of the trial judge to see that trials are conducted in an orderly and respectful manner. The statements and rulings of the trial judge, of which complaint is now made, were brought about by the improper conduct of defense counsel and we find nothing therein which can legitimately be made the subject of adverse criticism. Defense counsel may not by his own improper conduct goad the judge into taking disciplinary action and thereafter obtain a reversal of the judgment of conviction because of the rulings which he has brought upon himself.

Other assignments of error are made by defendant. They are without merit and are not of sufficient importance to call for discussion herein.

[15] The improper conduct in which defense counsel indulged during the trial has been continued in this court. He has filed a brief in which he refers to "the despicable manner in which the trial was conducted", "the so-called trial" and the "star chamber proceedings and the methods of medieval times". He repeatedly refers therein to opposing counsel as "the so-denominated deputy district attorney". After the oral argument he sent to the presiding justice of this court a letter under date of April 19, 1941, accompanied by several small calendars which he claims are of the type of the partially burned calendar found in the incinerator on defendant's premises, and which he asserts "can be had almost as easily as grapenuts". It was improper to send the letter and the calendars. It is ordered that they be stricken from the files.

The judgment and the order denying a new trial are affirmed.

We concur: MOORE, P. J.; McCOMB, J.

44 Cal.App.2d 903

CASTILLO v. WARREN et al.

Civ. 2736.

District Court of Appeal, Fourth District, California.

May 19, 1941.

Hearing Denied July 17, 1941.

1. New trial ⚷38

The improper granting of a nonsuit is an "error of law" for which a new trial may be granted under statute. Code Civ.Proc. § 657.

See Words and Phrases, Permanent Edition, for all other definitions of "Error of Law".

2. Executors and administrators ⚷29(2)

Where plaintiff's petition for letters of administration failed to allege that he was a California resident and that he had attained his majority, and order of appointment failed to find on those facts, but plaintiff was allowed to testify that when he filed petition he was a California resident and was over 21, and record did not show affirmatively lack of jurisdiction to make appointment, charge that because of plaintiff's failure to allege those facts, order was void and plaintiff had no capacity to bring action for death of his intestate was a "collateral attack" on appointment which did not oust trial court of jurisdiction nor make order void on its face and did not therefore deprive plaintiff of his capacity to bring action. Probate Code, §§ 302, 401, 420, 440.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action for wrongful death by Benjamin Castillo, as administrator, against John W. Warren and another. After the close of plaintiff's case, the trial court granted defendants' motion for a nonsuit and entered judgment for defendants. From an order granting plaintiff's motion for a new trial, defendants appeal.

Affirmed.

Gray, Cary, Ames & Driscoll, of San Diego, for appellants.

F. L. Richardson and Joseph S. Campbell, both of San Diego, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent brought this action in the capacity of administrator to recover damages for the death of the intestate which death he alleged was caused by the malpractice of the defendant and appellant doctor, John W. Warren, and the defendant and appellant Paradise Valley Sanitarium and Hospital in the treatment of respondent's intestate at the time she gave birth to her child. After the close of plaintiff's case, the trial court granted defendants' motion for a nonsuit and judgment was thereafter entered for defendants. Subsequently, the trial court granted plaintiff's motion for a new trial and this appeal is taken by defendants from this order.

The evidence shows that on June 12, 1938, the decedent was about to give birth to a child, and at that time decedent's sister requested appellant Dr. Warren, agent and servant of the Paradise Valley Sanitarium and Hospital, to take charge of the case. Subsequent to this call and on the same day, the appellant hospital sent a student nurse to the home of the decedent at about 2:30 o'clock in the afternoon and she remained in charge of the case until the arrival of the appellant doctor at about 9 o'clock p. m. of that day. After that time the appellant doctor remained in attendance upon decedent until the child was born at 11 o'clock that evening. After the birth of the child he remained with the patient until 1:30 a. m. of June 13, at which time he and the nurse left the patient in charge of the patient's sister, who was a person who was not experienced in taking care of sick persons. Appellant Warren agreed to return at 8 o'clock a. m. but did not do so and the patient being in a great deal of pain and calling for something to relieve her, the sister made an attempt to contact Dr. Warren and subsequently did contact him and he returned to attend the patient at about 11 o'clock a. m. of that day. When he returned he found the patient in a pool of blood and after some further examination and an attempt to remove the placenta, went away and left her again in charge of her sister and did not return until the evening of that day, at which time he advised that the patient be sent to the hospital for the purpose of a blood transfusion. Consequently she was sent to the appellant hospital where she arrived at about 8:30 p. m. on June 13. The brother and sister of the decedent were there ready to give their blood for a transfusion but the giving of the transfusion was postponed until the following morning. Subsequent thereto, on June 14, at about 11:30 a. m. the placenta was removed from the uterus of the decedent. This was about 36 hours after the birth of the child. The patient subsequently died.

The two principal acts of negligence alleged were the failure of the appellants to properly attend Mary Castillo after the birth of her child and to give her the usual and ordinary medical treatment which is given under the same or similar circumstances, and the failure of appellants to remove the placenta within the usual and ordinary time. It is contended that by reason of the failure to give such medical treatment and attention the decedent became infected with blood poisoning and as a result thereof died, leaving surviving her three minor children, one of whom was the child born just prior to her death.

Expert medical testimony was given on the question as to the course pursued by the appellant doctor compared to an ordinary practitioner engaged in the practice of medicine. It was testified that in many details it was not such a course as should have been pursued by a skillful and careful surgeon engaged in the same line of work in the city of San Diego at the time in question. Considering the evidence in a light most favorable to respondent, the court would not have been justified in taking the case from the jury and granting a nonsuit on the ground that the evidence was insufficient in so far as it related to the alleged negligence of the defendants.

We will therefore consider the question of the merits of the appeal from the order granting the new trial as framed. On September 5, 1940, the motion for nonsuit was made by counsel for defendants on two grounds: (1) that the evidence failed to show the legal capacity of the plaintiff to maintain the action in that the proceedings by which the plaintiff was appointed as administrator of the estate of Mary Castillo, deceased, were void; and (2) insufficiency of the evidence to establish negligence. The motion for nonsuit was granted as to defendant John W. Warren on September 11, 1940, and a judgment of dismissal of plaintiff's action was signed. On the same day, notice of entry of judgment was served. September 17, 1940, plaintiff filed a notice of motion for new trial. It specified as grounds for a new trial: (1) errors at law, occurring at the trial and excepted to by this plaintiff in sustaining defendants' motion for nonsuit: (2) erroneous ruling of the court in reference to the insufficiency of the evidence to sustain plaintiff's capacity to sue. On October 5, 1940, the motion for new trial was heard and determined upon the record and not upon affidavits. Thereafter, the court made the following order: "* * * that the motion of the plaintiff for a new trial in the above entitled action be and the same is hereby granted." No appeal was taken from the judgment of dismissal based upon the order granting the nonsuit. On October 14, 1940, the court signed a nunc pro tunc order as of September 11, 1940, correcting the first order granting the nonsuit and judgment of dismissal by making defendant hospital a prevailing party therein.

It will be noted that the first specified claimed error of law was based upon the court's ruling granting a nonsuit for the reason that plaintiff had no legal capacity to sue. It is apparent from the record that the trial court granted the nonsuit on the sole ground that plaintiff had not shown by the evidence his capacity to sue, and that on the motion for new trial the court believed that it had erroneously determined that question, as a matter of law, and therefore for that reason alone, granted the motion for a new trial.

Plaintiff alleged in his complaint that he was the administrator of the estate of Mary Castillo, deceased, and was authorized to bring the action in his official capacity as such. The answer to the complaint put this fact in issue. Defendants claim that plaintiff was thereafter required to establish at the trial his legal capacity to sue and that, as a matter of law, he failed to do this. The undisputed evidence shows that plaintiff's petition for letters of administration, received in evidence failed to allege that he was a resident of California and that he had attained the age of majority, and that the order appointing plaintiff administrator, also received in evidence, failed to find on these facts.

It is therefore argued that since plaintiff did not allege these facts in his petition, the purported order appointing the administrator was wholly void and therefore plaintiff had no capacity to bring this action, citing sections 401, 420 and 440 of the Probate Code; Estate of Gordon, 142 Cal. 125, 75 P. 672; Johnston v. Southern Pacific Co., 150 Cal. 535, 89 P. 348, 11 Ann.Cas. 841; In re Cloward's Estate, 95 Utah 453, 82 P.2d 336, 119 A.L.R. 123; and Abelleira v. Dist. Ct. of Appeal, Third Dist., 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715.

It is further argued that the trial court properly granted the motion for a nonsuit and thereafter improperly granted a motion for new trial; that the jurisdictional defect in plaintiff's appointment has not been corrected; and that therefore the order granting a new trial was erroneously made and should be reversed.

[1] The improper granting of a nonsuit is an error of law for which a new trial may be granted under section 657 of the Code of Civil Procedure. 20 Cal.Jur. 137, §§ 89-90; 8 Cal.Jur. Ten Year Supp. §§ 89-90, p. 528; Stow v. Superior Court, 178 Cal. 140, 144, 172 P. 598; Craig v. Hesperia L. & W. Co., 107 Cal. 675, 40 P. 1057; Converse v. Scott, 137 Cal. 239, 70 P. 13; Toulouse v. Pare, 103 Cal. 251, 37 P. 146; Carton Corporation v. Superior Court, 76 Cal.App. 434, 244 P. 932; McClurken v. Ralph's Grocery Co., 130 Cal.App. 529, 20 P.2d 66; Domico v. Casassa, 101 Cal. 411, 414, 35 Pac. 1024; Smith v. Hyer, 11 Cal. App. 597, 105 P. 787; Valentine v. Hayes, 37 Cal.App. 42, 173 P. 410; Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124.

An order granting a nonsuit is deemed excepted to under section 647 of the Code of Civil Procedure. The evidence in reference to plaintiff's capacity to sue is not in conflict. Before granting the nonsuit the court allowed plaintiff to testify that at the time he filed the petition for appointment as administrator he was in fact a resident of this state and was over 21 years of age.

We will therefore consider the merits of the question thus presented. The case of Jerauld v. Chambers, 44 Cal.App. 771, 187 P. 33, seems to be determinative of the question here involved. In that case the appointment of an administrator was collaterally attacked upon the ground that the petition for the appointment of the administrator was not signed by the applicant as required by the statute. The court held in that case that the appointment of the administrator was not subject to collateral attack, and said at page 773 of 44 Cal.App. at page 33 of 187 P.:

"As the court had jurisdiction of the subject-matter, objections to the mode of procedure were questions which could have been raised on an appeal from the order or by a direct attack for lack of jurisdiction or on the ground of fraud or mistake. No appeal having been taken from the order, and no direct attack having been made thereon, it became a final adjudication of the jurisdiction of the court to act, as well as the rights of the parties under the letters issued. In the absence of an appeal or other direct attack upon the order, it is free from a collateral attack in a suit brought by the administratrix in behalf of the estate which she represents. Thaxter v. Finn [178 Cal. 270, 273, 274, 281], 173 P. 163, 165, 168. In other words, letters of administration, when not revoked or suspended by a direct attack upon the order appointing the administratrix, are sufficient proof of her right to represent the estate in a civil action, unless the record affirmatively shows no jurisdiction to make the appointment."

The record in the instant case fails to affirmatively show no jurisdiction to make the appointment. Section 440 of the Probate Code, after setting forth the facts which the petition must state, also provides: "No defect of form or in the statement of jurisdictional facts actually existing shall make void an order appointing an administrator or any of the subsequent proceedings."

Section 302 of the Probate Code provides: "In the absence of fraud in its procurement, an order of the superior court granting letters, when it becomes final, is a conclusive determination of the jurisdiction of the court (except when based upon the erroneous assumption of death), and cannot be collaterally attacked." (Enacted 1931.) See, also, In re Meisner, 30 Cal. App.2d 290, 86 P.2d 124.

[2] We therefore conclude, as the trial court finally concluded as a matter of law, that under the circumstances related and the issues here presented, the collateral attack upon the appointment of the plaintiff as administrator of the estate did not oust the court of jurisdiction nor make the order appointing him as administrator void upon its face and did not therefore deprive plaintiff of his capacity to act.

For the reasons expressed, the order granting the new trial is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

44 Cal.App.2d 909

RICE et al. v. LEE.

Civ. 2746.

District Court of Appeal, Fourth District, California.

May 19, 1941.

1. Mines and minerals 🔑77

Abandonment will be more readily found in the case of oil and gas leases than in most other cases, even in the event of failure of lease to express condition subsequent, right of re-entry and forfeiture, or penalty for failure to commence exploration or operation within time specified.

2. Mines and minerals 🔑78(1)

Courts will not permit lessee to fail in development and hold oil and gas lease for speculative or other purposes, except in strict compliance with his contract for valuable and sufficient consideration other than such development.

3. Mines and minerals 🔑78(2)

The rule that forfeitures are not favored in law does not apply to oil and gas leases, and where there is a substantial breach of implied condition to develop, lessor may re-enter and claim a forfeiture of lease.

4. Mines and minerals 🔑78(7)

In suit to quiet title by lessors under oil and gas lease against lessee, evidence supported finding that lessee did not intend to explore, drill and develop, and that his failure to do so within time allowed by lease and extension agreement constituted "abandonment" of lease.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

5. Quieting title 🔑43

In suit to quiet title by lessors under oil and gas lease against lessee, wherein purported copy of lease attached to complaint omitted certain immaterial phrase which appeared in lease introduced in evidence, but lease admitted was properly identified and was undoubtedly the lease sued on, there was no "fatal variance." Code Civ.Proc. § 469.

See Words and Phrases, Permanent Edition, for all other definitions of "Fatal Variance".

6. Mines and minerals 🔑78(7)

In suit to quiet title by lessors under oil and gas lease against lessee, evidence, showing that lessee did not intend to explore, drill and develop, authorized inference that lessee intended to hold lease for speculative purposes only.

7. Quieting title 🔑44(3)

In suit to quiet title by lessors under oil and gas lease against lessee, where lease expressly set forth reciprocal obligations of the parties and did not provide for or refer to payment of $8,000, which was made when lease was released from escrow, finding that such sum was not paid as consideration for full term of 20 years, but as a bonus for execution of lease, was proper.

8. Mines and minerals 🔑78(2)

Under oil and gas lease setting forth lessee's agreement to start drilling within 60 days, provision for forfeiture of lease on abandonment of any well and failure to commence another well within 90 days thereafter did not prevent forfeiture for failure to start drilling within period allowed by lease and extension agreement.

9. Mines and minerals 🔑78(7)

The vested interest, if any, of lessee under oil and gas lease providing for term of 20 years plus so long thereafter as oil or hydrocarbon might be produced would not bar quieting of lessors' title for lessee's failure to commence drilling within period allowed by lease and extension agreement.

10. Mines and minerals 🔑73

It would be assumed that oil and gas lease was executed and was subject to interpretation according to the law existing at the time of its execution.

11. Mines and minerals 🔑78(6)

A lessee which abandoned oil and gas lease by failure to commence drilling within period allowed by lease and extension agreement was not entitled to return of money paid as bonus for execution of lease.

12. Appeal and error 🔑110

An order denying a motion for new trial is not appealable. Code Civ.Proc. § 963.

◆

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Suit to quiet title by Elmer C. Rice and others against William Y. Lee, etc., wherein a cross-complaint was filed. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals.

Judgment affirmed, and appeal from the order dismissed.

Jesse Bach Porter, of Los Angeles, for appellants.

Preisker, Goble, Twitchell & Stephan, of Santa Maria, for respondents.

KELLY, Justice pro tem.

The plaintiffs below sued to quiet title to certain lands in Santa Barbara county. The defendants having answered, the cause was tried by the court without a jury. Judgment having been entered for plaintiffs and a motion for a new trial having been denied, the defendants prosecute this appeal.

On June 30, 1937, the plaintiffs below, as lessors, leased to the defendants certain lands in the lease described, to be explored and developed for the production of oil, gas and other hydrocarbons. The term of the lease was 20 years and so long thereafter as oil or gas could be produced in paying quantities. The lessees were granted the exclusive right of prospecting the demised premises and drilling for and removing oil and gas and to establish and maintain the usual incidents to an oil lease such as tanks, boilers, houses, engines, power lines, roads, etc., and to drill for and develop water. The lessors were to receive the usual royalties out of the products of operation. The lease then recites in paragraph 3 thereof: "The lessee agrees to start the drilling of a well for oil on demised premises within sixty (60) days from the date of this agreement, and to continue the work of drilling such well after commencing the same, with due diligence and dispatch until a depth of 3,500 feet has been reached, unless oil is discovered in paying quantities at a lesser depth or unless such formations are encountered at a lesser depth as will indicate to the geologist of the lessee that further drilling will be unsuccessful. If by reason of encountering mechanical difficulties in the prosecution of the work, or other causes, the lessee shall determine to abandon the same, this lease shall continue in full force provided a new well is commenced within ninety (90) days and thereafter drilled diligently as hereinabove provided."

On August 27, 1937, the lessees having done nothing in discharge of their obligations, an extension agreement in writing was executed by the parties by which the lessees were given an additional period of sixty days to start drilling. This agreement further designated the particular location on the demised premises whereat the first well was to be drilled. The lessees having done nothing, the lessors, on November 6, 1937, signed and served upon them a notice to commence work within ten days or abandon their rights under the said lease. The lessees continued inactive and the lessors filed their complaint on January 10, 1938.

At the trial William Y. Lee, one of the lessees, testified that he had not obtained a permit to drill, had not made arrangements for obtaining water to drill, had not executed a contract to have a well drilled, and had placed no material, tools or equipment for exploration or drilling upon the premises. Testimony was received to the effect that Lee said he did not have to drill a well and that he did not intend to.

The lease is silent as to any express condition subsequent, right of reentry, forfeiture, or penalty for failure to commence work as indicated.

Findings were filed wherein it is recited:

"That it is true that said lessee has failed to commence the drilling of said well or any well within said period of 120 days from the date of said lease, or at all. That it is true that said lessee did not intend to drill said property within the time provided for in said lease and extension agreement, or at all. That it is true that defendant intended to hold said property for speculative purposes and had no intention of drilling the said property or any part thereof. That it is true that defendant abandoned said premises and abandoned said oil and gas lease. * * *

"That none of the denials of defendants' answer on file herein are true or correct."

[1-3] (1) We believe that the main issue in this case has been fully determined by the case of Hall v. Augur, 82 Cal.App. 594, 256 P. 232. In that well considered and leading decision, it is held that abandonment will be more readily found in the case of oil and gas leases than in most any other cases, even in the event of failure of the lease to express a condition subsequent, a right of reentry and forfeiture, or a penalty for failure to commence exploration or operation within the time specified; that rights granted under such leases are for exploration and development, and courts will not permit the lessee to fail in development and hold the lease for specula-

tive or other purposes except in strict compliance with his contract for a valuable and sufficient consideration other than such development; that the rule that forfeitures are not favored in law does not apply to oil and gas leases; that forfeitures are usually against conscience and without equity, and it is for these reasons that courts of chancery ordinarily refuse relief in such cases, but an exception to the rule must exist where it is against equity to permit the defendant to longer assert his title; and that where there is a substantial breach of the implied condition the lessor may reenter and claim a forfeiture of the lease. See, also, Carlisle v. Lady, 109 Cal.App. 567, 293 P. 686; Caswell v. Gardner, 12 Cal. App.2d 597, 601, 55 P.2d 1222; Garrison v. Hogan, 112 Cal.App. 525, 530, 297 P. 87.

[4] We hold, therefore, that the evidence and reasonable inferences to be drawn therefrom are ample to support the conclusion of the trial court that the lessees did not intend to explore, drill and develop the demised premises, and that such failure constituted an abandonment.

[5] (2) A purported copy of the lease was attached to the complaint and marked Exhibit A. At the trial the lease was introduced and marked Plaintiffs' Exhibit I. In the purported copy attached to the complaint, a certain phrase was omitted which, however, appears in Plaintiffs' Exhibit I. Appellant contends that the variance is fatal. The matter omitted is of no materiality in this discussion. The lease admitted in evidence was properly identified and there can be no doubt that it is the lease sued upon. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. * * *" Code Civ.Proc., sec. 469.

[6] (3) Appellant contends that the evidence does not support the finding of the trial court that the lessee intended to hold the lease for speculative purposes only. The trier of facts accepted the testimony as true to the effect that the defendants did not intend to drill. Such being true, the inference is reasonable as found by the trial court.

[7] (4) At the time of the release of the lease from escrow $8,000 was paid by the lessees to the lessors. The trial court found that this sum was not paid as a consideration for the full term of twenty years but that on the contrary the sum indicated was paid as a bonus for the execution of the lease. We deem this finding sound. The lease sets forth expressly the reciprocal obligations of the parties. It is a bilateral contract. The lease does not provide for nor refer to a payment of $8,000. The payment was evidently collateral to the lease contract and cannot in any wise be regarded as embraced within the express covenants of the written instrument.

[8] (5) The lease provides that upon the abandonment of any well and the failure to commence another well within ninety days thereafter the lease shall cease and determine. Appellants argue that because of this express forfeiture clause no theory of abandonment for failure to commence work can be entertained. This contention is without support in reason or in precedent. It is to be noted that the trial court did not rest its judgment upon a theory of forfeiture for failure to drill successive wells as provided in the lease, but upon a theory of abandonment for failure to do any work whatever or make any preparation tending to comply with the obligation on the part of the lessees to begin work within 120 days from the date of the lease.

[9, 10] (6) Appellants contend that because the lease provided for a term of twenty years plus so long thereafter as oil or hydrocarbons might be produced, the lessees procured an immediate vested interest in the land, which interest was real estate, and hence the lessors could not quiet their title against such vested interest. Assuming that the lease created a vested interest, such fact does not exclude the possibility of a judgment quieting the lessors' title for failure on the part of the lessees to comply with the express obligations which the lease instrument imposed upon them. It must be assumed that the lease was executed and that it was subject to interpretation according to the law existing at the time of its execution. The term of the lease, therefore, was subject to determination by abandonment as held in Hall v. Augur, supra, regardless of by what term we may designate the interest held by the lessees. Moon v. Marker, 26 Cal.App.2d 33, 78 P.2d 460; Dabney v. Edwards, 5 Cal.2d 1, 11, 53 P.2d 962, 103 A.L.R. 822.

[11] (7) The appellants contend that they should have judgment on their cross-complaint for $8,000, the amount of the bonus paid for the execution of the lease.

There is no merit in this contention. Neither the pleadings nor the proof support the theory that the lease did not truly express the agreement of the parties. The defendants, as cross-complainants or otherwise, have not attempted to reform the lease nor to rescind for any reason. It cannot be said that because a bonus was paid to the lessors for the execution of the lease that therefore the lessees were released from the performance of any obligations assumed by them by the terms of the written instrument nor relieved of the penalty of the law imposed for failure to perform. The misfortune suffered by the lessees was a direct and proximate consequence of their own wilful failure to perform their obligations. It would be most unreasonable to hold that while the lessees might lose their bonus money if they faithfully performed their obligations of exploration and development and failed to discover oil or gas, yet by utter failure to take any steps towards the performance of these obligations, they could recover back the $8,000 paid.

[12] No appeal lies from an order denying a motion for new trial. Sec. 963, Code Civ.Proc.

The judgment is affirmed. The attempted appeal from the order denying the motion for new trial is dismissed.

We concur: MARKS, Acting P. J.; GRIFFIN, J.

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44 Cal.App.2d 880

VAN RENNES et al. v. SOUTHERN COUNTIES GAS CO. OF CALIFORNIA.

Civ. 12423.

District Court of Appeal, Second District, Division 1, California.

May 19, 1941.

Rehearing Denied June 11, 1941.

Hearing Denied July 17, 1941.

1. Judgment ⇨199(3)

The state of evidence that calls for judgment notwithstanding verdict is the same that would have called for a directed verdict. Code Civ.Proc. § 629.

2. Trial ⇨168

The power to direct a verdict is, as respects state of the evidence, the same as right to grant a nonsuit at conclusion of the evidence.

3. Judgment ⇨199(3)
Trial ⇨178

The right to direct a verdict, and hence the right to enter judgment notwithstanding the verdict, is to be exercised only when, after giving full scope to plaintiff's testimony and indulging in all favorable and legitimate inferences from it, there is no substantial evidence to support a verdict for plaintiff. Code Civ.Proc. § 629.

4. Trial ⇨142

Unless it can be said as a matter of law that, when giving full scope to plaintiff's testimony and indulging in all favorable and legitimate inferences from it, no other reasonable conclusion is legally deducible from the evidence, and any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or a trial court to set it aside as a matter of law, trial court is not justified in taking case from the jury. Code Civ.Proc. § 629.

5. Judgment ⇨199(3)

Evidence of gas company's negligence in maintaining meter box with hole in lid, and of pedestrian's contributory negligence in falling on meter box, *held* to preclude judgment for gas company, notwithstanding verdict for pedestrian.

6. Judgment ⇨199(3)

A motion for judgment notwithstanding verdict cannot be granted where there is a conflict in the evidence, although the conflict is such that the trial court is justified in granting a new trial notwithstanding it, since the motion must be based upon such a state of facts as will warrant the court in granting it without trespassing on jury's province to be the judges of all questions of fact. Code Civ.Proc. § 629.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Richard Van Rennes and another against the Southern Counties Gas Company of California for injuries suffered in fall because of negligent maintenance of meter box. From a judgment for defendant notwithstanding verdict for plaintiffs, plaintiffs appeal.

Reversed, with directions.

Frank Desimone, of Los Angeles, for appellants.

LeRoy M. Edwards and O. C. Sattinger, both of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiffs appeal from a judgment which was rendered against them pursuant to section 629 of the Code of Civil Procedure, notwithstanding the verdict of the jury which was previously returned against the defendant, Southern Counties Gas Company of California, for its alleged negligent maintenance of a cement meter box.

The action arises out of injuries sustained by appellant Katie Van Rennes when she fell over the said meter box while walking along a dirt pathway or sidewalk running north and south between Eleventh and Melrose streets on the east side of Grand avenue in Buena Park, California, under the following circumstances:

On the day of the accident, May 20, 1938, Mrs. Van Rennes left the home of her employer, Dr. Counter, and walked east on Melrose street to Grand avenue; thence north using a cement sidewalk on the west side of Grand avenue for about half a block. She then crossed the street in a marked crosswalk and was proceeding northerly on the east side thereof on her way to her home, which was located slightly east of said Grand avenue on the north side of Eleventh street, which latter street intersected Grand avenue less than half a block north of the said marked crosswalk. The pathway upon which said appellant was walking at the time she fell was located approximately two feet from the curb line, was irregular in width and was fringed with weeds and grass. The concrete meter box of respondent was approximately 2 feet by 30 inches in size, and was situated directly in the said pathway in front of a residence at 1120 Grand avenue. This meter box had a split top, at one end of which was the inspection plate or reading cap, commonly referred to during the trial as the center lid. In order to read the gas meter it was necessary for the reader to remove this center lid which was done by inserting a vault hook in a hole approximately 1 by ¼ inches which was cast in the lid in the process of manufacturing the meter box.

It is alleged that because of the negligence of respondent in maintaining the said meter box in a state of disrepair, appellant Katie Van Rennes "tripped, fell and stumbled", sustaining a comminuted fracture involving the lateral condyle of the right humerus.

During the trial respondent moved for a nonsuit and also for an instructed verdict, which motions were denied. After the jury returned its verdict for appellants, assessing damages at $3,880 in favor of appellant Katie Van Rennes and at $1,100 in favor of her husband, appellant Richard Van Rennes, respondent's motion for a judgment notwithstanding the verdict was granted. This appeal is from the judgment entered pursuant thereto, it being urged by appellants that "the principal question involved in this case is whether the evidence was sufficient to sustain the verdict of the jury."

The principles of law that govern the action of a trial court in passing upon a motion for judgment non obstante veredicto are enunciated in Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, at page 682, 80 P.2d 185, at page 194, 1016 as follows:

[1] "Such a judgment is in order 'when a motion for a directed verdict, which should have been granted, has been denied, and a verdict rendered against the moving party'. Code Civ.Proc. § 629. The state of the evidence that calls for such a judgment, therefore, is the same which would have called for a directed verdict. That is to say, as stated in Barthelmess v. Cavalier, 2 Cal.App.2d 477, 480, 38 P.2d 484, 486:

[2-4] "'The rendering of a judgment notwithstanding the verdict is made by section 629 of the Code of Civil Procedure to depend upon the existence of grounds for the granting of a motion for a directed verdict. See [In re] Estate of Fleming, 199 Cal. 750, 251 P. 637; [In re] Estate of Yale, 214 Cal. 115, 124, 4 P.2d 153. The power to direct a verdict is as stated in [Re] Estate of Yale, supra, "touching that state of the evidence, the same as the right of the court to grant a nonsuit at the conclusion of the evidence." And the right is to be exercised only when, after giving to the testimony of the plaintiff its full scope and indulging in all favorable and legitimate inferences from it, there is no substantial evidence to support a verdict for the plaintiff. [In re] Estate of Caspar, 172 Cal. 147, 150, 155 P. 631; [In re] Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579. "Unless is can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from

the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury." [In re] Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768.'

"As said in [Re] Estate of Lances, supra [216 Cal.] page 400, 14 P.2d 768, quoting from Newson v. Hawley, 205 Cal. 188, 190, 270 P. 364:

"'It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted "only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given."'"

The testimony of appellant Katie Van Rennes, with respect to the manner in which she sustained the injuries here sued upon, is briefly as follows: "It was just after noon (on May 20, 1938), and I was going home from work and I started on Melrose Avenue and went to the east as far as Grand and I turned north, and at the safety zone I crossed the street across Grand to the east side of the street and walked in the path. I heard a horn and as I looked up I didn't see anything but down I went. * * * I got up and I looked for the cause of it and I noticed there was a ragged top in the meter. * * * To the best of my knowledge I hooked my toe in the hole of this meter box. * * * it was a jagged, quite a large hole." Upon cross-examination, she was asked "Just before you heard the horn sound, do you recall where you were looking as you were walking down this pathway?", to which she replied, "Well, I was looking in front of me."

Continuing:

"Q. But you didn't see the meter box at any time before the horn blew? A. No, I didn't. At the very instant I heard the horn, in looking up, I was down.

"Q. Just before the machine blew it, were you looking ahead of you? A. Yes, sir.

"Q. And you didn't see the mater box at any time before you fell? A. No, sir, I did not. * * *

"Q. Did you stumble over the edge of the meter box? * * * A. I stumbled in this hole.

"Q. That is right in the top of the box —the hole in the top of the box? A. There was a jagged edge.

"Q. Was it in the top of the box? A. It was in the top of the box.

"Q. Your foot didn't catch on the edge of the box? A. No.

"Q. Or you didn't stumble before you got to the box? A. My foot was right there in that hole.

"Q. Did you stumble before you got to the box? A. No, sir.

"Q. Your foot was caught in the hole? A. The right toe. * * * I remember my toe caught in the hole and I fell on my right elbow."

The record shows that said appellant sustained a comminuted fracture of the lateral condyle of the right humerus, the condyle referring to the enlargement of the bone above the elbow.

The witness McKenzie, a neighbor of appellants, testified he had lived in Buena Park fourteen years and was familiar with the meter box in question since January of 1938; that on that date the cap on the said meter box was broken; that "the break was approximately 3 inches one way by two and a half the other, and approximately two inches deep". It was brought out upon cross-examination of this witness that his testimony with respect to the condition of the meter box as it existed from January to May of 1938 was given from his independent recollection of what he had seen and that he did not need to rely upon photographs in order to testify.

The witness Duval testified that he had used the pathway in question for a period of ten years; that on May 20, 1938 he had occasion to inspect the meter box on Grand avenue, and that the inspection plate thereon was broken and the grass around it was 8 to 10 inches high; that the lid of the meter box was broken, "cracked in two, and there was a hole about two inches * * * deep * * *; I should judge three or four inches" wide.

Richard Van Rennes testified he inspected the meter box on May 20, 1938, and that "there was a piece out of the center lid * * * it was the north side of the south side piece * * * about 3 or 4 inches wide * * * approximately 2 inches" deep. He also testified that substantially the same condition existed with reference to the meter box for two or three months prior to May 20, 1938.

All of these witnesses were shown enlargements of photographs of the meter box which were taken subsequent to May 20, 1938, some as late as October and December of that year, and said witnesses testified that these photographs substantially represented the condition of the meter box as it existed at the time of the accident.

Respondent corporation, in addition tc the testimony of nine of its employees, presented the testimony of Mrs. Beebe, in front of whose home the meter box was located, an employee of an advertising corporation that maintained a billboard in the vicinity of the meter box, and also that of a lawyer who had observed the location while passing in his automobile. While several of the employees of respondent had no independent recollection of the meter box in question, except as they refreshed their memories from meter readers' sheets, etc., they were all certain that the meter box was in good condition within a short period of time both before and after the accident occurred. Those employees who either inspected the box or took pictures of it in June of 1938 testified they found no holes except the lifting hole cast in the lid, but it was also shown by their testimony that the center lid was replaced in January of 1939.

Mrs. Beebe testified she did not observe anything the matter with the center lid, although she saw the meter site almost every day during the year 1938. In rebuttal it was shown that Mrs. Beebe had told appellants and one Zoe Jackson that she had never had occasion to examine the meter box and knew nothing about it.

The photographs of the pathway and the photographic enlargements of the cement meter box which were introduced in evidence by both parties and marked as exhibits, are not before us, except for a few which are appended to respondent's brief. However, all of them were taken subsequent to the accident, some as late as October and December of 1938, consequently, they are of little value, particularly since they were used first by appellants and then by the respondent to show the condition of the meter box as it existed at the time of the accident, such evidence being in direct conflict.

Respondent urges that appellant Katie Van Rennes' uncontradicted testimony proves conclusively her contributory negligence which of itself justified the judgment notwithstanding the verdict.

The jury by its verdict impliedly found that appellant Katie Van Rennes was free of contributory negligence and that respondent negligently maintained the said meter box.

[5, 6] Applying the rules heretofore outlined to the evidence shown by the record, of which we have given a brief résumé herein, it is clear that the motion for judgment non obstante veredicto was improperly granted. Because, as was said in the case of Hunt v. United Bank & Trust Co., 210 Cal. 108, at page 120, 291 P. 184, at page 189: "It is the established law that such a motion cannot be granted where there is a conflict in the evidence, although the conflict is such that the trial court is justified in granting a new trial notwithstanding it, as the motion must be based upon such a state of facts as will warrant the court in granting it without trespassing on the province of the jury to be judges of all questions of fact in the case. 15 R.C.L. 607. To hold otherwise would result in the abridgement of the constitutional right to a jury trial."

Again in Re Estate of Barton, 16 Cal. App.2d 246, at page 248, 60 P.2d 471, at page 472 the court states: "The power of a court to grant a motion for judgment notwithstanding the verdict is no broader than its power to direct a verdict and it cannot be exercised where there is a conflict in the evidence, even though the conflict is such that the trial court would be justified in granting a new trial notwithstanding it. Hunt v. United Bank & Trust Co., 210 Cal. 108, 291 P. 184. On the motion all evidence in conflict with the Conner claimants' evidence must be disregarded; the trial court cannot judge the credibility of the witnesses, and the Conner claimants' evidence should be given all the value to which it is legally entitled. Herein indulging in every legitimate inference which may be drawn from that evidence, then the [verdict] can be set aside only if the result is a determination that there is no evidence of sufficient substantiality to support the verdict. In re Estate of Flood, 217 Cal. 763, 21 P.2d 579."

Tested by this rule, we are of the opinion that in this case the trial court was in error in determining that there was no evidence which gave substantial support to the verdict reached by the jury.

The judgment notwithstanding the verdict is reversed, and the trial court is directed to render judgment in accordance with the verdict of the jury.

We concur: DORAN, J.; WHITE, J.

44 Cal.App.2d 785

BEAL v. DUNN.

Civ. 11519.

District Court of Appeal, First District, Division 1, California.

May 15, 1941.

1. Appeal and error ⇨854(6)

If order of trial court granting new trial can be sustained on any one of the grounds assigned, the appellate court must affirm the order.

2. Appeal and error ⇨979(2)

Where there is conflict of evidence, an appellate court cannot interfere with decision of trial court granting a new trial on ground of insufficiency of evidence.

3. Appeal and error ⇨979(2)

In insured's action to recover possession of life policy from insured's daughter and beneficiary who claimed that policy was given to her under agreement whereby daughter was to furnish insured with a home rent free and who filed counterclaim to recover rental value of property, record sustained action of trial court in granting insured a new trial and such action could not be disturbed on appeal.

4. Appeal and error ⇨979(2)

An appellate court cannot hold it to be an abuse of discretion if the lower court grants a new trial in a case where the determination of the issues involved depends upon which of the parties who testify to completely contrary facts is to be believed.

5. New trial ⇨79

In insured's action against daughter and beneficiary of life policy to recover possession of policy, wherein daughter claimed that policy was given to her under agreement whereby she was to furnish insured with home rent free and filed counterclaim to recover rental value of property, where there was substantial conflict in evidence regarding manner in which daughter obtained possession of policy and regarding existence of the agreement, the trial court was well within its rights in setting aside its previous determination denying relief to either party by granting a new trial.

Appeal from Superior Court, San Francisco County; I. L. Harris, Judge.

Action by Frank J. Beal against Ethel Beal Dunn to recover possession of a life policy wherein defendant filed counterclaim and cross-complaint. From an order granting plaintiff a new trial, defendant appeals.

Affirmed.

Meurice Swim, of San Francisco, for appellant.

Jerome L. Schiller, of San Francisco, for respondent.

BRAY, Justice pro tem.

Defendant appeals from an order granting plaintiff a new trial. The action was brought by plaintiff to recover the physical possession of a $3,000 policy of insurance upon the life of the plaintiff, which, at the time the action was filed, was in the possession of the defendant, his daughter, and in which the defendant was named as the sole beneficiary. How the policy came into defendant's hands is disputed. Defendant claims, and the court originally found, that the policy was given by the father, the plaintiff, to the daughter on Thanksgiving Day, 1927, under an oral agreement then entered into whereby, in exchange for the policy, defendant was to furnish and provide plaintiff with a home rent free in Sacramento. Plaintiff denies this or any agreement, and claims that the policy was in the safe deposit box of plaintiff's wife, defendant's mother, and that upon the mother's death in 1927, the defendant took possession of the contents of that box, including the policy. The policy was issued in 1893 with the wife as beneficiary. Upon her death, under the terms of the policy, defendant, the sole child of plaintiff, became the beneficiary. It is conceded that defendant has had physical possession of the policy since 1927 and has paid the premiums thereon during all that time; also that since that year plaintiff has occupied, rent free, defendant's house in Sacramento, which house had come to defendant through her mother's estate. The evidence also shows that plaintiff had, over the years, rented out rooms in this residence and retained the rents to his own use. Defendant, by counterclaim and cross-complaint, sought to recover the full rental value of this property for the eleven years subsequent to his wife's death during which plaintiff had occupied it.

The lower court, at the end of the trial, gave an oral opinion ending up with the following statement: "Therefore the only thing I can do is to leave the parties in exactly the same position as they were when they came into this court: namely, I will give no judgment either way—no judgment for the plaintiff, no affirmative judgment—no affirmative judgment against the other side." However the court found that the oral agreement claimed by the defendant had been entered into and carried out, and that defendant was the owner and entitled to the possession of the policy, and then denied defendant any relief under the counterclaim and cross-complaint. After judgment was entered accordingly, plaintiff moved for a new trial on all the statutory grounds. Thereupon, the court, the same judge sitting who had tried the case, granted the motion for new trial "upon the ground of the insufficiency of the evidence to sustain the decision heretofore rendered in said action, and upon each and all of the other and further grounds enumerated and specified" in the notice of intention to move for a new trial.

[1, 2] On the motion for a new trial plaintiff had filed affidavits setting forth certain alleged newly discovered evidence, and also matters which he claimed constituted irregularity and surprise at the trial. The sufficiency of these affidavits as a basis for a new trial on these grounds is strongly attacked by defendant. However, it is not necessary to discuss the affidavits, or the matters therein contained, for the reason that the court specifically granted the new trial upon the ground of the insufficiency of the evidence, as well as upon the other grounds. This court is bound by the well settled rules, first, that if the order of the trial court can be sustained on any one of the assigned grounds the appellate court must affirm the order (2 Cal.Jur. 808, § 476); and secondly, that where there is a conflict of evidence an appellate court cannot interfere with the decision of the trial court granting a new trial on the ground of the insufficiency of the evidence. 20 Cal. Jur. 111, § 71.

[3, 4] Defendant contends that there is no substantial conflict in the evidence and that therefore the rule last mentioned does not apply. An examination of the record, however, discloses a sharp and clear conflict. The real determination of the issues involved depended upon which story was to be believed—that of the plaintiff or that of the defendant. The plaintiff unequivocally denied the existence of the contract. Moreover, many of the facts testified to by defendant, such as her possession of the policy since 1927, the payment of all premiums by the defendant, the occupancy and rental for his own use of the defendant's house at Sacramento, the fact that plaintiff did not exercise the right given him to cash in the policy at the end of each five year period, and others, are equally consistent with the plaintiff's testimony, on the one hand, as to the non-existence of the contract, or the defendant's testimony, on the other, that there was such a contract. All these things are equally consistent with the normal relationship of father and daughter, particularly a daughter who had been requested by the mother's will, as here, to give her father a helping hand, or with a contractual relationship, such as defendant claims was brought about by the agreement which the daughter so strenuously asserts and the father, equally strenuously, denies. Even the circumstance claimed by the defendant, that this litigation was brought about through the machinations of a former husband of the defendant (if such be the case), is not inconsistent, though defendant contends it is, with the claim of plaintiff that he never gave the policy to defendant, but on finding that she had it, he left it with her so that if he died without cashing it she would get the benefit of it. The lower court saw the witnesses, heard the testimony, and, although it first decided in favor of defendant, it later exercised the right, which this court cannot deny it under the circumstances, of changing that decision and granting a new trial. This court cannot hold it to be an abuse of discretion if the lower court grants a new trial in a case where the determination of the issues involved depends upon which of the parties who testify to completely contrary facts is to be believed.

[5] Defendant contends that the evidence as a whole would not be legally sufficient to justify a decision in favor of

plaintiff, had the court so decided, and therefore claims it was an abuse of discretion to grant plaintiff a new trial. To reach such a conclusion, however, defendant has to completely disregard the testimony of the plaintiff himself. Defendant practically takes the position that the mere possession by defendant of the insurance policy since 1927, and the payment of premiums thereon, requires the court to accept defendant's version of the circumstances under which she acquired the policy, or at least eliminates the right of the court to inquire into the circumstances of its acquisition. This, of course, is a fallacy, particularly where, as pointed out before, there existed the relationship of parent and child and these matters were as consistent with that relationship as with any contractual relationship. The solution of the case depends upon whether one believes the actions of the parties were motivated by the usual considerations which motivate the actions of father and daughter, or whether they were motivated by the additional consideration of a contract between them, and the determination of that question depends entirely upon which of the two stories is to be believed. There being a substantial conflict in the evidence the lower court was well within its rights in setting aside its previous determination of the case by granting a new trial.

The order granting the motion for new trial is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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44 Cal.App.2d 868

NANCE et al. v. FRESNO CITY LINES, Inc., et al.

Civ. 2621.

District Court of Appeal, Fourth District, California.

May 16, 1941.

As Modified on Denial of Rehearing June 9, 1941.

Hearing Denied July 14, 1941.

1. Carriers 🔑321(3)

In passenger's action for injuries resulting from sudden stopping of bus, instructions that driver was required to act as an ordinarily careful person would have acted under the same circumstances, and that same rule applied in emergencies not arising from driver's negligence, were contrary to codal provision that a carrier of persons for reward must use the utmost care and diligence. Civ.Code, § 2100.

2. Carriers 🔑348(5)

In passenger's action for injuries resulting from sudden stopping of bus, instructions on contributory negligence that passenger was required to keep such a lookout and to make such observations as an ordinarily careful and prudent person would have done under the circumstances, and that if she failed in that duty, and such failure on her part contributed proximately to her injury, verdict must be for defendants, placed a higher duty on passenger than the law requires because of failure to take into consideration the high degree of care a common carrier owes to its passengers. Civ.Code, § 2100.

3. Trial 🔑295(1)

All instructions are to be considered and construed as a whole to determine whether they contain reversible error.

4. Trial 🔑296(1)

If a single instruction omits an essential element of the case, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby.

5. Trial 🔑296(1)

Where an essential principle of law as given to a jury is materially incorrect, the error will not ordinarily be cured by a correct declaration of the same principle in another instruction.

6. Appeal and error 🔑1064(1)

The giving of instructions which are contradictory in essential elements may warrant a reversal of a judgment for the reason that it is impossible to determine which charge controlled the determination of the jury.

7. New trial 🔑27

In passing on a motion for a new trial, the trial judge is as firmly bound by constitutional provision relating to formal errors as is an appellate court when the cause is on appeal. Const. art. 6, § 4½.

8. New trial 🔑41(3)

In passing on a motion for a new trial, it is the duty of trial judge to sit as a thirteenth juror and weigh the evidence, pass upon its sufficiency, and consider the credibility of witnesses, and this is true even though he does not specify the insufficiency of the evidence as one of the grounds for granting a new trial, because the Constitution contains the direction that he shall not grant a new trial because of errors in instructions to the jury until he has re-examined the entire cause and shall have formed the opinion that the errors complained of resulted in a miscarriage of justice. Code Civ.Proc. § 657; Const. art. 6, § 4½.

9. Appeal and error ⚷933(4)

On appeal from an order granting a new trial but not specifying that the motion was granted because of the insufficiency of the evidence to sustain the verdict, appellate court must indulge in the presumption that the trial court obeyed mandate of the Constitution and considered the whole record in the case and decided that the giving of an instruction was prejudicial and did result in a miscarriage of justice. Code Civ. Proc. § 657; Const. art. 6, § 4½.

10. Appeal and error ⚷978(1)

Where trial judge in granting passenger injured by sudden stopping of bus a new trial without specifying that motion was granted because of insufficiency of evidence to sustain verdict evidently concluded that erroneous instructions resulted in a miscarriage of justice, such conclusion was not without support in the record, and order would be affirmed, notwithstanding that a study of the record left the conclusion that the evidence preponderated in favor of appellants. Code Civ.Proc. § 657; Vehicle Code, § 511, St.1935, p. 176; Const. art. 6, § 4½.

◆

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Eva H. Nance and another against Fresno City Lines, Inc., and another for personal injuries sustained by named plaintiff while a passenger on named defendant's bus line. From an order granting plaintiffs a new trial after verdict of jury for defendants, the defendants appeal.

Order affirmed.

W. M. Conley, Philip Conley, Matthew Conley and Conley, Conley & Conley, all of Fresno, for appellants.

Frank Curran and Matt Goldstein, both of Fresno, for respondents.

MARKS, Justice.

This is an appeal from an order granting a new trial. The order did not specify that the motion was granted because of the insufficiency of the evidence to sustain the verdict of the jury in favor of the defendants. Sec. 657, Code Civ.Proc.

Defendant Fresno City Lines, Inc., is a common carrier of passengers for hire, and Buck Storey was one of its drivers. Eva H. Nance, wife of Charles A. Nance, was a passenger in one of the busses on December 30, 1939, and had paid her fare. The bus was proceeding north on Fulton street in the city of Fresno and while in the intersection of Fulton and Mono streets, Storey, the driver, applied the hydraulic brakes with vacuum boosters, with which the bus was equipped, which caused it to stop suddenly. Mrs. Nance was thrown from her seat and injured.

The jury returned a verdict for defendants. The trial court granted plaintiffs' motion for a new trial and this appeal followed.

Counsel argue the effect of several instructions given to the jury at the request of defendants. The quotation of two of these instructions will serve to illustrate the errors involved. We quote as follows:

"If you find from the evidence that prior to, and at the time of the accident, Buck Storey, driver of the bus, acted as an ordinarily careful person would have acted under the same circumstances, then I charge that your verdict must be in favor of the defendants."

"You are instructed that when, through no negligence of his own, a person is suddenly placed in great peril, such person is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent person under other circumstances. If you shall find from the evidence that defendant, Buck Storey, driver of the bus, through no fault of his own, found himself suddenly in great peril, and immediate action was necessary, on his part, in order to avoid it, he was required to use only such care as an ordinarily prudent person would use under the same or similar circumstances, considering the danger, the proximity and the location of other automobiles, and all other circumstances which occurred just prior to, and at the time of, the accident."

[1] These instructions disregard the rule establishing the degree of care required of common carriers of persons for hire as stated in section 2100 of the Civil Code: "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill."

An instruction quite similar to the first one we have quoted was given to the jury in the case of Frost v. Los Angeles Ry. Co., 165 Cal. 365, 132 P. 442, 444. There, as here, the jury returned a verdict for defendant and the trial court granted a motion for new trial. The order was affirmed on appeal. In speaking of the instruction, the Supreme Court said: "There were also errors of law of sufficient importance to justify the order. Instruction No. 12, given at the request of the defendant, after stating that the complaint did not aver that the conductor or motorman was incompetent or inexperienced, and that there was no proof to that effect, proceeded as follows: 'The only question for you to consider with reference to them is whether, on the occasion of this accident, they acted with the care and prudence which a reasonably prudent man, under the circumstances, would have exercised.' The defendant was a carrier of passengers, and the plaintiff, when injured, was a passenger for hire, on its car. The care due to him from the conductor and motorman, for his safe carriage, was 'the utmost care and diligence' (Civ.Code, § 2100), not merely that of a reasonably prudent man, under the particular circumstances shown. The instruction was to that extent erroneous." See, also, Moeller v. Market Street R. Co., 27 Cal.App.2d 562, 81 P.2d 475.

In the case of Bosqui v. Sutro Street R. R. Co., 131 Cal. 390, 63 P. 682, the defendant, a common carrier, requested the trial court to instruct the jury in much the same language as that used in the second quoted instruction. The trial court modified the instruction by stating that it was the duty of a common carrier of passengers to use the utmost care or the care which an extremely cautious man would have used under like circumstances. The Supreme Court held that the modified instruction correctly stated the law in California.

[2] Instructions on contributory negligence required Mrs. Nance "to keep such a lookout and to make such observations as an ordinarily careful and prudent person would have done" under the circumstances, and that if she failed in that duty, and such failure on her part contributed proximately to her injury, then the verdict must be for defendants.

This instruction placed a higher duty of care on Mrs. Nance than the law requires of a passenger riding in a common carrier of persons for hire, by failing to take into consideration the high degree of care a common carrier owes to its passengers. Dowd v. Atlas T. & A. Service Co., 187 Cal. 523, 202 P. 870.

Defendants argue that in other instructions, particularly those proposed by plaintiff, the jury was correctly instructed on the questions we have been considering; that the instructions must be considered in their entirety; that the "minor errors" in the instructions proposed by defendants could not have misled the jury.

[3-6] While there are many cases supporting the rule contended for by defendants, especially in cases where a defendant's motion for new trial had been denied, we are also confronted by another rule equally well established which is applicable here. It is thus stated in Ferguson v. Nakahara, 43 Cal.App.2d 442, 110 P.2d 1091, 1096: "All instructions of the court are to be considered and construed as a whole to determine whether they contain reversible error. 'If a single instruction omits an essential element of the cause, but is a correct declaration of the law so far as it goes, and the omitted element is correctly given in another instruction, the omission will ordinarily be cured thereby. If, however, an essential principle of law is stated to the jury materially incorrect, this prejudicial error will not ordinarily be cured by a correct declaration of the same principle in another instruction. The giving of instructions which are contradictory in essential elements may warrant the reversal of a judgment, for the reason that it is impossible to determine which charge controlled the determination of the jury.' Soda v. Marriott, 118 Cal.App. 635, 5 P.2d 675, 678. See, also, Akers v. Cowan, 26 Cal.App.2d 694, 80 P.2d 143."

Defendants also urge that as the great preponderance of the evidence showed that Storey was not negligent, the trial court committed prejudicial error in granting the motion for a new trial because a reading of the record demonstrates that no miscarriage of justice resulted from the judgment in their favor. Sec. 4½, art. VI, Const.

Witnesses for defendants testified that the bus was traveling north on Fulton street at between fifteen and eighteen miles an hour; that an automobile was traveling south in the west traffic lane; that after the bus entered the intersection, and without giving any signal, the automobile driver suddenly turned to his left, cut the corner in front of the bus and proceeded easterly down Mono street; that to avoid running down the automobile Storey had to apply his brakes and stop the bus suddenly. From this it is argued that the proximate cause of the accident was the negligence of the driver of the automobile and that no negligence on the part of Storey was proved. It must be admitted that a majority of the witnesses testified to these facts.

On the other hand, there is the evidence produced by the plaintiffs that the intersection was obstructed (sec. 511, Vehicle Code St.1935, p. 176); that the bus was traversing the intersection at a speed of between thirty and thirty-five miles an hour; that no automobile passed in front of the bus in the intersection.

[7, 8] It is well established that, in passing on a motion for a new trial, a trial judge is as firmly bound by this constitutional provision as is an appellate court when the cause is on appeal. It is his duty to sit as a thirteenth juror and weigh the evidence, pass upon its sufficiency and consider the credibility of witnesses. This is true even though he does not specify the insufficiency of the evidence as one of the grounds for granting a new trial because the Constitution contains the direction that he shall not grant a new trial because of errors in instructions to the jury until he has re-examined the entire cause and shall have formed the opinion that the errors complained of have resulted in a miscarriage of justice. Sec. 4½, art. VI, Const.; Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774; Clippinger v. Reiss, 17 Cal.App.2d 604, 62 P.2d 418; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213.

[9] In considering a similar question in Bieser v. Davies, 119 Cal.App. 659, 7 P.2d 388, 389, this court said: "On this appeal we think we must indulge in the presumption that the trial court obeyed this mandate of the Constitution and considered the whole record in the case and decided that the giving of the instruction was prejudicial and did result in a miscarriage of justice."

[10] In view of these well-recognized principles of law we cannot say that the evident conclusion of the trial judge that the erroneous instructions resulted in a miscarriage of justice finds no support in the record even though a study of the record here leaves the conclusion that the evidence preponderates in favor of the defendants. Under these circumstances we do not feel disposed to reverse the order granting the new trial.

The order is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

44 Cal.App.2d 790

BARRON v. BOARD OF DENTAL EXAMINERS OF STATE OF CALIFORNIA.

Civ. 11465.

District Court of Appeal, First District, Division 2, California.

May 15, 1941.

1. Physicians and surgeons 🔑2

The statutory provision defining unprofessional conduct, for which dentist's license may be revoked or suspended, as including advertisement of professional superiority or performance of professional services in superior manner, is constitutional. St.1937, p. 1249, § 1680(12).

2. Physicians and surgeons 🔑11(2)

A dentist's advertisement in city telephone directory that he was city's leading plate dentist constituted "advertising of professional superiority" within statutory provision defining unprofessional conduct, for which dentist's license may be suspended as including the advertising of such superiority. St.1937, p. 1249, § 1680(12).

See Words and Phrases, Permanent Edition, for all other definitions of "Advertising of Professional Superiority".

3. Physicians and surgeons 🔑11(3)

An accusation before state Board of Dental Examiners, charging that dentist advertised his professional superiority or performance of professional services in superior manner, was sufficient to confer jurisdiction on board to suspend accused, though accusation repeated wording of statute in alternative in same manner that it appeared therein. St.1937, p. 1249, § 1680(12).

4. Physicians and surgeons 🔑11(3)

The defect, if any, in accusation against dentist before state Board of Dental Examiners because it was sworn to before board's secretary, not authorized by law to administer oaths, was "waived" by dentist by proceeding to hearing before board without objection. St.1937, p. 1247, § 1672.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

5. Physicians and surgeons 🔑2

A dentist, charged by accusation before state Board of Dental Examiners with unprofessional conduct by advertising his professional superiority in city telephone directory, was properly charged under Business and Professions Code with acts done by him before effective date of such Code in violation of previous statutory provisions continued in Code. St.1937, pp. 1230, 1249, §§ 2, 1680(12).

6. Physicians and surgeons 🔑11(3)

A finding by state Board of Dental Examiners that dentist, charged by accusation before board with unprofessional conduct by advertising his professional superiority in city telephone directory, was "guilty as charged in said accusation", was sufficient to warrant accused's suspension by board. St. 1937, p. 1249, § 1680(12).

7. Physicians and surgeons 🔑11(3)

The superior court's fact findings in favor of state Board of Dental Examiners and against dentist seeking peremptory writ of mandate to board after his suspension thereby for unprofessional conduct, charged in accusation before Board, *held* sufficient to sustain judgment denying relief prayed, without resort to court's alternative fact findings in language of accusation that petitioner advertised his professional superiority or performance of professional services in superior manner. St.1937, p. 1249, § 1680 (12).

8. Evidence 🔑20(2), 52

The fact that telephone company's regular issues of city telephone directory are brought home to public is matter of such common knowledge as to render testimony with respect thereto unnecessary to justify suspension of dentist's license by state Board of Dental Examiners on ground of his unprofessional conduct in advertising his professional superiority in such directory. St.1937, p. 1249, § 1680(12).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding by Fred T. Barron for a writ of mandate directing the State Board of Dental Examiners to set aside its order suspending petitioner from the practice of dentistry for unprofessional conduct. From a judgment denying the writ, petitioner appeals.

Affirmed.

Edwin W. Geary, of Oakland, and Bartley C. Crum and John A. O'Kane, both of San Francisco, for appellant.

H. E. Lindersmith, of Los Angeles, for respondent.

SPENCE, Justice.

Petitioner, a practicing dentist who had been suspended for a limited period by the defendant board for unprofessional conduct, filed his petition in the superior court seeking a peremptory writ of mandate directed to said board. He appeals from a judgment which denied him such relief.

Petitioner was charged by accusation before said board with "unprofessional conduct" as defined in section 1680, subdivision 12 of the Business and Professions Code, St. 1937, pp. 1248, 1249, which covers "The advertising of professional superiority or the performance of professional services in a superior manner." It was alleged therein "that within one year last past and prior to the date of this accusation, on a date known to the accused but unknown to complainant, he knowingly and intentionally caused to be published in the telephone directory for the City of Oakland, County of Alameda, State of California, issued by the Pacific Telephone and Telegraph Company and circulated to its subscribers in the City of Oakland, County of Alameda, State of California, in the month of November 1937, an advertisement wherein and whereby the said Fred T. Barron did advertise as a dentist, professional superiority or the performance of professional services in a superior manner which advertisement was in words and figures which follow, to wit: * * *." The entire advertisement was set forth in the accusation and it contained the statement, "His 'Naturally Beautiful' plates, combined with 'Facial Reconstruction' in designing, makes him Oakland's leading Plate Dentist."

A hearing was had before the board at which petitioner was present and was represented by counsel. Petitioner testified on his own behalf. He admitted causing the advertisement to be published but he claimed that he did not "wilfully intend to violate any law". When asked by his own counsel, "Now, Doctor, on this particular advertisement here that is objectionable, did you have any intention of violating any rule at that time?", he answered, "No, I had not." It appeared at the hearing that petitioner had previously been accused before the board of illegal advertising. It was stated by his counsel on the hearing that on the previous occasion his counsel stated to the board "that if they would indulge him, I (his counsel) would see that any future copy that the doctor wished to use would first be submitted to the board. Now, in this particular instance there was a slip-up". At the conclusion of the hearing and before submitting the matter to the board, counsel for petitioner merely expressed the hope that the decision of the board would not be a "sand bag", stating "If he were alone it would possibly be one thing; but you will be throwing some other men (meaning petitioner's employees) out of work if the board feels that it has to make an example out of him for an infraction of this sort." At no time during the hearing did petitioner or his counsel challenge the regularity of the proceedings in any way or question the fact that the advertising constituted unprofessional conduct within the meaning of said subdivision 12 of said section 1680. Thereafter the board found petitioner "guilty as charged in the accusation" and made its order of suspension.

Petitioner later filed his petition in the superior court. He alleged there (1) that the action of the board constituted an abuse of discretion in that the evidence before the board was insufficient as "it appeared that petitioner did not make use of any advertising wherein he claimed professional superiority" and that the discretion of the board "could only be exercised in one way, namely, the finding that petitioner was not guilty of the accusation made against him", and (2) that said subdivision 12 of section 1680 was unconstitutional. An answer to said petition was filed and the cause was submitted to the trial court upon the record before the respondent board. The trial court made findings against petitioner and in favor of the respondent board, including specific findings of unprofessional conduct based upon said advertisement.

[1, 2] We find no merit in either of the points raised by petitioner in his petition for a writ of mandate filed in the superior court. Petitioner does not urge the constitutional question on this appeal and there appears to be no doubt as to constitutionality of said section. See Webster v. Board **of Dental Examiners, 17 Cal.2d** 534, 110 P.2d 992; Semler v. Oregon State Board, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. As to the sufficiency of the evidence, it appears entirely clear that an advertisement as "Oakland's leading plate dentist" constitutes an advertisement of professional superiority. Several other points, however, are raised by petitioner for the first time on this appeal.

[3-5] Petitioner contends that the accusation filed before the board was insufficient to confer jurisdiction upon the board. It is first argued that "the accusation charges in the alternative and not positively and is indefinite, ambiguous, uncertain and unintelligible". This argument is directed at the allegation that petitioner did advertise "professional superiority or the performance of professional services in a superior manner". We find no merit in this argument. While so-called alternative pleading is ordinarily condemned, we believe that the accusation here was sufficient to confer jurisdiction on the board as no material allegations were alleged in the alternative. The accusation would have been sufficient in this regard if it had merely charged that petitioner had been guilty of unprofessional conduct as defined in said subdivision of said section of the code in that he had advertised in a certain manner setting forth the advertisement in full. It was unnecessary to repeat the wording of the subdivision in the accusation and the mere fact that the wording thereof was repeated in the alternative and in the same manner that it appears in said code is wholly immaterial. It is next argued that the accusation was not verified as required by section 1672 of the Business and Pro-

fessions Code, St. 1937, p. 1247. It appears that it was sworn to before the secretary of the board but it is claimed that said secretary was not authorized by law to administer oaths. We deem it unnecessary to discuss the question of whether said secretary was authorized to administer oaths for the reason that the defect, if any, was waived by petitioner by proceeding to a hearing before the board without objection. Donovan v. Board of Police Comrs, 32 Cal.App. 392, 403, 163 P. 69; see, also, Horstmyer v. Trial Board, 21 Cal.App.2d 533, 69 P.2d 1021. It is next argued that the accusation charges a violation of a section of the Business and Professions Code, "which code was not effective as law at the time of the commission of the alleged acts". It is claimed that the last acts done by petitioner, being the approval of the proof for the advertisement, were done on August 23, 1937, and that said code did not become effective until August 27, 1937. It may be pointed out that the advertising was done at petitioner's direction in the November 1937 telephone directory but, in any event, the provisions of said section 1680 were merely continuations of previously existing statutory provisions (see Business & Professions Code, sec. 2, St. 1937, p. 1230; Stats. 1915, Chap. 426, p. 698, Deering's General Laws, Act 2048) and petitioner was properly charged under said code with acts done prior to August 27, 1937, in violation of the previously existing statutory provisions as continued in the new code. Sobey v. Molony, 40 Cal.App.2d 381, 104 P.2d 868.

[6, 7] Petitioner further contends that the finding made by the board of "guilty as charged in said accusation" was insufficient. A complete answer to this contention of petitioner is found in the recent case of Webster v. Board of Dental Examiners, 17 Cal.2d 534, 110 P.2d 992, at pages 584 to 586. Similarly petitioner contends that the findings of fact of the superior court were insufficient because they followed the language used in the accusation filed before the board and contained a finding of advertising "professional superiority or the performance of professional services in a superior manner". But as above indicated, we are of the view that the allegations of the accusation were sufficient without resort to the alternative allegations above discussed and we are further of the view that the findings were sufficient without resort to the alternative findings of which petitioner complains.

[8] Finally, petitioner contends that the board acted "arbitrarily, capriciously and oppressively" in suspending his license. Under this heading, petitioner first restates his above-mentioned claims of the alleged insufficiency of the accusation, of the evidence and of the findings of the board. He then argues that even assuming that "the alleged offensive advertisement constitutes unprofessional conduct", and that the evidence shows that it was "run or printed in the November, 1937, issue of the Oakland Telephone Directory", there is "no affirmative showing that the advertisement was ever brought home to the public and no witness called so testified". We are of the opinion, however, that the fact that the regular issues of the directory of the telephone company are "brought home to the public" is a matter of such common knowledge that there was no necessity for testimony with respect thereto. 10 Cal.Juris. 691, et seq.

Throughout the briefs, petitioner has relied strongly upon Kalman v. Walsh, 355 Ill. 341, 189 N.E. 315, and contends that said case cannot be distinguished from the case before us. We find but little similarity in the situations presented. There was no complaint or accusation filed in the Kalman case but the dentists were notified to appear for an investigation to determine whether or not they had done one or more of several acts set forth in general terms and in the alternative in said notice. The court said on page 317 of 189 N.E., "It is apparent from this writing that no charges, as a matter of fact, had been filed as contemplated by the statute. The notice and the supposed charges are all in that one writing. The supposed 'written charges' as contained in such writing appear to be rather a galaxy of 'whethers' or 'whether or nots,' rather than written charges of the violation of any of the acts legislated against by said section 7 as it existed prior to July 7, 1933." Again on said page 317 of 189 N.E., the court said "The supposed charge in this record shows that the contemplated hearing was a hearing in the nature of an inquisition similar to an investigation by a grand jury. This is not the hearing that is provided by the statute. Neither the dental board nor the department has the power, under the statute, to originate or prefer charges against a dental practitioner. The charges against the complainant herein, in order to confer jurisdiction upon the dental committee, should have been in writing, filed with the secretary of the board and contain direct, positive, and specific charges based upon the alleged commission by the accused of some of the acts prohibited by section 7."

In the instant case, the charge against petitioner was contained in a written accusation duly filed. Said accusation contained the direct, positive and specific charge that petitioner had been guilty of unprofessional conduct in advertising in a certain manner in an advertisement which was set forth in full in the accusation. We find nothing in the Kalman case which would indicate that the accusation filed with the board here was insufficient to confer jurisdiction upon said board.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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44 Cal.App.2d 925

ALBANIA et al. v. KOVACEVICH et al.

STATE COMPENSATION INSURANCE FUND v. SAME.

Civ. 2590.

District Court of Appeal, Fourth District, California.

May 20, 1941.

1. Automobiles 🔑11

The statute providing that no person shall ride on any portion of vehicle not designed or intended for use of passengers was primarily intended to prevent persons from hanging on the outside portions of vehicles or from riding in positions which would add to the hazards which might normally be expected in the ordinary operation of such vehicles or in event such vehicles were struck by other vehicles. Vehicle Code, § 596.5, St.1937, p. 620.

2. Automobiles 🔑11

The statute prohibiting persons from riding on any portion of vehicle not designated or intended for passenger use was not intended for purpose of enabling or permitting passing vehicles to use the few inches of space that would be saved by complying therewith. Vehicle Code, § 596.5, St.1937, p. 620.

3. Automobiles 🔑11

The purpose of statute regarding width of any vehicle or load thereof and statute providing for the displaying of a light at extreme left side of a load whenever such load extends from left side of vehicle one foot or more from the left front hub cap is to restrict the width of loads to reasonable limits to the end that such loads shall not protrude over the center line of a road or over other traffic lanes in such a way as to interfere with other vehicles which are in their proper place and are properly using the other portions of the road. Vehicle Code, §§ 626(b), 694(a), St.1935, pp. 205, 228.

4. Automobiles 🔑244(56)

Where plaintiffs were seated along left side of truck and trailer, some being seated with legs hanging over left edge of beds and others with their heels resting upon the edge of left side of trailer with toes extending a few inches beyond edge thereof and were injured when struck by meeting truck traveling on wrong side of highway, evidence supported inference that width of load including legs and knees of the plaintiffs was such that statutes regarding width of load were not violated. Vehicle Code, §§ 527(a), 530(a), 626(b), 694(a), St.1935, pp. 182, 183, 205, 228.

5. Automobiles 🔑11

The statute providing that no person shall ride upon any portion of a vehicle not designed or intended for use of passengers but that such provisions should not apply to persons riding within the vehicle bodies in space intended for merchandise does not require all parts of body of person riding in space intended for merchandise to be entirely within body of the vehicle. Vehicle Code, § 596.5, St.1937, p. 620.

6. Automobiles 🔑224(7)

Where plaintiffs were seated along left side of truck and trailer, some being seated with legs hanging over left edge of beds and others with their heels resting upon the edge of left side of trailer with toes extending a few inches beyond edge thereof and were injured when struck by meeting truck traveling on wrong side of highway, the fact that plaintiffs permitted a portion of their bodies to protrude over side of vehicle did not constitute violation of statute providing that no person shall ride upon any portion of vehicle not designed or intended for use of passengers, but that such provision should not apply to persons riding within vehicle bodies in space intended for merchandise. Vehicle Code, § 596.5, St.1937, p. 620.

7. Appeal and error ⟹1008(1)

Where plaintiffs were seated along left side of truck and trailer, some being seated with legs hanging over left edge of beds and others with their heels resting upon the edge of left side of trailer with toes extending a few inches beyond edge thereof and were injured when struck by meeting truck traveling on wrong side of highway, whether the plaintiffs were negligent was a "question of fact" for the trier of facts. Vehicle Code, § 596.5, St.1937, p. 620.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

8. Appeal and error ⟹1008(1)

Where plaintiffs were seated along left side of truck and trailer, some being seated with their legs hanging over left edge of beds and others with their heels resting upon the edge of left side of trailer with toes extending a few inches beyond edge thereof and were injured when struck by meeting truck traveling on wrong side of highway, question whether plaintiff's negligence, if any, was proximate cause contributing to their injuries was "question of fact" for the trier of facts. Vehicle Code, § 596.5, St.1937, p. 620.

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Appeal from Superior Court, Kern County; Pat R. Parker, Judge.

Personal injury action by Sabello Albania and others against John J. Kovacevich and others, consolidated with an action by the State Compensation Insurance Fund against John J. Kovacevich and others, based upon right of subrogation. From adverse judgment, defendants appeal.

Affirmed.

Calvin H. Conron, Jr., of Bakersfield, and Iener W. Nielsen and Harold V. Thompson, both of Fresno, and Karl Lynn Davis, of Los Angeles, for appellants.

Edwards & Taylor, Gordon & Wunsch, and Harvey D. Taylor, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This action for personal injuries was consolidated with another action brought by the State Compensation Insurance Fund based upon its right of subrogation. The latter action presents no point on this appeal and no further reference to the parties in that action will be necessary. The court, sitting without a jury, found in favor of the plaintiffs and the defendants have appealed from the judgment which awarded varying amounts to the respective plaintiffs.

On October 27, 1937, at 6:15 p.m., the respondents, with forty or fifty other Filipinos, were riding along a road near Arvin, in Kern county, on a flat bed truck to which was attached a flat bed trailer, both vehicles belonging to their employer. These men were being taken from one place of employment to another. The truck bed was 11 feet long and the trailer bed 12 feet long, and each was six feet wide. There is some evidence that the truck and trailer were too crowded for all of the men to stand or sit without some of them having their legs hang over. This was an oiled road 21 feet 4 inches wide and there were no traffic lines thereon. At the time in question this truck and trailer was proceeding north on its right side at a speed of from 18 to 20 miles per hour, the right rear tire of the trailer being over on the dirt shoulder on the right-hand side of the road. The respondents were all seated along the left side of this truck and trailer, some being seated with their legs hanging over the left edge of the beds, and others with their heels resting upon the edge of the left side of the trailer with their toes extending a few inches beyond the edge thereof.

At the same time a cab to which was attached a trailer, which were owned by the appellant Kovacevich and driven by his employee, the appellant Kohut, were proceeding south on this road at a speed of about 35 miles per hour. While so proceeding, Kohut attempted to pass a Ford automobile which was traveling in the same direction and, in doing so, he crossed the middle of the road and passed between the Ford and the truck and trailer upon which the respondents were riding. In making this attempt to pass between the Ford and this truck and trailer, the appellants' cab and trailer struck the truck and trailer enough to scrape off a little paint at one point and also struck the legs and feet of the respondents, throwing several of them to the ground and causing the injuries in question. The appellant Kohut was asked: "Do you remember meeting a truck with some Filipinos in it?", to which he replied, "Sure, I seen them coming home." When asked about his passing the Ford car ahead of him he said: "Yes, I was going to go around it and then I seen I couldn't pass and I turned my wheel and I heard something sidescrape." He also testified that the cab he was driving "never had no brakes on it".

No contention is here made that Kohut was not negligent. It appears that he violated section 530(a) of the Vehicle Code, St.1935, p. 183, by driving to the left of the center line in overtaking and passing another vehicle when the roadway was not free of oncoming traffic, and that he violated section 527(a) of that code, St.1935, p. 182, by failing to give the oncoming driver at least one half of the main traveled portion of the roadway. Moreover, in other connections, the appellants argue that he was unable to control his vehicle because of the absence of brakes and that he was so "decidedly intoxicated" that he could not have seen what he said he did see.

Appellants' main contention is that it must be held as a matter of law that the respondents, in riding with their feet or legs protruding over the edge of this truck and trailer, were guilty of negligence and that this negligence contributed to their injuries as a proximate cause thereof. It is first contended that the respondents were guilty of negligence per se because they were violating section 596.5 of the Vehicle Code, St.1937, p. 620, which forbids anyone riding on any portion of a vehicle not intended for passengers. That section reads as follows:

"Unlawful Riding. No person shall ride on any vehicle upon any portion thereof not designed or intended for the use of passengers. This provision shall not apply to an employee engaged in the necessary discharge of a duty or to persons riding within vehicle bodies in space intended for merchandise."

[1-4] Doubtless this section was primarily intended to prevent persons from hanging on the outside portions of vehicles or from riding in positions which would add to the hazards which might normally be expected in the ordinary operation of such vehicles, or in the event such vehicles were struck by other vehicles. It is not reasonable to suppose that it was intended for the purpose of enabling or permitting passing vehicles to use the few inches of space that would be saved by complying therewith. This is indicated not only by the sections of the Vehicle Code to which we have above referred and others of similar import, but by the sections regulating the width of loads of merchandise which may be carried. For instance, section 694(a), St.1935, p. 228, provides that the total outside width of any vehicle or the load thereon shall not exceed 96 inches, with certain exceptions not material here, and section 626(b), St.1935, p. 205, provides for the displaying of a light at the extreme left side of a load whenever such load extends from the left side of the vehicle one foot or more from the left front hub cap. The apparent purpose of these latter sections is to restrict the width of the loads to reasonable limits to the end that such loads shall not protrude over the center line of a road or over other traffic lines in such a way as to interfere with other vehicles which are in their proper place and are properly using the other portion of the road. The evidence here supports the inference that the width of this load, including the legs and knees of the respondents, was such that the sections of the Vehicle Code last referred to were not violated.

[5-7] Section 596.5, providing that no person shall ride upon any portion of a vehicle not designed or intended for the use of passengers, also provides that the provision shall not apply to persons riding "within vehicle bodies in space intended for merchandise". The appellants would interpret this section as forbidding any person to ride upon a vehicle in space intended for merchandise unless he and all parts of his body are entirely within the body of the vehicle. It would not seem that the section was intended to be thus strictly applied. For example, if the flat beds of this truck and trailer had been enclosed on all four sides but not at the top it could hardly be said that one riding thereon violated this section if and because his head and shoulders were above the side boards. The provision is that no person shall ride upon a portion of a vehicle not intended for passengers, with the exception noted. It seems to be conceded that the respondents, under this section, could rightfully ride on this truck and trailer so long as they stayed within the boundaries or edges of the flat beds thereof. These persons were riding on that part of the vehicles, and it cannot be said that they were riding on a portion of the vehicle

outside thereof where their legs were hanging. That was not a portion of the vehicle and they were not riding thereon. As a matter of fact they were riding on a portion of the vehicle where the statute permitted them to ride, but they were allowing a portion of their bodies to protrude therefrom and hang in space. They may have been negligent in so doing, but whether or not they were depends upon a question of fact and not upon this statute.

In Moreno v. Los Angeles Transfer Co., 44 Cal.App. 551, 186 P. 800, 802, the court said: "The plaintiff Moreno was not required, either under the common law or any statutory enactment of this state, to refrain from occupying a position that could only become a place of danger by reason of the negligence of another. The Motor Vehicle Act of this state (St.1915, p. 397) required the defendant's employé, in passing, to keep to the left of the steam roller, and to not turn to the right again until entirely clear thereof. Moreno was justified in assuming that defendant's employé, and all others, would obey the law, and hence he was not negligent in failing to watch to the rear. Contributory negligence cannot be predicated upon an omission to assume that another will violate the law."

In Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396, 400, the court said: "Had plaintiff sustained injury solely because of the position in which she had seated herself, and without any negligence on the part of defendant's drivers in their operation of the trucks, she probably could not have recovered any damages from defendant. Thus, for example, if, during the usual and ordinary movements of the truck on which she was riding and without any negligence on the part of defendant's drivers in their management of the machines, plaintiff, solely by reason of the position which she had taken, had been bounced off the truck, she probably would have had no remedy against defendant, for the very good reason that in that case she would have to attribute her injury solely to her own voluntary conduct. That would be one of the risks ordinarily incident to plaintiff's position on the truck. But, while assuming risks of that character, plaintiff did not assume the risk of danger created by the negligent misconduct of defendant's drivers; and for injury caused by such misconduct defendant is liable."

The appellants rely upon such cases as Lorry v. Englander Drayage, etc., Co., 108 Cal.App. 116, 291 P. 467; Wheeler v. Buerkle, 14 Cal.App.2d 368, 58 P.2d 230; and Reeves v. Lapinta, 25 Cal.App.2d 680, 78 P.2d 465. These were cases involving clear violations of a statute and are therefore not applicable here. Under the circumstances here appearing reasonable minds might well draw different conclusions with respect to negligence upon the part of these respondents, and the question was one of fact for the trial court.

[8] The question whether respondents' negligence, if any, was a proximate cause contributing to their injuries was also a question of fact. Even where it appears that a statute has been violated the question as to whether such violation was one contributing to the injuries of the party has frequently been held to be one of fact. Watkins v. Nutting, Cal.Sup., 110 P.2d 384. This has been particularly true in cases involving automobile collisions, especially at street intersections. The truck and trailer here in question were over on the right-hand side of the road, a part thereof being off the oiled portion of the road. The truck and trailer were where they had a right to be and the respondents were well within the space where the load on the vehicles could rightfully be. The mere fact that the respondents happened to be in that particular spot does not conclusively establish negligence on their part which prevents a recovery. If we assume that their negligence resulted in their legs being in that particular spot at that particular time, instead of being 4 or 5 inches nearer their right-hand side of the road, it would not necessarily follow that this fact had a causal connection with the happening of the accident or with the injuries to the respondents. It may well be that the position in which they were riding would ordinarily be a safer one than had they been standing in any available space within the body of the truck and trailer. In our opinion the entire question with respect to contributory negligence on the part of these respondents was, under the circumstances of this case, peculiarly one of fact and not one of law.

In view of what has been said it is unnecessary to consider further questions raised by the appellants with respect to the sufficiency of the evidence and the findings to support a recovery on the part of the respondents on the doctrine of the last clear chance.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

44 Cal.App.2d 936

HOUZE (STATE COMPENSATION INSURANCE FUND, Intervener) v. KOVACEVICH et al.

Civ. 2583.

District Court of Appeal, Fourth District, California.

May 20, 1941.

1. Automobiles ⚷170(6)

Where deceased was seated on left side of trailer with legs hanging over edge thereof and sustained fatal injuries when struck by meeting truck, question whether defendants' truck and the vehicle on which deceased was riding came in actual contact was immaterial on question of liability for deceased's death.

2. Automobiles ⚷245(88)

Where deceased was seated on left side of trailer with legs hanging over edge thereof and sustained fatal injuries when struck by meeting truck, question whether deceased was contributorily negligent was for the jury.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Wrongful death action by N. C. Houze, etc., against John J. Kovacevich and others, wherein the State Compensation Insurance Fund intervened as a plaintiff. From an adverse judgment, defendants appeal.

Affirmed.

Calvin H. Conron, Jr., of Bakersfield, and Iener W. Nielsen and Harold V. Thompson, both of Fresno, and Karl Lynn Davis, of Los Angeles, for appellants.

Brittan & Mack and Kendall & Howell, all of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for wrongful death arising from the same accident or collision which was involved in the case of Albania v. Kovacevich, Cal.App., 113 P.2d 251, this day decided. A complaint in intervention was filed by the State Compensation Insurance Fund based upon a claim of subrogation. No point is raised in connection therewith and no further reference thereto is necessary.

[1] Regino Riray died as the result of injuries he received in the accident above referred to. He was riding upon the trailer upon which some of the plaintiffs in the other action were riding, being seated upon the left side of that trailer with his legs hanging over the edge thereof. The essential facts in the two cases are the same, with the exception that the appellants here contend that there was no evidence in this case to the effect that the cab and trailer driven by Kohut actually struck the other truck and trailer, although it is conceded that it did strike the protruding legs and feet of eleven men who were riding upon the other truck and trailer. In the instant case, another occupant of the trailer upon which the deceased was riding testified, in response to a question as to what was the first sign of the accident which came to his attention: "Well, it was so sudden I just noticed we had already been hit." This witness had been standing in the middle of that trailer and he testified that "the jolt was not strong enough" to make him lose his balance. Probably the evidence is sufficient to justify the inference that the two sets of vehicles came into contact but the matter is not of sufficient importance to warrant further consideration.

[2] This action was tried before a jury and this appeal is from the judgment which was entered pursuant to the verdict. The appellants contend that the court erred in submitting the case to the jury because all of the evidence conclusively shows that the deceased was guilty of contributory negligence as a matter of law. This contention has been sufficiently considered in the case of Albania v. Kovacevich, and the same is herewith held without merit for the reasons given in, and upon the authority of, that case.

No questions are here raised with respect to the instructions which were given to the jury, and the only other point which is raised requires no consideration in view of our holding on the main proposition advanced by the appellants.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

44 Cal.App.2d 850

BLAYLOCK v. COATES et al.

Civ. 13001.

District Court of Appeal, Second District,
Division 2, California.
May 16, 1941.

1. Negligence 🔑47

A landowner may not construct or maintain a trap or pitfall into which he knows or has reason to believe that a trespasser will probably fall.

2. Negligence 🔑47

The liability of landowner, who maintains a trap or pitfall into which he knows or has reason to believe that a trespasser will probably fall, depends upon the circumstances surrounding the maintenance of the trap, the extent of the danger involved, and the comparative ease or difficulty of preventing the danger without disturbing or impairing the usefulness of the thing which is claimed to be trap or pitfall.

3. Appeal and error 🔑1008(1)

In action for injuries sustained by fall into trap or pitfall maintained by landowner, the duty is placed upon trial judge of determining the issue of liability in view of all of the conditions shown by the evidence.

4. Appeal and error 🔑1071(6)

In action for injuries suffered by a 13 year old girl in being mired in an oil sump on property in defendant's possession, failure of trial court to make finding on issue of contributory negligence raised by defendant required reversal of judgment for the plaintiff.

5. Appeal and error 🔑1071(6)

A failure to find on the issue of contributory negligence when pleaded is reversible error.

6. Appeal and error 🔑1008(1)

Where it appeared that 13 year old girl whose dog was mired in oil sump on property in defendant's possession had never seen an oil sump, did not know what was holding the dog, and did not know what she was stepping into, she was not contributorily negligent as a matter of law.

7. Negligence 🔑85(1, 3)

Where it appeared that 13 year old girl whose dog was mired in oil sump on property in defendant's possession had never seen an oil sump, did not know what was holding the dog, and did not know what she was stepping into, in determining whether the girl was guilty of contributory negligence, the court could consider the fact that she was of tender years and the fact that she was endeavoring to rescue her dog.

8. Appeal and error 🔑1008(1)

Where it appeared that 13 year old girl whose dog was mired in oil sump on property in defendant's possession had never seen an oil sump, did not know what was holding the dog, and did not know what she was stepping into, it was not contributory negligence as a matter of law for the girl to attempt to rescue the dog, even if she knew that she was taking a risk in doing so, unless the risk was wanton or unreasonable, and whether her act in attempting to rescue the dog was wanton or unreasonable was question to be determined by the trial court.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Personal injury action by Johnnymay Blaylock, etc., against Mabel Coates, etc., and others. Judgment for plaintiff, and the named defendant appeals.

Reversed.

Marion A. Smith, of Santa Maria, and D. E. Ruppé and C. W. Bowers, both of Los Angeles, for appellant.

Fred A. Shaeffer, of Santa Maria, and Wilbur D. Garber, of Temple City, for respondent.

WOOD, Acting Presiding Justice.

Plaintiff commenced this action to recover damages for injuries which she suffered in being mired in an oil sump on property in the possession of defendant. The appeal is from a judgment in plaintiff's favor in the sum of $500.

On the afternoon of April 6, 1940, plaintiff, a girl thirteen years of age, was walking with her two sisters, aged eleven and fifteen years, and a boy aged fifteen years, along the highway about one mile from her home at Nipomo, California. Her dog ran loose in front of the group. About twenty or thirty feet from the paved highway oil and tar had accumulated on defendant's property in a hole about 250 feet long and about 100 feet wide. The sump was separated from the highway by a low embankment. Various witnesses described the appearance of the surface of the oil. Plaintiff described it as "just black with dirt and I could not tell what it was". She also stated that it was "like a big round hole and it was black and it had sand over it". One of the plaintiff's witnesses testified that the sump "looked brown", and another testified that it was "covered with sand and it had black streaks in it". No signs were placed on the premises giving notice of the dangerous condition of the sump.

As plaintiff walked on the highway by the sump she noticed that her dog was barking and trying to extricate itself from the sump. She called but the dog could not come to her. She and the other children remained on the bank of the sump about five minutes and then she started into the sump to rescue the dog. Plaintiff was able to walk about ten steps on the surface but she then suddenly mired down at a distance of about thirty feet from the dog. Both of her feet became stuck in the oil and tar and she fell on her right side. She was not rescued for several hours and during this period oil covered her body with the exception of her left arm and head. The boy who was accompanying plaintiff attempted to rescue her and he in turn became mired in the oil.

[1-3] Defendant argues that the sump was not an "attractive nuisance", and that since plaintiff was a trespasser defendant was under no obligation to plaintiff to keep the premises in a safe condition. Although the trial court found that defendant "knew that it (the sump) was attractive to children", the liability of defendant need not be predicated upon the attractive nuisance doctrine. The conclusion of the trial court may be sustained under the general rule that a landowner may not construct or maintain a trap or pitfall into which he knows or has reason to believe that a trespasser will probably fall. The liability of the owner in such cases depends upon the circumstances surrounding the maintenance of the "trap", the extent of the danger involved and the comparative ease or difficulty of preventing the danger without disturbing or impairing the usefulness of the thing which is claimed to be a trap or pitfall. Upon the trial judge the duty is placed of determining the issue of liability in view of all of the conditions shown by the evidence. In support of plaintiff's contention that the trial court was justified in concluding that defendant is liable plaintiff properly cites the case of Malloy v. Hibernia Savings & Loan Society, 3 Cal.Unrep. 76, 21 P. 525, a case in which the owner was held liable where a child fell into a cesspool on the defendant's property, about ten feet from a sidewalk. In referring to this case it was said in Loftus v. Dehail, 133 Cal. 214, 217, 65 P. 379, 380: "It is true that damages were there sought for the death of an infant, occasioned by falling into a cesspool; but the complaint would have been sufficient to have warranted a recovery had an adult been killed under the same circumstances; for the complaint showed a veritable trap,—a cesspool, open and unguarded, yet with its surface covered with a layer of deceptive earth to a level with the adjacent land. Into such a trap any one, adult or child, might have walked."

[4, 5] In her answer defendant pleaded as an affirmative defense that plaintiff was guilty of contributory negligence. The trial court made no finding on this issue, and its failure to do so requires a reversal of the judgment. It has frequently been held that a failure to find on the issue of contributory negligence, when pleaded, is reversible error. Woodworth v. Morgan, 4 Cal.App.2d 488, 41 P.2d 186; Linde v. Emmick, 16 Cal.App.2d 676, 61 P.2d 338; Maxwell v. Auto Stage Co. Inc., 46 Cal. App. 548, 189 P. 710, and cases therein cited.

[6-8] We cannot agree with defendant's contention that plaintiff was guilty of contributory negligence as a matter of law. Only thirteen years old, she had lived in several states, in California but three months and in the neighborhood of Nipomo about one month before the accident. She had never seen this particular sump or any other oil sump, did not know what was holding the dog and did not know what she was stepping into. In considering whether plaintiff was guilty of contributory negli-

gence the court, of course, should take into consideration the fact that she was of tender years and the fact that she was endeavoring to rescue her dog. It was not contributory negligence as a matter of law for plaintiff to attempt to rescue the dog, even if she knew that she was taking a risk in doing so, unless the risk was wanton or unreasonable. Whether her act in attempting to rescue the dog was wanton or unreasonable was a question to be determined by the trial court. Henshaw v. Belyea, 220 Cal. 458, 469, 31 P.2d 348.

The judgment is reversed.

I concur: McCOMB, J.

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44 Cal.App.2d 853

BLAYLOCK v. COATES et al.

Civ. 13002.

District Court of Appeal, Second District, Division 2, California.

May 16, 1941.

Appeal and error 🔑790(3)

Where, after judgment for plaintiff in personal injury action, plaintiff filed memorandum of costs and disbursements, issue presented by appeal from order striking various items claimed by plaintiff as proper disbursements was "moot" requiring dismissal of appeal, where judgment for plaintiff had been reversed on defendant's appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot".

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Personal injury action by Johnnymay Blaylock, etc., against Mabel Coates, etc., and others. After judgment for plaintiff, plaintiff filed memorandum of costs and disbursements, and from an order striking various items claimed by plaintiff as proper disbursements, plaintiff appeals.

Appeal dismissed.

Fred A. Shaeffer, of Santa Maria, and Wilbur D. Garber, of Temple City, for appellant.

Marion A. Smith, of Santa Maria, and D. E. Ruppé and C. W. Bowers, both of Los Angeles, for respondent.

WOOD, Acting Presiding Justice.

A judgment in the sum of $500 was rendered by the superior court in favor of plaintiff and against defendant Mabel Coates. Thereafter plaintiff filed her memorandum of costs and disbursements and the defendant, objecting to certain items, filed her motion to have the costs taxed by the court. The court made an order striking various items claimed by plaintiff as proper disbursements. From this order plaintiff has appealed.

On a separate appeal, which was prosecuted by defendant from the judgment in plaintiff's favor, we have this day entered an order reversing the judgment for $500. 113 P.2d 256. The issue has therefore become moot.

The appeal is dismissed.

I concur: McCOMB, J.

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44 Cal.App.2d 832

NELSON v. SAN FRANCISCO BANK.

Civ. 11680.

District Court of Appeal, First District, Division 2, California.

May 16, 1941.

1. Partnership 🔑328(3)

Evidence tending to prove that plaintiff and his deceased brother were at times partners, that their ventures were profitable, that plaintiff intrusted his share in profits to the brother, that no accounting was had, that brother received large sums of money that were not partnership funds, and that from 1922 until the brother's death in 1937, brother had caused numerous payments to be made to plaintiff, would have warranted trial court in ordering an accounting.

2. Partnership ⚷336(3)

In order to entitle plaintiff to recover from executor of estate of plaintiff's deceased brother, profits of enterprises engaged in by plaintiff and brother as partners, which had not been divided and had been placed in name of brother, proof on part of plaintiff was required to be clear, satisfactory and convincing.

3. Appeal and error ⚷1010(1)

In action against executor of estate of deceased brother of plaintiff, for profits of enterprises engaged in by plaintiff and the brother as partners, which had not been divided and had been placed in name of brother, record failed to disclose substantial evidence of existence of a balance in a trust fund in favor of plaintiff so as to entitle him to recover.

◆

Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Action by Harry F. Nelson against the San Francisco Bank, as executor of the estate of Henry Nelson, deceased, to recover profits of various enterprises engaged in by the plaintiff and deceased which had not been divided and had been placed in the name of the deceased. From an adverse judgment, the executor appeals.

Reversed and remanded for further proceedings in accordance with opinion.

John C. Altman, of San Francisco (Willard L. Ellis, of San Francisco, of counsel), for appellant.

Raymond D. Williamson and William E. Barden, both of San Francisco, for respondent.

STURTEVANT, Justice.

In an action to recover a judgment against the estate of a decedent for money the trial court made findings in favor of the plaintiff and from that judgment the executor of the estate of the decedent has appealed.

In his complaint the plaintiff alleged that the decedent died testate February 21, 1937, that the San Francisco Bank was appointed executor of his estate on the 17th day of March, 1937, that it qualified and ever since has continued to act as such executor. It was further alleged that the plaintiff is a younger brother of the decedent. Continuing the plaintiff alleged as follows: "That at all times herein mentioned, plaintiff placed full faith and credit and confidence in his older brother, said decedent, and never made demand upon him for accounting of the money as hereinafter set forth. That at no time did plaintiff's said older brother ever renounce, repudiate or leave plaintiff to believe, either by word, act or deed, that the trust as hereinafter set forth did not continue, with plaintiff the beneficiary thereof. That for a long period of time, to-wit: ever since the year 1912 until the 21st day of February, 1937, decedent Henry and plaintiff Harry Nelson, engaged in various and sundry enterprises, that at no time was there ever a separation of the proceeds or a division of the profits of the said enterprises; that the said proceeds, at all times, with the full knowledge and acquiescence of plaintiff were placed in the name of said decedent; that at all times it was understood and expressed by and between plaintiff and decedent that the proceeds belonged to the both of said brothers plaintiff and decedent, to the exclusion of neither; that decedent at no time laid claim to the proceeds to the exclusion of plaintiff; that decedent at all times admitted plaintiff to be the owner of one-half of the said proceeds. That the proceeds above mentioned are now in the hands of defendant San Francisco Bank, and plaintiff is informed and believes and therefore alleges the fact to be that the said proceeds amount to the sum of Fifteen Thousand Nine Hundred Forty-nine and 03/100 Dollars".

In its answer the defendant denied plaintiff's allegations and alleged that prior to the commencement of this action the plaintiff presented no claim of any kind or nature against the estate of said decedent. The trial court found all of said affirmative allegations to be true.

The defendant contends there was no evidence that the plaintiff had a property interest in the said "proceeds". Nor is there any evidence that said "proceeds", or any part thereof, are in the possession of the defendant.

Commencing in 1907 the plaintiff and decedent engaged in the hog business at different times at different places in the states of California, Oregon, and Washington. The last place they were so engaged was at Camp Lewis. At that place the decedent, the plaintiff, and O. P. Woolsey, all three, acted as partners. That venture terminated in 1922 and accounts on that venture were mutually adjusted among the three. At different times both prior to 1922 and subsequent thereto the decedent engaged in his trade as a machinist and as such received wages amounting to as much as seventy-five, eighty, or one hundred dollars a week. The decedent never married. The plaintiff married and had two sons. The decedent and the plaintiff's family lived together. About a year before his death the decedent made a will leaving all of his property to his two nephews, the sons of the plaintiff.

The decedent was apparently a frugal man. He invested a sum in real estate and opened savings accounts at different times in the San Francisco Savings & Loan Society, the Anglo-California Trust Company, Crocker First Federal Trust Company, American Trust Company, the Hibernia Savings & Loan Society, and the Bank of America. At the time of the trial evidence was introduced showing there was on deposit in the name of the decedent in San Francisco Savings & Loan Society $8,741.84, in the Anglo-California Trust Company $483.09, in the American Trust Company $1,094.21, and in the Crocker First Federal Trust Company $4,135.71, making a total of $14,454.85. As to where those moneys came from there was no evidence except as mentioned below. As to the deposits in every bank excepting San Francisco Savings & Loan Society there was no evidence. As to the deposit in San Francisco Savings & Loan Society the plaintiff testified that after the venture at Camp Lewis was sold out he and his brother Henry, and Woolsey, met and settled the accounts. He does not state where they were but indicates pointedly that the meeting was at or in the neighborhood of San Francisco. The moneys had been advanced by the Nelson boys. The bank of deposit had been the Puget Sound Bank & Trust Company. The account stood in the name of this plaintiff. The moneys paid into the Camp Lewis venture were withdrawn from the sales moneys and repaid. Continuing he testified: "Then after we got everything down here again we sat down, and the money that was left, we divided it up right in three, and I gave Mr. Woolsey a check for his share of it, and I made another check out and gave it to my brother and he deposited it in our account. The check was made on the Puget Sound Bank and Trust Company". The plaintiff was shown the bank book of San Francisco Savings & Loan Society. His attention was directed to a deposit of $2,475.21 on July 31, 1922. Plaintiff testified that was a check he wrote out at Camp Lewis, that it was joint funds of his brother and himself, and that his brother "sent it down here and deposited it". As to a deposit entry of $1,783.30 made September 1, 1922, the plaintiff testified that was all Camp Lewis money. As to a deposit entry of $1,518.39 made December 7, 1922, the plaintiff testified, "That is also Camp Lewis". The plaintiff did not testify and he produced no witness who testified that any one of the checks drawn on the Puget Sound Bank & Trust Company was deposited in any particular bank. O. P. Woolsey was called as a witness by the plaintiff. He testified he was present at the accounting. There was a sum, between fifteen thousand and eighteen thousand dollars, turned over to the two Nelsons. As to the division of the moneys taken out of the Camp Lewis venture he testified: "Well, when we came to winding up the business I did not have so much money in it and there was the two brothers, and so we were figuring out the interest, and we took the interest out of the business and paid it to the Nelson brothers, to the two of them. It was paid individually and when we settled our business Harry handed the money over to his brother and he said, 'Take care of it, here it is again'. Prior to that Harry had the money, the money was all in Harry's hand in the Puget Sound Bank." What we have just said regarding deposits $2,475.21, $1,783.30, and $1,518.39, involves a total of $5,776.90. But that is but a little over one-third of the share of the plaintiff and decedent in the sales moneys, a sum stated by Woolsey amounting to from $15,000 to $18,000. What became of the rest of it? How can it be said the $5,776.90 were trust moneys when the decedent was entitled in his own right to a sum estimated at from $7,500 to $9,000? We think the record contains no answer to the question.

There was evidence that from the beginning of the relations between the decedent and the plaintiff checks were drawn from time to time in favor of the latter. From the year 1922 the plaintiff was looking for employment and business investments. The record does not disclose that he found either. The plaintiff's family, consisting of four persons, in addition to the decedent, was supported out of checks drawn on the banks. How much was drawn in behalf of the plaintiff personally, how much in behalf of the plaintiff and the decedent in their joint ventures, and how much in support of the household expenses, the record is silent.

During the period 1922 to the date of the death of the decedent, February 21, 1937, the record discloses that the decedent was employed as a machinist and that his pay checks in whole or in part were deposited in the banks. How much the record does not disclose. Assuming his pay check was $50 per week (the smallest amount testified to) and that he worked fifty-two weeks a year, he would have earned $2,600 per year. In fifteen years he would have earned $39,000.

If we understand the plaintiff correctly it is his contention the decedent gave to the partnership his personal earnings. But construed most favorably in behalf of the plaintiff, the proof does not show that fact. The most that could be claimed was a promise to make a gift. However, until the bank accounts were placed in the names of the partners, or some assignments were made, the promise to make a gift was incomplete.

[1] The foregoing facts it will be conceded tend to prove that, at least at times, the decedent and the plaintiff were partners, that their ventures were profitable, that the plaintiff entrusted his share in the profits to the decedent, and that no accounting has ever been had. They also show the decedent received large sums of money that were not partnership funds. Finally, they show that from 1922 down to the date of the death of the decedent, he had caused numerous payments to be made to the plaintiff. What balance, if any, was due plaintiff at the time of decedent's death can be ascertained only by having an accounting. The evidence introduced at the trial would have warranted the trial court in ordering an accounting. 1 C.J.S. 655, Accounting, § 19; Elizalde v. Murphy, 163 Cal. 681, 685, 126 P. 978. Upon taking that account it can be ascertained what amount, if any, of plaintiff's money remained in the hands of decedent at the time of his death. Until such an accounting is had the amount of the plaintiff's claim is wholly problematical.

In the brief of the plaintiff there are statements to the effect that the decedent "admitted that one-half of said money was his brother's, respondent herein". An examination of the record discloses no such admission in any place. However, it will be conceded there were statements by the decedent that the plaintiff had some interest in some of the moneys at certain designated times.

[2, 3] The plaintiff concedes that in this kind of a case the proof should be clear, satisfactory and convincing. Bollinger v. Bollinger, 154 Cal. 695, 99 P. 196. However he claims "when there is substantial evidence to support the existence of a trust, it must be left to the trial court, and its determination that such evidence is clear, satisfactory, and convincing will be accepted by the appellate court as conclusive". Turman v. Ellison, 37 Cal.App. 204, 208, 174 P. 396, 398. But the vice in that contention is the assumption that there is substantial evidence. We do not hesitate in stating that in the record before us there was no substantial evidence of the existence of a balance in a trust fund.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with what has been stated above.

We concur: NOURSE, P. J.; SPENCE, J.

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44 Cal.App.2d 863

LYNCH v. HARRELL.

Civ. 2741.

District Court of Appeal, Fourth District. California.

May 16, 1941.

Hearing Denied July 14, 1941.

1. **Appeal and error** 🔑518(1)

Where plea of statute of limitations is raised by demurrer, the original complaint and date of its filing are essential parts of the record.

2. **Appeal and error** 🔑900

On appeal, all presumptions are in favor of the judgment.

3. **Time** 🔑10(4, 10)

The Code of Civil Procedure permitting extension of legal period for performance of act by number of days equaling holidays occurring during period did not apply to private contracts, but only to acts required by law to be performed within a certain time, and, as applied to extension of time for bringing mortgage foreclosure action, did not permit consideration of holidays occurring prior to time statute of limitations began to run. Code Civ.Proc. § 12a(b).

4. Time ⚿**10(4)**

An action to foreclose mortgage brought 26 days after expiration of regular statutory period was barred by limitations, notwithstanding intervention of holidays, where, after elimination of special holidays and of general holidays designated by Political Code, extension of time for bringing action authorized by intervention of holidays was less than 26 days. Code Civ.Proc. § 12a(b), and § 337, subd. 1; Pol.Code, § 10.

5. Time ⚿**10(1)**

The term "holiday", within Code of Civil Procedure authorizing extension of legal period for performance of acts by number of days equaling number of holidays occurring during period, does not include special holidays, such as "bank holidays", nor holidays specifically designated by Political Code, but refers only to those based solely upon executive proclamation. Code Civ.Proc. § 12a(b); Pol.Code, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Holiday".

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Leonard Lynch against Almeda Harrell to foreclose a mortgage. From a judgment of dismissal, the plaintiff appeals.

Judgment affirmed.

Euler & Subith, of Los Angeles, for appellant.

Henry W. Hache and S. G. North, both of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action to foreclose a mortgage. A demurrer on the ground that the statute of limitations (Code Civ.Proc., sec. 337, subd. 1) had run was sustained, and the plaintiff has appealed from the judgment of dismissal.

The sole question presented is whether the four-year limitation was so extended by the provisions of section 12a of the Code of Civil Procedure as to bring the filing of this action within the time allowed. That section, so far as material here, reads as follows:

"As to any act provided or required by law to be performed within a specified period of time, such period of time is hereby extended—* * *

"(b) By such number of days as equals the number of holidays (other than special holidays) appointed by the President or by the Governor and which occur within or during such period; * * *."

[1, 2] The note in question was dated August 15, 1931, and was payable two years after date. Aside from the matter here suggested, the period in which the action could be filed would expire on or about August 15, 1937. The clerk's transcript contains a first amended complaint which was filed on November 29, 1937, or approximately 106 days after the expiration of the regular four-year period. The record does not contain the original complaint and there is nothing in the record to show when the action was commenced. Where a plea of the statute of limitations is raised by demurrer the original complaint and the date of its filing are essential parts of the record. Dougall v. Schulenberg, 101 Cal. 154, 35 P. 635; Sullivan v. Shannon, 25 Cal.App.2d 422, 77 P.2d 498; Young v. Young Holdings Corp., Ltd., 27 Cal.App.2d 129, 80 P.2d 723. If the instant action is not barred by the statute the appellant has failed to produce a record which discloses that fact. All presumptions are in favor of the judgment. As the court said in Galusha v. Fraser, 178 Cal. 653, 174 P. 311, 312: "The second amended complaint was filed on November 18, 1914. The record fails to show when the action was begun and the parties in their briefs do not advise us of the date of filing the original complaint. It is not claimed that it was begun within three years after June, 1910. Moreover, in the absence of a showing to the contrary, we will presume, if necessary to do so in order to support the judgment, that the action was begun at the latest possible time prior to the filing of the second amended complaint."

If we were to presume in support of the judgment that the original complaint was filed nearly 100 days after August 15, 1937, the action would be barred in spite of any claimed effect of section 12a of the Code of Civil Procedure.

[3, 4] The appellant is in no better position if the case be considered on its merits, as here presented. The respondent states that the original complaint was filed

twenty-six days after the expiration of the regular statutory period and the appellant seems to accept this as a fact. The appellant then contends that under the provisions of section 12a the regular statutory period was extended on account of forty-six holidays proclaimed by the Governor of this state or the President of the United States, and that he thus had twenty days more than he needed. Of these forty-six holidays, which he designates, he states that thirty-four were "proclaimed" by the Governor of this state. Fifteen of these are days in 1931, 1932 and up to June, 1933, all prior to the time the statute began to run which, of course, cannot be considered. Section 12a applies only to acts required by law to be performed within a certain time and not to private contracts to pay at a certain time. Moreover, by subdivision (b) thereof the extension provided for is limited by holidays occurring "within or during such period", which would here mean the period during which the statute was running. The remaining nineteen holidays said to have been proclaimed by the Governor include general holidays specifically named in section 10 of the Political Code, certain election days, four "public holidays—account financial unrest" and five "special holidays —account financial unrest". Of the twelve holidays said to have been proclaimed by the President, four were Thanksgiving days and eight were special "bank holidays". The latter, and the five "special holidays" proclaimed by the Governor, are expressly excluded from consideration here because of the provisions of section 12a, subdivision (b). If we were to allow the appellant the remaining fourteen holidays proclaimed by the Governor and the remaining four proclaimed by the President, it would still appear that the complaint was filed eight days too late.

[5] However, we are unable to accept the appellant's theory that the running of this statute was extended by all of these remaining holidays. So far as material here, section 12a provides that the time within which this suit might be filed is extended "by such number of days as equals the number of holidays (other than special holidays) appointed by the President or by the Governor and which occur within or during such period". 1. It clearly appears from the portion in parentheses that the time is not extended on account of special holidays. These are defined in section 10 of the Political Code and are such as apply only to a special class of business or persons, a notable example being "bank holidays". 2. The time is extended on account of general holidays "appointed by the President or by the Governor". It seems clear that it was intended to distinguish between general holidays thus proclaimed and those fixed and established by statutory enactment, being those specifically and definitely designated as such in section 10 of the Political Code. Subdivision (b) of section 12a, therefore, has the effect of excluding from the extension therein provided for any days represented by general holidays which are established by statute and which are not created by and based solely upon executive proclamation. It follows that Sundays, and the other holidays specifically designated in section 10 of the Political Code, are to be eliminated from consideration in computing any extension to the statute of limitations as applying to this action.

The legislature, in adopting section 12a of the Code of Civil Procedure has rather clearly, though inferentially, placed general holidays established by executive proclamation in a separate category and provided for a corresponding extension in the time within which an act required by law is to be performed, when holidays so established have intervened. There is a good reason for the distinction thus made, as suggested in the case of Adolph Ramish, Inc., v. Behr, 40 Cal.App.2d 54, 104 P.2d 410, 411, where the court said: "There is a very sound reason for the foregoing distinction which is that everyone is presumed to know the legal holidays prescribed by the legislature and to accommodate his acts accordingly, while holidays appointed by the President and Governor may be selected on short notice and vary according to the exigencies of the circumstances."

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

44 Cal.App.2d 822

STANSELL et al. v. SAFEWAY STORES, Inc.

Civ. 2716.

District Court of Appeal, Fourth District, California.

May 15, 1941.

1. Master and servant ⚷302(1, 6)

A master is liable for wrongful acts of servant committed while in service and within scope of employment, but is not liable for wrongful acts committed by servant who has departed from service of master and is engaged in carrying out independent purpose of his own.

2. Master and servant ⚷302(1)

A master is not responsible for negligent acts of servant who has departed from line or scope of employment, but is responsible for negligent acts of servant who has departed from or neglected a duty in line of employment.

3. Master and servant ⚷302(3)

To hold master liable for assault of servant, it is not necessary that assault should have been made as a means, or for purpose of performing work which servant was employed to do, but it is sufficient if assault takes place in course of servant's employment.

4. Master and servant ⚷302(1, 6)

An employer is liable for wrongful acts of employee if acts promote object of employment or if employee is acting in behalf of employer and not on employee's own account, or if servant is combining both his own and his master's business.

5. Master and servant ⚷306

That wrongful act of employee is wilful does not relieve employer of liability so long as act was committed in course of employment and in performance of duties which employee was otherwise ordered and empowered to perform, whether or not employee was empowered to perform the specific act in question.

6. Master and servant ⚷302(3)

A grocery store manager's assault on 14 year old girl who went to store to obtain groceries on county relief order, which girl had been told by her mother was at store, occurred in "course of employment" of manager and in "scope of employment" of manager so as to impose liability on store owner, where manager first lost temper during telephone conversation with mother about order, and he became more angry in answering girl's question as to whether he was trying to gyp girl and mother out of groceries and called girl's mother a "damned bitch," and assault occurred after girl called manager a "bastard."

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment" and "Scope of Employment".

Appeal from Superior Court, San Diego, County; Robert B. Burch, Judge.

Action by Lavinia Stansell, etc., and others, against Safeway Stores, Inc., for injuries allegedly suffered by the named plaintiff as a result of an assault made upon her by an agent of the defendant. From a judgment for the plaintiffs, the defendant appeals.

Affirmed.

Arthur F. H. Wright, of San Diego, for appellant.

Harden, Hervey & Holt, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages on account of injuries suffered by the plaintiff minor as a result of an assault made upon her by an agent of the defendant, who was the manager of one of its branch grocery stores in San Diego. A judgment totaling $516 was rendered in favor of the plaintiffs and the defendant has appealed on the sole ground that the court's finding to the effect that this manager at the time of the assault was acting within the scope of his employment is not sustained by the evidence, it being contended that the evidence clearly discloses that at the time in question he had departed from the course and scope of his employment.

The facts are undisputed. On February 9, 1939, the respondent minor, who was then fourteen years of age, at the request of her mother, went to this store to obtain certain groceries upon a county relief order, which order she had been told by her mother was at that store. She collected the groceries and took them to the checking counter where she was told by another employee of the store that he was unable to find the relief order. The manager assisted in looking for the order, but was also unable to find it. Thereafter, the manager talked to the girl's mother over the telephone and told her the order was not there. The mother insisted it was there and asked him to look again. He replied that the order was not there, that he was not going to look any more, that he was the manager of the store and that he should know what was there. He became angry during the telephone conversation and immediately thereafter, the closing hour for the store having come, he accompanied the girl to the door in order to let her out. At the door, the girl said to him "Well, are you-all trying to gyp us out of some groceries?" The manager replied: "No, and that damned bitch on the other end of the line is lying". The girl replied: "If my mother is a damned bitch you are a bastard". The manager immediately started for the girl and she ran. He caught her within sixty or seventy feet and struck her and kicked her, knocking her to the ground and causing the injuries here involved.

[1] It is well settled that a master is liable for the wrongful acts of his servant committed while in his service and within the scope of his employment. Conversely, it is equally well settled that the master is not liable for acts committed by a servant who has departed from the service of his master and is engaged in carrying out an independent purpose of his own. Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 P. 234, 15 L.R.A. 475, 27 Am.St.Rep. 223. In Rahmel v. Lehndorff, 142 Cal. 681, 76 P. 659, 65 L.R.A. 88, 100 Am.St.Rep. 154, where a guest of a hotel was assaulted by a dining room waiter, a judgment for the plaintiff was reversed largely on the theory that the defendant was not liable because he had not authorized his servant to assault his guests. This theory was criticized in Ruppe v. City of Los Angeles, 186 Cal. 400, 199 P. 496, in which case it was held that it was immaterial whether or not the wrongful act had been authorized by the employer. While the court reiterated the rule that a master is not liable where his servant steps aside from his employment to do a wilful wrong, it pointed out that such liability still exists, even where the servant's act is malicious or wilful, if the act is one which is done in furtherance of the purpose of the employment.

The court there said: "It is, however, wholly immaterial whether or not the assault was authorized by the city, or was committed by Nealon in violation of his instructions. It is plain enough that it was committed by him in the course of doing that which he had been sent to the building by the city to do, and in furtherance of its doing; that it was, in other words, an act done by him in the course of his employment."

[2] There is marked distinction between a departure from the line or scope of a servant's employment and his departure from, or neglect of, his duty while carrying on his employment. In Riordan v. Gas Consumers' Ass'n, 4 Cal.App. 639, 88 P. 809, 811, the court said: "The question, generally, is whether the servant, at the very time of the alleged act of negligence, had departed from his employment, or whether he departed from or neglected a duty in the line of his employment. In the first case the principal is not responsible for the servant's acts, and in the second case he is responsible."

[3] This distinction has been recognized in the more recent cases, a number of which are discussed in Hiroshima v. Pacific Gas & Elec. Co., 18 Cal.App.2d 24, 63 P.2d 340, 342. In that case, which is factually quite similar to the one now before us, the court said: "It is not necessary that the assault should have been made 'as a means, or for the purpose of performing the work he was employed to do'. The authorities hold that if the assault takes place in the course of the agent's employment, the principal is liable. The language of the Code which we have just set forth reads: 'Wrongful acts committed by such agent in and as a part of the transaction of such business,' not, as appellant would have us hold, for the purpose of transacting the business. This fact being kept in mind, the cases cited by the appellant are readily distinguishable from the facts involved, from what we have here to consider."

[4] The court also quoted from 18 Ruling Case Law, page 797, as follows: "'Responsibility is not limited to those acts which promote the objects of the employment. * * * The general idea is that the employee at the time of doing the wrongful act, in order to fix liability on the employer, must have been acting in behalf of the latter and not on his own account. But every departure by the servant from the strict course of his duty, even for

a purpose of his own, will not in and of itself be such a departure from his master's business as will relieve the master of liability for the acts of the servant. The servant may at the same time be combining both his own and his master's business, and in such case the master will be liable for his acts.'"

[5] In connection with the discussion of another case the court then said: "The opinion in this case shows careful consideration, and shows clearly that the master is liable even though the act of the agent is willful, so long as it is committed in the course of his employment, not that the agent was employed to perform the specific act, but that the agent was in the performance of the duties which he was otherwise ordered and empowered to perform. In the case at bar Downs was unquestionably engaged in the work of his principal, for which he was employed and directed to perform, and brings the act of the assault upon the plaintiff as being performed within the meaning of the term 'scope of employment.'"

[6] Applying these rules to the facts now before us it must be held that the evidence sustains the finding that the wrongful acts here in question were committed while the appellant's manager was acting within the scope of his employment. He first lost his temper while he was handling the matter of the order, which was clearly in the line of his duty. He became more angry in answering a question asked by the girl with respect to the groceries, and in replying to that question accused her mother of lying and called the mother a vile name. The girl's answering epithet increased his anger but did not change the nature of the quarrel which arose in, from and as a part of his performance of the duty for which he was employed. He was on duty at all times, the girl was dealing with him for this reason, the matter was still being discussed and had not been completed when the final phase started, the entire controversy was closely connected with his work, and the matter was continuous and of brief duration. Rather than disclosing a departure from the line and scope of his employment the evidence indicates that his wrongful acts resulted, at least in part, from his mistaken and excessive zeal in performing his duty as manager of the store. Any personal element, involving his reaction to the girl's epithet, was incidental and additional to his obvious purpose to protect the interest of the store, to complete the transaction, and to get rid of the girl. His unwarranted action not only immediately grew out of the manner in which he was performing his duty to his employer, but was in a very real sense a part thereof and not a departure therefrom. The matter being one which was a question of fact for the trial court it cannot be said that the court's finding that the acts were committed in the course and within the scope of his employment is not sustained by the evidence.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

WEST KEY NUMBER SYSTEM

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44 Cal.App.2d 796

COMMANDER OIL CO., Ltd., et al. v. BARDEEN et al.

Civ. 12893.

District Court of Appeal, Second District, Division 2, California.

May 15, 1941.

Appeal and error 🔑623

Where appellant's notice of appeal was filed on May 31, 1939, clerk's transcript was filed on October 21, 1940, and reporter's transcript on appeal was certified by trial judge on February 24, 1941, and transcript was tendered to clerk of appellate court for filing two days thereafter, appellant was not in default under court rule, and hence motion to dismiss appeal would be denied. Code Civ.Proc. § 953a; Rules for the Supreme Court and District Courts of Appeal, rule 1, §§ 1, 4.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Commander Oil Company, Ltd., a corporation, and others against H. A. Bardeen and others. From an unsatisfactory judgment, defendants appealed. On motion to dismiss appeal.

Motion denied.

Oliver O. Clark, of Los Angeles, for appellants.

Don S. Irwin, Andrews, Blanche & Kline, and E. J. Queen, all of Los Angeles, for respondents.

McCOMB, Justice.

This is a motion to dismiss the above entitled appeal on the ground that appellant has failed to conform to the requirements of Rule I of the Rules for the Supreme Court and District Courts of Appeal (213 Cal. xxxv).

The facts are these:

Appellant chose to prepare his record for use on appeal pursuant to the requirements of section 953a of the Code of Civil Procedure.

May 31, 1939, notice of appeal was filed. October 21, 1940, the clerk's transcript was filed in this court. February 24, 1941, the reporter's transcript on appeal was certified by the judge of the trial court, and on or about February 26, 1941, said transcript was tendered for filing to the clerk of this court.

This is the sole question for our determination:

Is appellant in default pursuant to the provisions of Rule I of the Rules for the Supreme Court and District Courts of Appeal, supra?

This question must be answered in the negative. Under the provisions of section 1 of Rule I, supra, appellant had forty days after the reporter's transcript was approved and certified by the trial judge within which to file the same in this court, since the record was prepared pursuant to the provisions of section 953a of the Code of Civil Procedure. Under the provisions of section 4 of Rule I, supra, appellant had thirty days after the filing of the reporter's transcript within which to prepare and file his opening brief. The reporter's transcript having been certified February 24, 1941, and having been tendered for filing in this court on or about February 26, 1941, the time for filing the reporter's transcript clearly had not elapsed, and ipso facto the time for the preparation of appellant's brief had not expired.

For the foregoing reasons the motion to dismiss the appeal is denied and the clerk is ordered to file the reporter's transcript as of May 15, 1941.

WOOD, Acting P. J., concurred.

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44 Cal.App.2d 826

TILLIS v. WESTERN FRUIT GROWERS, Inc.

Civ. 2581.

District Court of Appeal, Fourth District, California.

May 15, 1941.

1. Appeal and error ⚷1058(1)

An appellant could not complain of rejection of evidence as to intent of parties to contract, where appellant was subsequently allowed to bring out practically all the evidence sought to be produced, and also conversations before, after, and surrounding execution of contract.

2. Sales ⚷10

A growing crop of oranges could be sold upon the trees, after inspection and prior to severance thereof, and was so sold under contract providing that "the Seller has sold and the Buyer has bought the entire crop of Wash. Navels now growing and maturing on Tillis Grove". Civ.Code, §§ 1738, 1739.

3. Sales ⚷153

Under contract for sale of growing crop of oranges, providing that picking and hauling should be done as directed by buyer, there was no duty resting on seller to tender oranges before cause of action for breach of contract arose, since buyer could not remain silent and then profit by its own wrong.

4. Contracts ⚷147(2)

Where contract has been reduced to writing, the instrument measures the rights, duties, and obligations of the parties, and, in absence of any charge of fraud, mistake, or accident, and the language of the contract being clear, explicit, and certain and not involving an absurdity, court may interpret contract and ascertain intention of parties from the language thereof. Code Civ.Proc. § 1856; Civ.Code, §§ 1638, 1639, 1647.

5. Sales ⚷383

In action for buyer's breach of contract to purchase entire growing crop of oranges, part of which buyer refused to accept because market price had broken, evidence supported judgment allowing recovery of difference between contract price of oranges which buyer refused to accept and price realized by seller, who, to mitigate damages, sold oranges through growers' exchange.

6. Sales 🔑384(7)

Where buyer of fruit crop refuses to accept crop and pay therefor, seller may sue for breach of contract and recover difference between price agreed to be paid by buyer under contract and price realized from sale of fruit in open market at current rates.

7. Appeal and error 🔑1008(3)

Where trial court, in action for breach of written contract, had fully considered terms of contract, and its interpretation thereof was reasonable, appellate court would not interfere with such interpretation.

Appeal from Superior Court, Tulare County; Stanley Murray, Judge.

Action by Roy E. Tillis against Western Fruit Growers, Incorporated, for breach of a contract for the sale of oranges. From a judgment for plaintiff, defendant appeals.

Affirmed.

McFadzean & Crowe, of Visalia, for appellant.

John Preston King, of Lindsay, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent instituted this action to recover damages against defendant and appellant corporation for breach of contract respecting the sale of respondent's crop of oranges. The case was tried without a jury and resulted in a judgment for respondent in the sum of $637.93, from which judgment defendant has appealed.

During the first part of November, 1937, respondent, an orange grower, owned about 5 acres of full-bearing trees on which there was growing a crop of Washington navel oranges. Both respondent and appellant corporation (which corporation was engaged in buying, shipping and packing citrus fruit) were quite familiar with the orange industry and market. On November 5, 1937, appellant, through its agent Mr. King, entered into an agreement of sale for the crop of navel oranges on the trees. This sale was consummated in writing on a printed form of contract prepared by appellant after the oranges had been inspected by the appellant. It reads in part as follows:

"* * * the Seller (respondent) has sold and the Buyer (appellant) has bought the entire crop of Wash. Navels now growing and maturing on Tillis Grove, * * *

"The Buyer agrees to pay the Seller 2½¢ per lb. up to and including Nov. 7th, 2¢ per lb. up to and including Nov. 12-1937. * * *

"It is further agreed that the picking and hauling are to be done at such time and manners as directed by the Buyer and the expense of the same is to be borne by the Seller * * *

"* * * Fruit to be paid on receipt of weights * * *

"Estimated boxes 2000."

The evidence discloses that on the 5th day of November, 1937, the date the sale was consummated, appellant harvested from the premises 14,190 pounds of oranges for which appellant paid respondent the contract price of 2½¢ per pound; that on November 5, 1937, the entire crop of oranges then growing upon the premises of respondent was ready and suitable for harvest and marketing, both as to sugar content and color; that on the 11th day of November, 1937, when the remaining oranges were still ready for harvest and marketing, and would still pass the government test, the appellant refused to accept the balance of the oranges and informed the respondent that it would not accept any more of them. The appellant appears to have refused to take the balance of the oranges because the market price had broken. Immediately after such refusal, the respondent, in order to mitigate his damages, shipped and sold the balance of the oranges through a growers' exchange. The oranges sold through the exchange amounted to 50,423 pounds, and after deducting cost of picking, hauling, and selling, brought the sum of $370.53.

The court found from the arithmetic involved that respondent suffered damages in the sum of $637.93, being the difference, figured at 2¢ per pound, between the contract and the actual selling price of the oranges.

It is appellant's contention that under the contract it agreed to pay certain specified premium prices for that portion of the crop which the appellant could and did accept and use during the first week of the navel orange season in that year; but that the appellant did not thereby obligate itself to pay the same premium prices for any remaining portions of the crop which might have been, but which never were delivered to the appellant, and that it especially reserved the right to specify what portions of the crop it would accept and pay such premium prices for, by expressly reserving the right to direct the time when and the manner in which the fruit was to be picked and delivered to it; that this construction is amply supported by the language of the written contract in question and also by conversations between the parties, which conversations both preceded and followed the execution of the contract, and by the construction placed upon the contract by the parties thereto.

Appellant also contends that it was unduly limited by the trial court in not allowing extrinsic evidence of certain conversations as bearing on the intention of the parties as to the construction of the contract.

[1, 2] The record does disclose the fact that counsel for appellant endeavored to produce certain testimony to the effect that the contract was intended to be that a premium price was to be paid for early season fruit. With some emphasis the trial court denied the right of appellant to pursue such a course. However, the record does disclose that appellant was later allowed to bring out practically all the evidence sought to be produced and also conversations both before, after, and surrounding the execution of the contract. Appellant cannot now be heard to complain of the trial court's ruling in this respect. Rapolla v. Goulart, 105 Cal.App. 417, 421, 287 P. 562. The contract clearly recites that "Seller has sold and Buyer has bought the entire crop of Wash. Navels now growing and maturing on Tillis Grove". There is no uncertainty about the words "has sold" and "has bought" and no ambiguity therein. These words certainly constitute a present sale and a consummated transaction. The grower sold and the buyer bought the entire crop of Washington Navels. The crop could be and was sold upon the trees, after inspection and prior to the severance thereof. Jones v. California Growers & Shippers, 182 Cal. 777, 190 P. 172; Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574, 25 P. 52, 10 L.R.A. 369, 21 Am.St.Rep. 63. Title to specific or ascertained goods under a contract of sale passes at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case. Civ.Code, secs. 1738 and 1739.

The contract further provides that the "picking and hauling are to be done at such time and manners as directed by the Buyer * * *." The evidence discloses that King, buyer for Western Fruit Growers, Inc., agreed with the respondent to secure the pickers (most of whom were men regularly employed by appellant corporation) to pick the oranges because he could "get it done cheaper". On November 5, 1937, 14,190 pounds were picked and paid for (less hauling and picking charges). No further picking was done or directed to be done by the buyer. On November 11, 1937, respondent went to appellant's place of business and inquired as to why the rest of the fruit had not been picked and he was told: "I am not going to pick any more of that stuff * * * the fruit market is broken." Respondent then sold the balance of the crop to the exchange. Appellant never demanded the balance of the fruit nor did respondent tender it to appellant.

[3] There was no legal duty resting upon respondent to tender the oranges to appellant, as contended by it, before a cause of action arose. Appellant could not remain silent and then profit by its own wrong. Danielson v. Neal, 164 Cal. 748, 130 P. 716; Howard v. Galbraith, 13 Cal.App. 373, 109 P. 889.

[4, 5] It is a familiar rule that where a contract has been reduced to writing the instrument measures the rights, duties and obligations of the parties. Harding v. Robinson, 175 Cal. 534, 166 P. 808; Code Civ.Proc. sec. 1856. The trial court had full knowledge of all the surrounding circumstances pertaining to the execution of the contract. In the absence of any charge of fraud, mistake or accident, the language of the contract being clear, explicit and certain, and not involving an absurdity, the trial court was justified in interpreting it and ascertaining the intention of the parties from the language thereof. Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055; Civ. Code secs. 1638, 1639 and 1647. We see no extrinsic ambiguity in the contract before us. The findings of fact in this case are amply supported by the evidence.

[6] It has been clearly held that if the buyer of a crop of fruit, as in the instant case, refuses to accept and pay therefor, the seller may sue him for breach of his contract and recover as damages the difference between the price agreed to be paid by him under the contract of purchase and that realized from the sale of the fruit in open market at current rates. Cutting Packing Co. v. Packers' Exchange, supra.

[7] The trial court has fully considered the terms of the written contract. Its interpretation thereof is a reasonable one. Under these circumstances an appellate court will not interfere with such a construction. Tide Water Associated Oil Co. v. Curtin, 41 Cal.App.2d 884, 107 P.2d 945.

Judgment affirmed.

We concur:

BARNARD, P. J.; MARKS, J.

* * *

44 Cal.App.2d 915

GRIFFIN v. COLUSA COUNTY et al.

Civ. 6515.

District Court of Appeal, Third District, California.

May 20, 1941.

Hearing Denied July 17, 1941.

1. Appeal and error 🔑171(2)

An action, conceded by plaintiff's counsel to be for negligence, rather than breach of contract, will be so treated on plaintiff's appeal from judgment for defendant.

2. Pleading 🔑214(3, 5)

The general rule that all facts well pleaded are admitted as true on demurrer does not extend to admission of conclusion of law, construction of instrument pleaded in complaint, facts impossible in law, or allegations contrary to facts of which court may take judicial knowledge.

3. Counties 🔑144

The operation of a county hospital is a "government function".

See Words and Phrases, Permanent Edition, for all other definitions of "Government Function".

4. Counties 🔑224

In action against county for injuries to patient in general public hospital conducted by county, it cannot be held as matter of law that hospital was conducted in proprietary capacity, regardless of allegation to that effect in complaint.

5. Counties 🔑144

The fact that public hospital conducted by county admitted certain paying patients did not convert it into proprietary or private hospital.

6. Counties 🔑1, 146

Municipal corporations 🔑54

Counties are "state agencies", exercising state's sovereignty within their boundaries, and are no more liable than state for injuries caused by their employees' negligence in performance of governmental functions, but cities are "municipal corporations", not state agencies.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Corporation" and "State Agency".

7. Statutes 🔑237

Laws in derogation of sovereignty must be construed strictly in the state's favor.

8. Counties 🔑144

The acts relating to liability of counties for personal injuries resulting from defective or dangerous condition of public property and declaring counties liable for such injuries in case of governing or managing board's failure or neglect to remedy or take steps to protect public against such condition within reasonable time after acquiring knowledge thereof fix county's liability for injuries to pay patient in public hospital conducted by county as result of fall from bed therein because of nurses' negligence in leaving patient unattended while delirious and unconscious. Gen.Laws 1937, Acts 5149, 5619.

9. Counties 🔑146

A county and supervisors thereof are not liable in damages for injuries to pay patient in county hospital, to which she was admitted on her application for emergency treatment when taken suddenly ill because there was no other hospital in county, as county acted in governmental capacity in conducting hospital and is not liable for its employees' negligence. Gen.Laws 1937, Acts 5149, 5619; St.1937, pp. 1016, 1017, §§ 200–204.

10. Hospitals 🔑8

In action against county, supervisors thereof, director of county hospital and two nurses therein for injuries to pay patient, amended complaint, charging that defendants negligently failed to furnish plaintiff with proper nursing care and attention in certain particular, but not alleging that defendant director ordered anyone to do or refrain from doing anything the doing or omission of which caused injuries, that plaintiff contracted with such director for care or attention, that her personal care or attention devolved on director, or that he selected or employed nurses detailed to take care of plaintiff or was responsible to her for any failure in supervision of such nurses, stated no cause of action against director.

11. Negligence ⚿2

One undertaking, even voluntarily, to render assistance or care to another, owes legal duty to exercise care toward person assisted.

12. Hospitals ⚿8

In action for injuries to pay patient in county hospital, complaint alleging that care of and attention to plaintiff were personally entrusted to certain nurses in hospital and that they failed to render such service was sufficient on demurrer to state cause of action against nurses.

13. Constitutional law ⚿70(1)

Where legislature has refused to relax laws as to nonliability of state agency, such as county, for injuries caused by its employees' negligence in performance of government function, courts should not attempt to legislate on such matter by decision.

◆

Appeal from Superior Court, Colusa County; Warren Steel, Judge.

Action by Catherine M. Griffin against the County of Colusa and others, for personal injuries suffered by plaintiff while a patient in defendant county's hospital. Judgment for defendants, and plaintiff appeals.

Affirmed in part, and reversed in part.

Hearing denied; CARTER, J., dissenting.

Huston, Huston & Huston, of Woodland, for appellant.

Hudson Ford, of Colusa, and Hadsell, Sweet, Ingalls & Lamb, of San Francisco, for respondents.

PULLEN, Presiding Justice.

This is an appeal from a judgment in favor of defendants, County of Colusa, and the Board of Supervisors of Colusa County, entered after demurrers to an amended complaint were sustained without leave to amend, and also in favor of the director of the county hospital, and two nurses, following orders sustaining their demurrers with right to amend, of which right plaintiff refused to avail herself, and after her default, judgment was entered against her.

Plaintiff brought this action against the above defendants to recover damages for injuries suffered while a patient in the Colusa Memorial Hospital. The amended complaint alleged that the County of Colusa maintained and conducted, in a proprietary capacity, a county hospital known as the Colusa Memorial Hospital, which was under the management and control of the Board of Supervisors, and that Dr. Joseph Tillotson was the surgeon and director, and that Barbara Stevens and Mildred Brown were employed by the county as nurses to care for all patients in the hospital.

It is also alleged the plaintiff applied for hospitalization and agreed to pay the fixed and established cost thereof, and that while a patient therein, and in need of constant nursing, care and attention, and while in a state of delirium from fever and illness, and while wholly unconscious, the defendants failed to render such necessary care and attention by leaving plaintiff unattended, and as a result thereof she fell from her bed in the hospital and was injured. By an amendment to the amended complaint it was further alleged "that * * * the said plaintiff herein was taken suddenly ill and required immediate hospitalization; * * * that said hospital was the only hospital in the County of Colusa to which the said plaintiff could apply for such treatment; that said defendants thereupon admitted the said plaintiff to said hospital for such emergency treatment * * *".

To this amended complaint the county and the supervisors have interposed demurrers, both general and special, claiming, among other things, that the cause of action is inconsistent with the claim for injury and damage filed with the County Clerk of the County of Colusa, and also that the amended complaint is uncertain in certain specified particulars.

The demurrer of defendant Tillotson was also general and special and was sustained, and plaintiff given time within which to amend, but she elected to stand upon her complaint. A similar demurrer was interposed by the two nurses, and as to them plaintiff chose also not to amend.

[1] Directing our attention to the correctness of the order sustaining, without leave to amend, the demurrers of the county and of the supervisors. One question raised by both the demurrer of the county and of

the supervisors was as to whether the amended complaint was based upon a breach of contract or was an action for negligence, but it seems to have been conceded by counsel for plaintiff that the action was for negligence and it will be so treated here.

[2] Plaintiff relying upon the rule that all facts well pleaded are admitted as true upon demurrer, contends the allegation in the amended complaint "that at all the times herein mentioned the County of Colusa * * * maintained * * * and conducted in a proprietary capacity, a county hospital, known as the Colusa Memorial Hospital", must be accepted as true.

This general rule of pleading, however, does not admit a conclusion of law, nor does it admit the construction placed on an instrument pleaded in the complaint, or facts impossible in law, or allegations contrary to facts of which a court may take judicial knowledge. As evidence of this rule and as illustrative of a situation quite similar as to the facts is the case of Villalpando v. City of Cheyenne, 51 Wyo. 300, 65 P.2d 1109, 1110. There plaintiff sued defendant for injuries caused by the negligence of a city employee in the operation of a city street sprinkler. The complaint alleged "that said motor vehicle * * * was owned and operated by defendant and * * * defendant, its agents, servants and employees were driving and operating said motor vehicle * * * in sprinkling certain streets * * *; that defendant was thereupon engaged in a private or municipal capacity and not in a governmental capacity."

[3] Plaintiff, as here, contended the general demurrer admitted the truth of this allegation, but the court, relying upon State ex rel. Wyoming Agr. College v. Irvine, 14 Wyo. 318, 84 P. 90, held the allegation was not admitted, and that the sprinkling of the streets of a city was in fact a governmental and not a proprietary function of the city. The same principle was declared in People v. Oakland Water Front Co., 118 Cal. 234, 50 P. 305; Mullan v. State, 114 Cal. 578, 46 P. 670; People v. Roach, 76 Cal. 294, 18 P. 407. That the operation of a county hospital is a government function was first stated in the early case of Sherbourne v. Yuba County, 21 Cal. 113, 81 Am.Dec. 151.

[4, 5] The complaint here, however, further alleged that the Colusa Memorial Hospital was maintained and conducted by the county for the purpose of furnishing hospitalization to the following persons:

First: To all indigent sick in the county, and in the case of indigents without means to pay for the same, the hospital would furnish such necessary medical and surgical attention and service as might be required without charge.

Second: Free hospitalization to all veterans who were legal residents of the County of Colusa, and those directly dependent upon them.

Third: To other residents of the county as the facilities of the hospital would permit, upon payment of the cost of hospitalization and for medical and surgical services, and

Fourth: In the case of an emergency to any one needing attention, who would be admitted and charged the cost of such hospitalization and medical and surgical services. In addition to the foregoing groups any expectant mother who is unable to pay for her necessary care shall be admitted, and the cost thereof shall be a charge against the county of her residence. § 204, Welfare and Institutions Code, St.1937, p. 1017.

From these classifications it would appear that the county was conducting a general public hospital, and it cannot be held as a matter of law, that the hospital was conducted in a proprietary capacity, regardless of any allegation to that effect in the complaint. In the first two groups applicants were admitted without charge; in the two latter groups the service was rendered at cost and without profit. The fact that the hospital admitted certain paying patients did not convert a public hospital into a proprietary or private hospital. In Melvin v. State of California, 121 Cal. 16, 53 P. 416, 418, plaintiff, the holder of a ticket of admission to the state fair, was injured by the collapse of a grandstand. The court held that the State Agricultural Society was a state institution, and was authorized to charge an admission under its general authority to operate a state fair, and there said: "It does not follow, however, that the society is organized for gain. It exists for the sole purpose of promoting the public interest in the business of agriculture and kindred objects. It is an agency of the government, and in no sense an organization for pecuniary profit to the state", and therefore remained a state agency regardless of the collection of an admission fee.

In Kellar v. City of Los Angeles, 179 Cal. 605, 178 P. 505, 507, it was claimed the operation of this particular summer camp was in a proprietary capacity, but the court said that the fact that "a small charge is made upon those children going to and staying at the camp for the purpose of assisting in defraying the cost of maintenance of such children while at the camp does not change the situation".

In Manning v. City of Pasadena, 58 Cal. App. 666, 209 P. 253, it was held that the sale of garbage by the city after its collection did not convert the governmental activity into a proprietary function so as to render the city liable for the negligent acts of its employees while engaged in gathering the garbage together. To the same effect is Davie v. Board of Regents, 66 Cal. App. 693, 227 P. 243, where a charge was made upon each student at the University of California at Berkeley, to maintain an infirmary.

[6] In considering cases bearing upon the distinction between governmental and proprietary functions it is important to recall the legal difference between a city and a county. Counties are state agencies which exercise within their boundaries the sovereignty of the state, and in the absence of a specific statute imposing liability upon them they are no more liable than the state itself. Cities, however, are municipal corporations and not state agencies. This distinction is clearly expressed in Dillwood v. Riecks, 42 Cal.App. 602, 184 P. 35.

[7, 8] Having in mind this distinction and the universally recognized rule of construction that laws in derogation of sovereignty shall be construed strictly in favor of the state, it would appear that the two statutes, Act No. 5149 and Act No. 5619 of Deering's General Laws 1937, Vol. Two, at pages 2204 and 2630 respectively, fix the liability of the county.

It is true that the Welfare and Institutions Code, sections 200–204, St.1937, pp. 1016, 1017, in authorizing the supervisors of a county to provide for the care and maintenance of the indigent sick or dependent poor of a county does not, in express terms, authorize the establishment of a hospital for all the purposes hereinbefore set forth, but in Goodall v. Brite, 11 Cal. App.2d 540, 54 P.2d 510, it was held the supervisors under the police power granted by section 11 of article XI of the Constitution had the right under that authority to adopt rules and regulations for the operation of a county hospital, to admit a patient in need of hospitalization who could not himself, or through legally liable relatives, pay the charges of a private institution. The court there also declared such a right to admit such persons might be founded upon the definition of an indigent to be one who had insufficient means to pay for hospitalization after providing for those who legally had a claim upon him for their support, and cited many cases in support of that interpretation.

[9] A further power of the supervisors to extend the right of admission to a county hospital is found in Calkins v. Newton, 36 Cal.App.2d 262, 97 P.2d 523. There an action was commenced against the County of Siskiyou and certain physicians and nurses for injuries sustained by plaintiff while a patient in the county hospital. It was there claimed, as here, that the county was acting in a proprietary capacity in conducting the hospital under the facts there existing. It appeared from the amended complaint that there were no private hospitals in the vicinity of the general county hospital at Yreka, and the delay incident to transporting a person in need of hospitalization to another hospital might be fatal; under such conditions the court held that it was within the police power of the county to open its hospital to all persons in the county, regardless of their financial status, and such a hospital was there held to be a governmental activity.

The facts of this case as alleged in the amended complaint seem to bring it, at least as to the liability of the county, clearly within the rule laid down in the case of Calkins v. Newton, supra, which case goes even further than the case at bar, for in the Calkins case the question of profit was involved, but in this case no profit was claimed. The question there involved as stated by the court was whether a county was liable for an injury caused by its employees in a hospital operated by the county, at a profit, where such county hospital furnished the only hospital facilities available in the community, and the injured person was a paying patient; or stated more directly, whether the county was acting in a governmental or proprietary capacity under such circumstances. The court then proceeded to hold that the county was acting in a governmental capacity and not liable for the negligence of its employees. From the foregoing it would appear that here neither the county nor the supervisors were liable in damages to the plaintiff.

[10] The next point to be considered is the order sustaining the demurrer upon behalf of Joseph E. Tillotson, the surgeon and director of the hospital. The amended complaint charged that the defendants negligently and carelessly failed to furnish plaintiff with proper nursing care and attention in that defendants left plaintiff unattended and as a result thereof she fell from her bed and was injured. From this allegation it does not appear that the defendant Tillotson ordered any one to do or refrain from doing anything that caused the injury to plaintiff, or that plaintiff entered into any contract or agreement with Tillotson for her care or attention. It is alleged in the complaint that the two defendant nurses were employed to take care of plaintiff, but there is no allegation that the personal care or attention devolved upon Tillotson, or that he failed to properly care for her while she was under his personal care or attention.

The gist of the complaint against Tillotson is that he was negligent in his supervision of the nurses, but he as director did not apparently select or employ these nurses, nor was he as director, responsible to plaintiff for any failure of supervision, but was answerable only to the county that employed him. In Hilton v. Oliver, 204 Cal. 535, 269 P. 425, 426, the trustees of a reclamation district were sued for damages to one whose lands were flooded by the obstruction of a culvert, caused by the negligent acts of the subordinate agents of the district. The trustees were the agents of the reclamation district, a public corporation, and the superintendent and the foreman of the crew were subordinate agents employed in the service of the common principal. "The rule," it is there said, "laid down or approved by the decisions in this state is that an agent is not in general liable to third persons for the misfeasance or malfeasance of a subagent employed by him in the service of his principal, unless he is guilty of negligence in the appointment of such subagent, or directs or authorizes the particular wrongful act of the subagent, or improperly co-operates in the latter's acts or omissions." See, also, Atkinson v. Clark, 132 Cal. 476, 64 P. 769.

Appellant refers us to Davie v. Board of Regents, 66 Cal.App. 689, 227 P. 247, where it was held that even if the regents of the university were not liable for the tort, nevertheless the employees of the hospital were individually chargeable with such negligence, and it made no difference whether the hospital was being conducted in a proprietary capacity or as a governmental function. That is true where the injuries resulted from the negligent care and treatment of the patient by the employee, but here the director, as we have pointed out, was not alleged to have had the care of plaintiff—that duty resting upon the attendants of the hospital—and the injury sustained by plaintiff had nothing to do with the lack of skill or care of the director of the hospital.

It would therefore appear that the personal care of plaintiff not being upon defendant Tillotson, or that he directed the nurses to do or refrain from doing anything that caused harm to plaintiff, and there being no contract between plaintiff and this defendant there was no cause of action stated against him.

Defendant also urges that he is a public officer, i. e., the director of the county hospital and the failure to serve upon him a claim for damages as required by section 1, article 5150, General Laws (Deering 1937, vol. II, p. 2205) is fatal to the maintenance of an action. Sponogle v. Curnow, 136 Cal. 580, 69 P. 255. Without discussing this point, what has been said before is sufficient to uphold the ruling of the trial court.

[11, 12] The situation of defendant nurses is somewhat different from that of the director. The care and attention of plaintiff was personally entrusted to them, and the complaint alleges they failed to render such service. When one has undertaken to render assistance or care, even if a volunteer, the law imposes a duty of care toward the person assisted. Reinstatement of Law or Law of Torts, section 324. The court should have overruled the demurrer of the two defendant nurses and required them to answer.

Plaintiff recognizes that to sustain her position this court must deviate from the rule laid down in several earlier cases, and to re-examine the law particularly with reference to the immunity granted counties because of injury inflicted upon those who are compelled to seek its services.

From several rather recent cases she claims to see a tendency in that direction and calls our attention to Silva v. Providence Hospital, 14 Cal.2d 762, 97 P.2d 798 and England v. Hospital of Good Samaritan, 14 Cal.2d 791, 97 P.2d 813. These do not, of course, discuss the responsibility of a state agency and deal only with private charitable institutions.

[13] Plaintiff also refers to Yolo v. Modesto Irrigation District, 216 Cal. 274, 275, 13 P.2d 908, 910, where the court said: "The rule excluding state agencies from liability for tort is an exception to the general rule which we are not inclined to extend." However, it must be remembered in that case Modesto Irrigation District was created as an irrigation district, but subsequently under proper provisions of a later law, constructed power houses and transmission lines for the manufacture, distribution and sale of electric power throughout its territory and outside its boundaries, competing with privately owned power companies in the area served. The court held that by engaging in these activities it stepped outside the character and functions of an irrigation district, and assumed the status of a municipal corporation, thereby joining a class that is liable for the torts of its agents. Here the legislature, rather than indicating a purpose or intent to relax the law as to nonliability of a state agency, has refused so to do, and where the legislature has refused to act, the courts should not, by decision, attempt to legislate.

That part of the judgment in favor of defendants County of Colusa, the Board of Supervisors, and the director of the hospital is affirmed, and that portion of the judgment in favor of Barbara Stevens and Mildred Brown is reversed, with the right to plead further if so advised. Each of the parties to pay his own cost on appeal.

We concur: TUTTLE, J.; THOMPSON, J.

44 Cal.App.2d 838

CLARKE et al. v. FIEDLER.

Civ. 12392.

District Court of Appeal, Second District, Division 1, California.

May 16, 1941.

1. Appeal and error 🔑867(1)

Where trial court sitting without a jury made complete findings of fact and entered judgment for plaintiffs, and thereafter on defendant's motion for new trial ordered judgment vacated and amended findings and ordered judgment for defendant, and plaintiffs appealed from the last judgment, appellate court was limited in its consideration of the evidence to question whether record contained sufficient evidence to support last-made findings and judgment, notwithstanding that appellate court might believe that original findings were amply supported by the evidence, provided that original findings and judgment were legally set aside.

2. Appeal and error 🔑1010(1)

The District Court of Appeal will disturb findings of trial court sitting without a jury only where testimony relied on by trial court to support judgment is inherently improbable, in which case the issue becomes one of law.

3. Appeal and error 🔑987(1)

The jurisdiction of the District Court of Appeal is limited to questions of law.

4. Contracts 🔑1

A formal written contract is not the agreement of the parties, but only evidence of the agreement.

5. Contracts 🔑32

An agreement which the parties understand shall not become binding upon any of them until evidenced by the written form does not become a binding agreement until reduced to writing and signed by the parties.

6. Contracts 🔑32

Where contract is not required by law to be in writing, and terms thereof are definitely agreed upon and are complete, the fact that the parties, contemporaneously with making of full and complete oral agreement, decide to evidence the same by a written instrument, does not impair the force and effect of the oral agreement.

7. Partnership 🔑22

In action for breach of contract for sale to plaintiffs of an interest in baseball parks operated by defendant, evidence was sufficient to show that oral agreement for sale was binding on defendant, notwithstanding defendant's refusal to sign formal written contract, on ground that all the terms and conditions of the understanding between plaintiffs and defendant were definitely agreed upon and the written memorial thereof was accepted, though not signed, and the oral agreement left nothing to be done other than to sign the writing and pay over the initial payment. Civ.Code, §§ 1550, 1565.

8. New trial 🔑**79**

Under statute relating to powers of trial court on motion for new trial in a cause tried without a jury, court deeming itself mistaken as to its previous view of the evidence or in the application thereto of the law, can set aside previous findings and the judgment predicated thereon. Code Civ. Proc. § 662.

9. New trial 🔑**164**

A court trying case without jury and vacating original judgment on motion for new trial within 60-day period prescribed by statute, could adopt new findings and enter such judgment as in its opinion correctly determined the issues raised by the pleadings and presented by the evidence, and was not required to limit the new findings to those expressly referred to in the minute order setting aside the original findings and judgment. Code Civ.Proc. §§ 660, 662.

10. Partnership 🔑**76**

The interest of one partner in assets of partnership does not entitle him to any particular portion of such assets, but merely confers upon him a right to an accounting with the other members of the partnership, and when affairs of partnership are settled, such partner shall receive the share to which he is entitled.

11. Partnership 🔑**76**

Until affairs of partnership are wound up and settled, claims of respective partners are equitable, because the only way such claims can be enforced is through an equitable action for an accounting.

12. Frauds, statute of 🔑**76, 84**

An oral agreement for sale to plaintiffs of an interest in baseball parks operated by defendant at agreed purchase price of $15,000, was an agreement for creation of a present partnership in a going business and not in a business to begin at some future time, and was a contract to be performed at once, and did not contemplate transfer of assets of the going business from one party to the other, and hence agreement did not provide for sale of goods and choses in action of value of $500 and for sale of interest in realty so as to be violative of statute of frauds. Civ.Code, § 1624, subds. 1, 4 and §§ 1624a, 1724; Code Civ.Proc. §§ 1973, 1973a.

13. Partnership 🔑**61**

Where agreement for creation of present partnership in going business was silent as to duration of partnership and no evidence on the subject was introduced at trial of action for breach of the agreement, partnership would be considered as "partnership at will", and the period of a leasehold interest belonging to partnership was no criterion for determining duration of partnership.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership at Will".

14. Partnership 🔑**61**

A partnership at will owning or acquiring a fee simple does not thereby become a never-ending partnership.

15. Appeal and error 🔑**1177(1)**

Where action of trial court in setting aside original findings and judgment was within court's prerogatives under statute relating to powers of trial court on motion for new trial in cause tried without a jury, District Court of Appeal concluding that second findings upon which second judgment was predicated were not supported by the evidence, was not authorized to direct reinstatement of original findings and judgment, but was limited to reversing the second judgment and remanding the cause for a new trial. Code Civ.Proc. § 662.

Appeal from Superior Court, Los Angeles County; Minor Moore, Judge.

Action by Thomas A. Clarke and others against Marty Fiedler for damages for breach of alleged contract. From a judgment for the defendant, the plaintiffs appeal.

Reversed and remanded for a new trial.

Delvy T. Walton, of Los Angeles, for appellants.

Mitchell, Silberberg, Roth & Knupp and Joe Orloff, all of Los Angeles, (Lester W. Roth and Peery Price, both of Los Angeles, of counsel), for respondent.

WHITE, Justice.

Plaintiffs by their complaint filed herein alleged that in the year 1938 and up to June 27 thereof, they were operating a public soft baseball park in the city of Santa Monica; that on or about June 1 they were solicited by defendant, through the latter's agent, to purchase an interest in similar baseball parks operated by defendant in the city of Los Angeles; that negotiations were commenced between the parties with a view to combining their joint efforts in the ownership and management of the Los Angeles baseball parks, and that at defendant's suggestion and with his consent, plaintiffs did in fact close their Santa Monica activities on or about June 27, 1938. It was further alleged that a definite and certain oral contract was agreed upon for a sale by defendant to plaintiffs of a fifty per cent interest in the Los Angeles baseball parks; that said agreement was reduced to writing to be signed by the parties, dated June 30, with the joint operations of the parties in connection therewith to commence July 1, 1938. A copy of said agreement was attached as an exhibit to the complaint, and generally speaking, provided that defendant would sell to plaintiffs a fifty per cent interest in and to the said amusement business and that plaintiffs would enter upon the active management and operation of the same with the defendant after closing and giving up their similar enterprise in the city of Santa Monica. The agreed purchase price was $15,000, of which $6,000 was to be paid upon the execution and delivery of the agreement, $1,500 on August 1, 1938, and $2,500 respectively on September 1, October 1 and November 1 of the same year. The agreement further provided that defendant's two brothers, who were associated with him in the Los Angeles venture, were to retire from the business, and that fifty per cent of the same was to be owned by the plaintiffs and a like per cent by the defendant.

Plaintiffs further alleged in their complaint that from and after the 15th day of June, 1938, as their negotiations with defendant progressed, and when the contract terms were agreed upon, they entered upon their duties in the Los Angeles amusement parks, rendered considerable and extensive services in connection therewith in the matter of meeting the managers of various baseball teams and umpires, checking the gate receipts of the two parks, going over financial statements of past operations, discussing and formulating plans for improvement of said parks and the purchase of additional appurtenances in connection therewith. It was further charged by the complaint that after full and complete terms of the contract were agreed upon it was determined to put such agreement in writing; that said writing was prepared and submitted by plaintiffs to defendant on June 30, 1938, upon which occasion a definite appointment was made for the following day, at which time the writing was to be signed. Plaintiffs alleged that at defendant's request they telegraphed for funds to make the initial payment; obtained the funds and deposited them in the bank; but that on the first day of July, 1938, at the appointed time, defendant failed to appear and refused to accept payment from plaintiffs or to sign the contract in question. The complaint further averred that on said first day of July, 1938, plaintiffs learned that defendant had given an option to another party and had repudiated his agreement with plaintiffs, refusing to carry out the terms of the same or to proceed with the contract. By reason of defendant's alleged failure to proceed in accordance with the terms of the contract, plaintiffs sought damages for expenses necessarily incurred in connection with the preparation of the contract, loss of their investment in the Santa Monica amusement park, and deprivation of profits which were in prospect and would reasonably have accrued had defendant fulfilled the terms and conditions of the contract in question.

Defendant interposed a general demurrer to plaintiffs' complaint on the usual statutory grounds, and further demurred on the ground that the cause of action was barred by the provisions of section 1973a of the Code of Civil Procedure. The demurrer being overruled, defendant filed his answer, traversing all the material allegations of the complaint and setting up, as a separate defense, that the action was barred by the aforesaid code provision.

On March 6, 1939, the case proceeded to trial before the court sitting without a jury. Following completion of the trial, the court filed a written memorandum of decision made full and complete findings of fact upon the allegations of plaintiffs' complaint and the affirmative defense of defendant, and concluded that plaintiffs had sustained damage in the sum of $7,000, which they were entitled to recover from defendant. Judgment was accordingly entered April 3, 1939. Thereafter and within the time allowed by law, defendant filed a notice of intention to move for a new trial. This last-named motion was heard and submitted, whereupon the court, on May 24, 1939, made its written decision on motion for new trial, ordering the earlier judgment vacated and specifying particular changes or amendments to the findings, and ordered judgment for defendant. That judgment from which this appeal is taken was entered June 9, 1939.

In the first set of findings the trial court found that following negotiations between the parties they did, on or about June 28, 1938, orally agree upon the terms of sale of a fifty per cent interest in defendant's business to plaintiffs, and agreed that the latter should cause said terms to be reduced to writing as evidence of such agreement, said writing to be executed on July 1, 1938. The court further found that prior to reaching said agreement plaintiffs had operated a baseball park in the city of Santa Monica and owned certain necessary equipment therein which represented an investment in excess of $5,000, which amusement park was closed and the equipment therein disposed of solely by reason of the agreement made between plaintiff and defendant, and that by reason thereof plaintiffs suffered a loss of $800. It was further found that pursuant to the understanding of June 28, plaintiffs did prepare an agreement in writing setting forth all the terms theretofore agreed upon, and on July 1, deposited $6,000 in a bank for the purpose of making the initial payment; that defendant had agreed to meet with plaintiffs on July 1, sign the agreement and receive the initial payment thereunder, but that said defendant did not appear in conformity with his promise, did not execute the agreement, but on the contrary repudiated the same and each and every term thereof. The findings upon which the original judgment was predicated further found that plaintiffs had expended the sum of $128 as attorney's fees; that the approximate net gain of the defendant in operating the Los Angeles amusement parks in 1937 was in excess of $19,000; that the approximate net gain made by the defendant in the operation of the same parks in the year 1938 was slightly in excess of $10,000, and that by reason of defendant's repudiation of said contract plaintiffs suffered a loss in the sum of $7,000. Judgment for this amount was docketed and entered on April 4, 1939.

In the amended findings of fact and conclusions of law, upon which the instant judgment is predicated, the court found that in the first half of the year 1938 plaintiffs were operating a public baseball park in the city of Santa Monica; that they learned that defendant had for sale a fifty per cent interest in the two baseball parks owned and operated by him in the city of Los Angeles; that after the initial meeting of plaintiffs and defendant on June 19, the parties entered upon negotiations for the sale and purchase by plaintiffs of a fifty per cent interest; that these negotiations continued at frequent intervals from June 19 to about June 28, and that upon the last-mentioned date the parties orally agreed upon some terms of sale of said interest and agreed that plaintiffs should cause the terms then orally agreed upon, and such other terms as would or might be deemed necessary for a partnership working agreement, to be reduced to writing and the same to be executed by the parties as evidence of their agreement. It was further found that plaintiffs were to present such writing to the defendant on July 1, but that it was a part of the understanding of the parties that no term of the said oral negotiations should become effective until after execution of the proposed writing. In the last-named findings the court found that plaintiffs' Santa Monica investment exceeded $5,000, and that in reliance upon defendants' promise to execute a contract, plaintiffs agreed to and did close their Santa Monica amusement parks for the purpose of creating additional good will. It was further found that on June 28 the plaintiffs did cause to be prepared a writing setting forth the terms theretofore agreed upon and certain other terms essential to an operating partnership, and did on July 1, 1938, deposit in a bank $6,000 for the purpose of making an initial payment pursuant to the oral agreement; that on the last-mentioned date plaintiffs, pursuant to appointment theretofore made, appeared at the stated place for the purpose of making the initial payment of $6,000 and for the further purpose of executing and delivering the written agreement and of receiving assignments of a fifty per cent interest in the leases and in the enterprises operated by defendant; that plaintiffs were at all times ready and willing to do and perform each and every promise, term and condition of their oral agreement, but that defendant did not appear; that he did not sign the written agreement nor assign any interest in the enterprises to the plaintiffs. Paragraph VII of the last-named findings reads: "That by reason of the failure of the parties to reduce their agreement to writing in order to make the same binding, no damage has been suffered by the plaintiffs." The same findings also declared that neither of the plaintiffs entered into any duties or rendered any services in connection with the Los Angeles parks owned and operated by the defendant. As conclusions of law upon which the second judgment was rendered, the court concluded: "1. That no contract was entered into between said parties. 2. That assuming that the cause of action alleged by the plaintiffs is predicated upon an oral contract, said oral contract and said alleged cause of action are barred by the provisions of section 1624 of the Civil Code of the State of California and section 1973 of the Code of Civil Procedure of the State of California; that the said cause of action is barred by the provisions of section 1624a of the Civil Code of the State of California and section 1973a of the Code of Civil Procedure of the State of California." On June 9, 1939, judgment was entered for defendant, and it is from that judgment that plaintiffs prosecute this appeal.

[1-3] It is first contended by appellants that the final set of findings is wholly unsupported by the evidence. From a mere reading of the record on this appeal, we are impressed with the fact that the original findings are amply supported by the evidence and justified the statement made by the court in its original memorandum decision, wherein it was said: "So persuasive is the narrative recited by him (plaintiff Thomas A. Clarke) and so convincing are the proofs offered by him of the agreements arrived at that no doubt is left that he and Marty Fiedler definitely agreed upon the terms set forth in the writing which was to be executed." But notwithstanding the view we might take of the evidence, we are limtied in our consideration thereof to a determination solely of the question whether there is contained in the record evidence of sufficient substantiality to support the last-made findings and judgment, provided, of course, that the original findings and judgment were legally and lawfully set aside—a question we shall discuss and determine later in this opinion. We have examined the reporter's transcript in detail and find therein testimony, which, if believed by the court, would establish the fact that there never was any final and complete understanding between appellants and respondent herein that the latter was to sell to the former fifty per cent of his own interest in the Los Angeles amusement parks. We refer particularly to the testimony of respondent himself. He testified that it was true that he owned a fifty per cent interest in the parks, but that his two brothers owned the remaining fifty per cent. This witness admitted discussions with appellants concerning their acquiring an interest in the baseball parks, but throughout his testimony contended that appellants were negotiating for the purchase of the interest belonging to his brothers, neither of whom are parties to this litigation. While admitting that appellants showed him the proposed contract, he testified that he looked at it only casually, for the asserted reason that he considered it as a contemplated deal between appellants and respondent's two brothers. Respondent further testified that he agreed to only one thing, and that was his willingness to accept appellants as partners should they purchase the interest of his brothers. Had the court adopted respondent's version of the negotiations and the nature of the proposed written agreement, we would not be justified in disturbing his findings based thereon, because it is only when we can say that the testimony relied upon by the trial court to support its judgment is inherently improbable that we may disturb the findings; and in the last-mentioned case the issue becomes one of law. Our jurisdiction is limited to questions of law.

But it is at once apparent that the trial court was not impressed with the verity of respondent's testimony, because reference to the amended findings of fact discloses that the court found in favor of appellants on all of their contentions, including the claim that after weeks of conferences and negotiations, plaintiffs, with the consent of respondent, caused to be prepared a contract between the parties for the purchase of a fifty per cent interest in the baseball park venture; deposited the initial payment thereunder in a bank; and on July 1, 1938, "plaintiffs appeared at the Rector Hotel in the City of Los Angeles, pursuant to the arrangements made on June 30, 1938, for the purpose of making said payment of $6,000.00 to the defendant and for the purpose of executing and delivering said writing and of receiving the assignments of said fifty per cent interest in said leases and in the enterprises operated in said parks; that plaintiffs on said July 1st were ready willing and able to do and perform each and every promise, term and condition of their oral agreement and did then and there offer so to do; but that defendant did not appear at said hotel; that he did not meet plaintiffs at any place; that he did not receive said payment; that he did not assign the interest in said enterprises to the plaintiffs; that he did not assign any interest in the said leases; that he did not execute said writing, but on the contrary refused to enter into or execute said proposed agreement".

[4-7] We are therefore called upon to determine whether the finding "that by reason of the failure of the parties to reduce their agreement to writing in order to make the same binding, no damage has been suffered by the plaintiffs" is supported by the evidence. If we disregard, as the trial court did, the testimony of respondent that there were never any negotiations to purchase his interest and that the deal was exclusively between appellants and the brothers of respondent, then we have no hesitancy in saying that the proof is overwhelming and without any creditable contradiction that respondent accepted the written contract on the night of June 30 and agreed to meet on July 1 for the purpose of signing the same and to receive the initial payment thereunder. Having thus assented to the terms and conditions of such contract, respondent is bound by them, and the court should have so found under the evidence herein. The testimony clearly shows that respondent at no time expressed an intention not to be bound until the writing was executed, but his every act and declaration was to the contrary. After all, the formal written contract is not the agreement of the parties, but only evidence of that agreement. The oral agreement between the parties, which left nothing to be done other than to sign the writing and to pay over the initial payment, fully met the requirements of sections 1550 and 1565 of the Civil Code, and therefore constituted a valid and binding contract. In all the cases cited by respondent it appears from the facts thereof that the parties therein understood that their agreement was not to become binding upon any of them until evidenced by the written form; and under those circumstances, of course, their understanding does not become a binding agreement until it is reduced to writing and signed by the parties to it. However, where, as in the instant case, the contract is of such a nature that the law does not require it to be in writing, and it is conceded that a contract of partnership may be oral, and where the terms of the contract are definitely agreed upon and complete, then the fact that contemporaneously with the making of their full and complete oral agreement, they decide to evidence the same by a written instrument, the force and effect of the oral agreement is not thereby impaired or interfered with. We believe this rule to be sound and that it should be so held in the present case. The reason for the rule is thus aptly stated in Sanders v. Pottlitzer Bros. Fruit Co., 144 N.Y. 209, 39 N.E. 75, 76, 29 L.R.A. 431, 43 Am.St.Rep. 757: "Any other rule would always permit a party who has entered into a contract like this, through letters and telegraphic messages, to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commerical business. * * * If the parties did not become bound in this case, they cannot be bound in any case."

See, also, Pratt v. Hudson River Railroad Co., 21 N.Y. 305, 308, where it was said: "A contract to make and execute a certain written agreement, the terms of which are * * * mutually understood, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear * * * that the minds of the parties had met; that a proposition for a contract had been made by one party and accepted by the other; that the terms of this contract, were, in all respects, definitely understood and agreed upon, and that a part of the mutual understanding, was, that a written contract, embodying those terms, should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform. * * *"

When, as here, the evidence indisputably shows that all the terms and conditions of the understanding between the parties were definitely agreed upon and the written memorial thereof itself accepted, though not signed, the parties are bound.

[8,9] Appellants' contention that the trial court was without power to alter its

findings and completely to reverse its prior judgment cannot be sustained. Under the broad power conferred upon the court in this regard by section 662 of the Code of Civil Procedure, the trial court was empowered, in ruling upon the motion for a new trial, if it deemed itself mistaken as to its previous view of the evidence or in the application thereto of the law, to set aside the previous findings and the judgment predicated thereon. Spier v. Lang, 4 Cal.2d 711, 714, 53 P.2d 138; Wyman v. Monolith Portland Cement Co., 3 Cal.App.2d 540, 545, 39 P.2d 510. The case of Jones v. Clover, 24 Cal.App.2d 210, 74 P.2d 517, relied upon by appellants, is not in point here. That case deals only with the power of the court under section 663 and 663a of the Code of Civil Procedure. The power of the court under section 662 was neither discussed nor decided. The original judgment herein having been vacated by a duly entered minute order within the sixty-day period prescribed by section 660 of the Code of Civil Procedure, the court was authorized to file new findings and judgment, and it was not required that such new findings be limited to those expressly referred to in the valid minute order setting aside, within the statutory time, the original findings and judgment. By its last-named order the court was authorized to adopt findings and enter such judgment as in its opinion correctly determined the issues raised by the pleadings and presented by the evidence.

[10-14] We come now to a consideration of respondent's claim that the judgment must be affirmed because the alleged agreement provides for the sale of goods and choses in action of the value of $500, as well as for the sale of an interest in real estate, and hence is within the statute of frauds. Subdivisions 1 and 4 of section 1624, section 1624a and section 1724 of the Civil Code; sections 1973 and 1973a of the Code of Civil Procedure. The agreement before us was for the creation of a present partnership in a going business, and not in a business to begin at some future time. The contract, creating as it did an immediate partnership, was a contract which was to be performed at once and without any delay. Though we concede that certain property constituted a portion of the assets of the going business, nevertheless the partnership contract did not contemplate the transfer of such property from one party to the other, because the interest of one partner in the assets of the partnership does not entitle him to any particular portion of such assets, but merely confers upon him a right to an accounting with the other members of the partnership, and when the affairs of the partnership are settled, such partner shall receive the share to which he is entitled. Until the affairs of the partnership are wound up and settled the claims of the respective partners are, strictly speaking, equitable, because the only way such claims can be enforced is through an equitable action for an accounting.

The agreement with which we are here concerned therefore cannot be said to contravene the provisions of the statute of frauds. As to the duration of the partnership the agreement is silent, and no evidence on that subject was introduced at the trial. The partnership was therefore one at will. The period of the leasehold interest belonging to the partnership is no criterion for determining the duration of the partnership. Unless such be recognized as the rule, it would mean that should a partnership own or acquire a fee simple, there would be a never-ending partnership. Manifestly such is not the law.

[15] Holding as we do that the action of the trial court in setting aside the original findings and judgment was within its prerogatives and power under section 662 of the Code of Civil Procedure, we are not authorized to direct the reinstatement of such findings and judgment, but are limited to reversing the final judgment because we conclude that the findings upon which it is predicated are not supported by the evidence. It therefore becomes unnecessary to pass upon the claim that the damages awarded by the first judgment were excessive.

The judgment from which this appeal was taken is reversed and the cause remanded for a new trial.

We concur: YORK, P. J.; DORAN, J.

In re KING'S ESTATE.

Civ. 6544.

District Court of Appeal, Third District, California.

May 15, 1941.

Hearing Granted July 11, 1941.

1. Executors and administrators 🔑497

Under will directing executors to care for testator's horses and cattle until they could be disposed of to good advantage, which might be within about a year from date of will, court properly awarded executrix $2,000 as extra compensation for carrying on cattle business, where, within a year after testator's death, executors were authorized by court order to continue stock business, and stock appraised at $16,950 was eventually sold for $29,008.45. Probate Code, § 572.

2. Wills 🔑801

The fact that testator's widow elected to take under rules of succession rather than under provisions of will did not abrogate provision of will directing executors to care for testator's livestock until it could be disposed of to good advantage.

3. Executors and administrators 🔑91

An executor with or without court order has duty to take charge of property of estate and preserve it in as good condition as is reasonably possible pending administration.

4. Executors and administrators 🔑497

In determining whether executrix was entitled to additional compensation for caring for testator's horses and cattle pending administration of estate, court was required to presume that stock was properly cared for, that expense of doing so was necessarily incurred, and that stock was sold as promptly as necessary for best interests of estate.

5. Executors and administrators 🔑497

Under provision of Probate Code prior to 1939 amendment authorizing allowances to an executor or administrator for special services, court was authorized to allow executrix additional compensation for feeding and care of horses and cattle belonging to testator's estate. Probate Code, § 902.

6. Executors and administrators 🔑93(1)

Although ordinarily it is not duty of executor to carry on testator's business during administration of estate, executor may do so when authorized by will or where necessary for preservation of estate.

7. Executors and administrators 🔑497

The amount of extra compensation to executor for carrying on testator's business pending administration of estate is matter within sound discretion of probate judge.

8. Executors and administrators 🔑501

The amount of extra compensation awarded to executor for carrying on testator's business pending administration of estate will not be disturbed on appeal unless it was improperly allowed or clearly appears to be excessive.

9. Executors and administrators 🔑501, 510(6)

The right of appeal from order settling first and final account and allowing executrix extra compensation for caring for livestock was waived by failure to give notice of appeal within 60 days from time of settlement of account. Probate Code, § 1240; Code Civ. Proc. § 939.

10. Executors and administrators 🔑501, 510(8)

Where no appeal was taken from order settling executor's first and final account and allowing extra compensation for carrying on livestock business, the propriety of such allowance could not be reviewed on subsequent appeal from order settling such account and making distribution of estate. Code Civ. Proc. § 939; Probate Code, § 1240.

11. Executors and administrators 🔑173

The right of widow to receive a family allowance pending administration of estate is purely statutory. Probate Code, §§ 680, 750.

12. Executors and administrators 🔑181

The provision of Probate Code that, if property designated by will as source of money for family allowance pending administration of estate is insufficient, the obligation shall be made a charge against that portion of estate not disposed of by will, does not apply where testator has made no provision in his will for a family allowance. Probate Code, § 750.

13. Executors and administrators 🔑181

Under provision of Probate Code authorizing a family allowance for maintenance of widow and minor children, the allowance is treated as a part of cost of administration of estate and becomes a charge against any available assets of estate. Probate Code, § 680.

14. Executors and administrators ⚷181

The family allowance granted widow pending administration of estate was not required to be paid from community interests of testator and his widow, but was properly charged against assets of estate without regard to whether they constituted community or separate property. Probate Code, §§ 300, 680.

15. Wills ⚷801

Where will devised named ranch to testator's widow and purported to dispose of all of separate and community property, but contained no residuary clause, widow, upon renunciation of will, was entitled to her interest in community property, and to entire interest in named ranch as community property undisposed of by will by virtue of her renunciation thereof. Probate Code, § 201.

16. Wills ⚷801

A widow repudiating will is entitled to benefits of statutes of succession as fully and completely as though there was no will. Probate Code, § 201.

17. Executors and administrators ⚷88

Where unpaid matured notes executed by one of testator's sons to testator did not outlaw until after son qualified as coexecutor of estate, the notes became chargeable to coexecutor as cash on hand and were properly charged, together with accumulated interest thereon, against his distributive share of the estate. Probate Code, § 602.

18. Executors and administrators ⚷88

An executor, by virtue of his fiduciary relationship, is not only chargeable with principal sum of note owing by him to deceased if it is not outlawed before he accepts that trust, but he is chargeable with interest due thereon as cash in his hands. Probate Code, § 602.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Proceeding in the matter of the estate of Frank J. King, deceased, who left surviving him his widow, Josephine King, and two sons, Frank A. and William H. King. From an order settling the executor's final account and directing distribution of the estate, Frank A. King and William H. King appeal.

Affirmed.

Carter, Barrett & Carlton, of Redding, for appellants.

George R. Freeman and Elmer Laine, both of Willows, for respondent.

PER CURIAM.

Two sons of Frank J. King, deceased, have appealed from the order settling the final account and directing distribution of his estate. The appellants also seek to review a previous order settling the first annual account of the executor, from which no appeal was taken.

It is contended the court erred in allowing the executrix extra compensation for services in conducting a cattle business during administration; that the compensation was wrongfully charged against both separate and community property of the estate; that the expenses of administration were improperly apportioned; that the community interests of the deceased in certain real and personal property were illegally distributed to the widow, and that Frank A. King, was wrongfully charged as a coexecutor with the appraised value as cash on hand, of two matured notes which he owed the deceased.

Frank J. King died testate, December 12, 1936, at San Francisco, leaving surviving him, his widow, Josephine King, two sons, Frank A. and William H. King, and a brother named George W. King. He left a will dated September 26, 1936, by the terms of which he appointed his widow and his son Frank as coexecutors. The will purported to dispose of his entire separate property and of all the community property belonging to himself and wife. He willed specific real and personal property to each of his heirs. He devised to his widow the Peterich ranch, consisting of 314 acres of land, and he bequeathed to her a legacy of $10,000 and one-third of the proceeds from the sale of 565 head of cattle which he possessed. He directed the executors to care for the horses and cattle until they could be disposed of to good advantage, which he said might be within "about one year from the date of the will".

The will was admitted to probate in Glenn county. Letters testamentary were issued to Josephine King and Frank J. King, February 16, 1937. The estate was appraised at

$49,142.33. The inventory included two unpaid notes executed by Frank A. King and payable to his father, both of which were matured. One note was for $4,328.10, upon which unpaid interest was then due in the sum of $1,363.83. That note was appraised at $5,691.93. The other note was appraised at $600. The cattle and horses were appraised at $16,950. A portion of the horses and cattle were sold to Moffett Company, July 12, 1937, for $16,776.20. Upon petition therefor, under section 572 of the Probate Code, the court authorized the continuation of the cattle business until the stock could be sold to advantage. The following January the balance of the cattle were sold to Mr. Zumwalt for $12,232.25. The total receipts from the sale of horses and cattle was $29,008.45. The cattle business was conducted at a substantial profit to the estate.

The widow renounced her right to inherit property from the estate of her husband according to the terms of his will, and upon the contrary elected to take her share of the property pursuant to the rules of succession. The executor's first annual account was settled and approved October 21, 1938. In that account the widow was allowed $2,000 extra compensation, to be paid from the assets of the estate. The order making that allowance and settling the account was entered October 21, 1938. No appeal was taken from that order and it became final. Upon application therefor the court also made an award of $100 per month to the widow for a family allowance during the process of administration.

The final account was settled and distribution of the property of the estate was made and entered September 12, 1939. At that time the assets of the estate were marshaled and the expenses of administration were properly apportioned against the respective devisees, legatees and heirs in the proportions ascertained from the appraised valuations of the distributive shares received by each one. Besides the several ranches and other personal property on hand for distribution, there was $35,090.37 in cash, received from the sales of horses and cattle and from other sources. The costs of administration were $12,277.53. The portion of the costs assessed against the widow was the sum of $5,295.09.

All of the cash on hand, the two notes and the three ranches which are involved on this appeal, are community property. Those farms were called respectively the "Peterich Ranch", the "Edgewood Ranch", and the "Magoffey Ranch". By the terms of the will the Peterich ranch was devised to the widow, together with a legacy of $10,000, one-third of the proceeds from the sales of horses and cattle, and whatever residue remained after the debts and expenses of administration had been paid. The will gave to Frank A. King the Edgewood ranch, the Magoffey ranch, together with some other property, and a third of the proceeds from the sales of cattle and horses.

Having elected to inherit her share of the estate according to the rules of succession, there was distributed to Josephine King the Peterich ranch, consisting of 314 acres of land, an undivided one-half interest in the Edgewood ranch, one-third interest in the Magoffey ranch, one-half interest in two small notes and cash in the sum of $12,930.37, all of which properties distributed to her were her community share thereof, except that she took the entire Peterich ranch under section 201 of the Probate Code, as community property which was not disposed of by will on account of her renunciation of that instrument.

In the decree settling the final account and directing distribution to be made, the court charged Frank A. King with the appraised value of the two matured notes as cash in his hands as a coexecutor, aggregating the sum of $6,854.46, which he owed to the estate. From that decree settling the final account and directing distribution of the estate to be made, Frank A. King and his brother William have appealed.

[1, 2] We are of the opinion the allowance of $2,000 as extra compensation for carrying on the cattle business was properly awarded. The will specifically authorized the executors to retain the cattle and horses for a period of "about one year from the date of the will", and they were directed to sell them when it was most advantageous to do so. That provision necessarily infers that the business of carrying on the cattle enterprise for a period of at least one year was authorized by the testator. The fact that the widow elected to inherit her share of the estate in accordance with the rules of succession rather than under the provisions of the will, in no way abrogated the independent authorization of the testator to carry on the business until the cattle could be sold to advantage. That provision of the will is nevertheless valid and binding. The fourth clause of the will provides in that regard: "I direct that my executors sell the cattle and horses on the ranch near Fruitc *as soon as they are in condition to be sold,*

which should be *about one (1) year from the date of this will.*"

The will was dated September 26, 1936. On July 12, 1937, a portion of the cattle and horses were sold to the Moffett Company for $16,776.20. On October 8, 1937, before the year had expired, the court made an order under section 572 of the Probate Code, authorizing the executors to continue the stock business. The following January the balance of the cattle were sold to Mr. Zumwalt for $12,232.25. There is no evidence the stock could have been sold to advantage before they were actually disposed of. Evidently the business was conducted at a profit, for the horses and cattle were appraised at $16,950. They were sold for the total sum of $29,008.45.

[3, 4] It is the duty of an executor, with or without an order of court, to take charge of the property of an estate and to preserve it in as good condition as is reasonably possible pending administration. Estate of Fulmer, 203 Cal. 693, 265 P. 920, 58 A.L.R. 430; Estate of Freud, 131 Cal. 667, 63 P. 1080, 82 Am.St.Rep. 407; Estate of Smith, 118 Cal. 462, 50 P. 701; 11 B Cal. Jur. 250, sec. 842; 2 Bancroft's Probate Pr., 682, sec. 359. In the absence of evidence to the contrary it must be presumed the stock was properly cared for; that the expense of doing so was necessarily incurred, and that the horses and cattle were sold as promptly as was for the best interest of the estate. The court so found. There is evidence to support the finding that these duties were performed.

[5] The court was authorized under section 902 of the Probate Code, as it existed prior to the amendment of that section in 1939, to allow additional compensation for the feeding and care of 565 head of horses and cattle belonging to the estate. That section then provided in part: "Such further allowances may be made as the court may deem just and reasonable for any extraordinary services, such as * * * the carrying on of the decedent's business pursuant to an order of the court, and *such other * * * special services as may be necessary for the executor or administrator to prosecute, defend or perform.*"

[6] It is said in Riedy v. Bidwell, 70 Cal.App. 552 at page 555, 233 P. 995, at page 996, there is an exception to the general rule that it is not ordinarily the duty of an executor to carry on the business of the testator during the administration of his estate. That exception exists "where the will of the testator expressly creates the power so to do, or where the carrying on of a business would be cast upon the executor as a necessary means for the preservation of the estate".

An allowance of compensation for extraordinary services performed by an administrator with the will annexed, for carrying on a farming enterprise of the deceased, was affirmed by the Supreme Court in the case of Estate of Broome, 162 Cal. 258, 122 P. 470, 472. It is there said: "It is well settled, as a general rule, that if an executor or administrator, in the course of his administration, renders to the estate services not ordinarily required or expected of him, he is not entitled to special compensation therefor, *unless it is so provided by statute or by the will under which he acts.*" 11 B Cal.Jur. 269, sec. 859; Estate of Ward, 127 Cal.App. 347, 15 P.2d 901.

Where a continuation of the business of a deceased person during administration results in a profit to the estate, it has frequently been said the executor is entitled to extra compensation therefor, even though he voluntarily assumes to perform that service. 11 B Cal.Jur. 270, sec. 860; 2 Bancroft's Probate Pr. 788, sec. 419. In the text last cited it is said: "Likewise, for management of farm operations, because of the chance of loss to the estate and personal liability on the part of the representative, *extra compensation may be allowed.*"

In the text of 11 B Cal.Jur., supra, it is said in that regard: "When the representative does assume the management of the estate beyond his duty, his services are extraordinary entitling him to compensation according to their worth as a balance to the accountability which he assumes, and he is entitled to reimbursement for proper and beneficial expenditures."

[7, 8] When extra compensation is allowable for such service, the amount which is proper to fix is within the sound discretion of the probate judge. Estate of Broome, supra. The amount of extra compensation which has been awarded will not be disturbed on appeal unless it is improperly allowed or clearly appears to be excessive. In the Broome case it is said in that regard: "Where serious question arises, either over the character of the service or the value of the service to the estate, this court under familiar principles, will be reluctant to disturb the determination of the judge in probate. So, also, will it be reluc-

tant to disturb an order fixing the amount of compensation where extraordinary services are found to have been rendered."

[9, 10] Moreover the appellants waived their right of appeal from the order allowing extra compensation, by their failure to give notice of appeal therefrom within sixty days from the time of the settlement of the account as provided by section 939 of the Code of Civil Procedure. Sec. 1240, Probate Code; sec. 939 Code. Civ.Proc.; 11 A Cal.Jur. 218, sec. 142; 3 Bancroft's Probate Pr., p. 1188, sec. 999. October 21, 1938, the probate court made and entered its order settling the executor's first and final account. That order specifically found that Josephine King performed valuable services feeding and caring for the cattle; that her special services were worth $2,000, and thereupon allowed extraordinary compensation in that amount. The decree settling that account, which included the order awarding the widow extraordinary compensation, became a final judgment from which an appeal must be taken within sixty days therefrom. Sec. 939, Code Civ.Proc.; sec. 1240, Probate Code. No appeal was taken from that decree of October 21, 1938, and we may therefore not review its validity on this appeal. The notice of appeal in this case is from the order settling the final account and making distribution of the estate only, which was made and entered September 12, 1939.

We find no merit in the appellants' contention that the business of operating the stock ranch was conducted at a loss. In settling the account the court specifically found that it was conducted at a profit. The decree recites in that regard: "A rough analysis of the account will indicate that the inventory value of the cattle, plus all the expenses of feeding and keeping them, is several thousand dollars less than the assets derived from the sale of the same."

That finding appears to be amply supported by the record. We are directed to no evidence to the contrary.

The appellants contend that the court erroneously directed payment of the family allowance, which was previously granted to the widow under section 680 of the Probate Code, to be charged against the "devisees and legatees in the proportions that they respectively share in the properties, both community and separate", upon final distribution. It is asserted the entire amount of family allowance granted to the widow is required to be paid from the *community interests* of the deceased and his widow. We think not.

[11, 12] The right of a widow to receive a family allowance, pending the administration of the estate, is purely statutory. Hills v. Superior Court, 207 Cal. 666, 279 P. 805, 65 A.L.R. 266; 11 A. Cal.Jur. 505, sec. 367; 21 Am.Jur. 560, sec. 314; 24 Cal.Jur. 230, sec. 758. The will may direct that a specified sum of money for family allowance shall be paid *from particularly designated property*. Sec. 750, Probate Code. The section last mentioned provides that if the designated property "is insufficient" in value from which to pay the family allowance, the obligation shall be made a charge against "that portion of the estate not disposed of by the will". It is further provided that if such designated property is not sufficient for that purpose "the property given to residuary legatees and devisees [shall be resorted to], and thereafter all other property devised and bequeathed is liable for the same, in proportion to the value or amount of the several devises and legacies, but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate".

The preceding section has no application to the present case for the reason that the testator made no provision in his will for family allowance, and designated no property from which it was to be paid.

[13] Since section 680 of the Probate Code authorizes the granting of family allowance for the maintenance of the widow and minor children and neither the will nor a statute designates the class of property from which it must be paid, it reasonably follows that the family allowance under such circumstances becomes a charge against any available assets of the estate. That construction is supported by uniform authorities. A family allowance is ordinarily treated as a "part of the cost of administration". 24 C.J. 231, sec. 758. In 21 Am.Jur. 563, sec. 320, it is said: "The allowance to a decedent's widow is normally payable *out of the assets of his estate.*" In Estate of Finch, 173 Cal. 462, at page 464, 160 P. 556, at page 557, it is said: "Her right to an allowance as such is, as we have stated, founded on the statute (sections of the Code of Civil Procedure, supra) and does not accrue to the widow until the death of her husband. Under these sections the surviving wife is then given the right

to have a reasonable allowance made by the court for her support from the estate of her deceased husband *whether the estate was community property or his separate estate and irrespective of whether the widow has estate of her own out of which she might support herself.*"

Section 300 of the Probate Code specifically provides that: "All of his property shall be subject to the possession of the executor or administrator and to the control of the superior court for the purposes of administration * * * *and shall be chargeable with the expenses of administrating his estate, and the payment of his debts and the allowance to the family,* except as otherwise provided in this code."

That construction of the statute was so declared in the case of Estate of Haselbud, 26 Cal.App.2d 375, 79 P.2d 443, in which a hearing by the supreme court was denied. In accordance therewith the syllabus of that case says in that regard: "Debts which constituted part of the obligations of the estate * * * *as well as family allowance* and expenses of administration *were to be borne ratably by the community and separate property of the decedent.*"

A contrary construction of the statute might result in charging the obligation of an estate to pay family allowance to a widow against her own community interest in the property. That construction is opposed to the policy of the law with respect to family allowances. In the headnote to an exhaustive brief on that subject, found in 98 A.L.R., at page 1326, it is said: "It appears, however, that with some exceptions, it has been generally held that where there is provision for but one form of allowance for the widow, this will not be deducted from her distributive share of her husband's estate."

[14] We conclude that, under the circumstances of this case, the court properly held that the family allowance was chargeable to the assets of the estate without regard to whether it consists of community or separate property of the decedent.

[15] The appellants contend that the court wrongfully distributed to Josephine King, the widow of the deceased, the entire Peterich Ranch and one-half interest in two small notes, together with cash in the sum of $12,930.37. It is asserted that her renunciation of the will entitled her to inherit only her community interest in the real and personal property. We do not agree with that construction of the law. Section 201 of the Probate Code provides that: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and *in the absence thereof goes to the surviving spouse,* subject to the provisions of sections 202 and 203 of this code."

Sections 202 and 203, referred to in the preceding section, have no application to the circumstances of this case. We construe section 201, supra, to mean that upon the death of one spouse, the surviving one is the absolute owner of one-half of the community property, both real and personal, and that if the one-half interest belonging to the deceased is not disposed of by will, the entire property goes to the survivor subject to the provisions of sections 202 and 203 of the Probate Code. All of the property involved on this appeal is community property. That fact is not disputed. When the widow renounced the will, the Peterich Ranch and the other community property which were devised and bequeathed to her were deemed to be undisposed of by that instrument. There was no residuary clause of the will in favor of any other heir. By virtue of the widow's renunciation of the will, her husband's effort to devise or bequeath to other heirs her community interest in the property became ineffectual and void to the extent of her community interest therein. She was absolutely entitled to her community share of the property, plus the entire interest of her husband in any such property which was undisposed of by the will. The Peterich Ranch belonged to the character of the property last mentioned. It was undisposed of by the will, after the widow's renunciation, and she was therefore entitled to the entire ranch. She received only her one-half community share of other property of the estate. The result of the marshaling of the assets of the estate discloses that fact.

[16] It has been definitely determined that when a widow repudiates the will of her deceased husband, she is entitled to the benefits of the statutes of succession as fully and completely as though there was no will. Estate of Bump, 152 Cal. 274, 92 P. 643; 11 A Cal.Jur. 513, sec. 373; 1 Bancroft's Probate Pr., 1324, sec. 740. Section 201, supra, declares that the widow, under such circumstances, is entitled to her deceased husband's entire share of the community property. Estate of Arms, 186 Cal. 554, 199 P. 1053.

There is nothing in the case of Williams v. Williams, 170 Cal. 625, 151 P. 10, upon which the appellants rely, in conflict with what we have previously said regarding the widow's right to the community property which is undisposed of by will.

[17] The court properly charged against the distributive share of the estate received by the executor, Frank A. King, two unpaid matured promissory notes executed by him to the deceased in his lifetime. The notes were included in the inventory as assets of the estate. The appellants contend that these notes were barred by the statute of limitations, and that they were therefore erroneously charged to the distributive share of the maker of the notes.

September 5, 1930, for value received, Frank A. King and Grace V. King, executed and delivered to the deceased, Frank J. King, their note for $1,200, payable five years after the date thereof. It was never paid. It became a part of the assets of the estate in the hands of Frank A. King, one of the makers thereof, as a co-executor of the will of the deceased. It was due and was appraised at $600. It did not outlaw until February 6, 1939. Frank A. King qualified as executor February 16, 1937. The note was in his hands as an executor of the estate for two years before it outlawed.

On November 25, 1932, for a valuable consideration, Frank A. King executed and delivered to his father another note for $4,328.10, due one year after the date of execution. It was secured by a mortgage on real property. The note was never paid. That note did not outlaw until November 26, 1937. It was also in the hands of the maker, as executor, for about three months before it would outlaw.

Section 602 of the Probate Code charges an executor with obligations which he owes to the testator "as for so much money in his hands". It provides that such debts shall be included in the inventory, and that the executor is liable therefor. That section reads: "The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same as for so much money in his hands, when the debt or demand becomes due."

The notes executed by the executor which were due and payable, and in his hands as assets of the estate before they were outlawed, become chargeable to him as cash on hand, and they were therefore properly charged, together with the accumulated interest thereon, against his distributive share of the estate. Estate of Clary, 203 Cal. 335, 264 P. 242; Estate of Miner, 46 Cal. 564; Estate of Jones, 115 Cal.App. 664, 2 P.2d 483; Treweek v. Howard, 105 Cal. 434, 39 P. 20; 11 B Cal.Jur. 554, sec. 1100. In the opinion which was rendered in the Estate of Clary, supra [203 Cal. 335, 264 P. 244], it is said: "When Charles M. Clary on the 6th day of December, qualified as an executor of the last will and testament of Abraham E. Clary, deceased, he became a voluntary trustee of the property and assets of the estate of Abraham E. Clary, deceased, holding the same for the benefit of the devisees and legatees, under the terms of the last will and testament of Abraham E. Clary, deceased. Thus, as pointed out in 16 California Jurisprudence, p. 420 et seq., sections 30 to 37, the rule is that the statute of limitations does not run where the parties occupy a fiduciary relationship toward each other, so long as such relationship is not repudiated."

Quoting with approval from the case of Minifie v. Rowley, 187 Cal. 481, 202 P. 673, the Clary opinion further says: "As a necessary consequence [of a fiduciary relationship], if defendant Forrest S. Rowley owed the ten thousand dollars here in controversy on June 3, 1915, when he became executor, he became chargeable with that sum as for so much money in his hands and continued liable therefor, *irrespective of the running of the period of the statute of limitations* against the debt itself by reason of the change in the character of his obligation due to his intervening fiduciary capacity."

Commenting on the preceding language the court said in the Clary opinion: "It means that, irrespective of the lapse of time which would ordinarily bar an action upon the note, the executor, by reason of his fiduciary capacity, becoming chargeable with the note in his hands as so much money, is in that capacity, precluded from pleading the bar of the statute, and therefore, so long as the trust relation continues, the statute does not run."

[18] It has been held that an executor, by virtue of his fiduciary relationship, is not only chargeable with the principal sum of a note which he owes to the deceased, if it is not outlawed before he accepts that trust, but he is also chargeable with the interest due thereon, as cash in his hands.

Estate of Miner, 46 Cal. 564; 11 B Cal. Jur. 556, sec. 1100. In Estate of Miner, supra, the court says with respect to the obligation of the executor to pay both principal and interest of a note which he owes to the deceased: "We think there was no error in charging the administrator with the amount of his own note and the stipulated interest. It is a debt due to the estate and has never been paid. The money has remained in his hands, not separated or set apart from his private funds or been devoted to the uses of the estate. Under what circumstances an administrator will become liable to pay interest is discussed in the Matter of the Estate of Mary McQueen, 44 Cal. 584, and upon the principles settled in that case we think the administrator cannot escape the payment of interest."

The decree settling the final account and making distribution of the estate is affirmed.

WEST KEY NUMBER SYSTEM

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44 Cal.App.2d 798

JONES et al. v. PLEASANT VALLEY CANAL CO. et al. (WARDLAW et al., Interveners).

Civ. 6319.

District Court of Appeal, Third District, California.

May 15, 1941.

Hearing Denied July 11, 1941.

1. Trial 🔑404(2)

In suit to quiet title to water rights, ultimate findings that plaintiffs' rights were not prior in time or paramount to those of defendant appropriators or, with certain reservations, to those of defendant riparian owners, and that interveners' rights were not prior in time or paramount to those of defendants, were not "conclusions of law", especially where findings were in accord with issues raised by pleadings.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

2. Trial 🔑404(5)

A determination of all probative facts necessary to sustain ultimate fact findings was implied in such findings.

3. Trial 🔑404(5)

Where trial court, in suit to quiet title to water rights, made ultimate findings that plaintiffs' rights were not prior in time to those of defendant appropriators or, with certain reservations, to those of defendant riparian owners and that interveners' rights were not prior in time to those of defendants, that appropriations by defendant were first in point of time and that diversions as against riparian owners were made on land then belonging to United States were, under circumstances, among probative facts upon which trial court impliedly made a determination. Civ.Code, § 1414.

4. Appeal and error 🔑1011(1)

Where findings of ultimate facts, carrying by implication a determination of probative facts, were founded on conflicting evidence, appellate court could not disturb findings on appeal if there existed in record substantial evidence to support them.

5. Waters and water courses 🔑152(8)

Evidence supported trial court's conclusions in suit to quiet title to water rights.

6. Appeal and error 🔑1010(1)

Where evidence supported trial court's conclusions, it was not within appellate court's province to interfere with such conclusions.

7. Waters and water courses 🔑152(10)

In suit to quiet title to water rights, the ultimate fact to be found by trial court was as to respective rights of parties and not as to how such rights were acquired.

8. Appeal and error 🔑1071(1)

Immaterial conflicts in findings would be disregarded on appeal where judgment was supported by findings based on evidence sustaining such findings.

9. Appeal and error 🔑1071(5)

If inconsistent theories are relied upon at trial, and evidence to support a finding on either theory appears in record on appeal, findings on the other theory may be disregarded as "surplusage".

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

10. Appeal and error 🔑931(1)

On appeal, findings will be so construed as to uphold the trial court's judgment.

11. Waters and water courses 🔑152(8)

In suit to quiet title to water rights, substantial evidence that there had been a long-continued use of a specified quantity of water from a river by defendants created a presumption that such use was necessary and beneficial.

12. Pleading 🔑427

Where suit to quiet title to water rights was tried on theory that statute of limitations and adverse user were in issue as to all defendants, and no objection was made to introduction of evidence to support such theory, and there was no attempt to limit evidence to those defendants who had pleaded statute, trial court was authorized to find upon issue whether plaintiffs' cause of action was barred by limitations, even though such issue was not directly tendered by pleadings, especially where plaintiffs introduced evidence on issue and were not misled by failure of some defendants to plead statute. Code Civ.Proc. §§ 318, 319, 321.

13. Waters and water courses 🔑152(11)

In suit to quiet title to water rights, failure to limit award to defendant appropriators to maximum amounts in acre feet per year, in addition to fixing amounts in cubic feet per second, was not reversible error and did not render judgment objectionable on ground of uncertainty.

14. Waters and water courses 🔑152(11)

That a judgment in suit by downstream appropriators against upper riparian owners to quiet title to water rights failed to establish quantity of water which upper owners might divert from river was not ground for complaint by downstream appropriators, where judgment determined extent of appropriators' rights.

15. Waters and water courses 🔑152(11)

Where judgment in suit by downstream appropriators against upper riparian owners to quiet title to water rights determined extent of appropriators' rights but failed to establish quantity of water which riparian owners might divert from river, judgment did not violate constitutional provisions providing that the right to the use or flow of water in or from natural streams shall be limited to such water as is reasonably required for beneficial use to be served. Const. art. 14, § 3.

16. Waters and water courses 🔑152(12)

Where trial court's findings in suit to quiet title to water rights determined that plaintiffs' rights were paramount to those of codefendant against whom default was entered but judgment subordinated plaintiffs' rights to those of codefendant, on plaintiffs' and interveners' appeal, judgment would be modified by adding thereto a provision that codefendant had no right to water of river and was restrained from interfering with flow of river in any manner so as to prevent parties to suit from exercising any right which they had under terms of judgment.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Suit by Claude M. Jones and others against Pleasant Valley Canal Company and others to quiet title to water rights, wherein J. A. Wardlaw and others intervened. From an unsatisfactory judgment, plaintiffs and interveners appeal.

Judgment modified and affirmed.

Adolph Feierbach, of Visalia, and J. A. Wardlaw and R. V. Wardlaw, in pro. per., for appellants.

Farnsworth, Burke & Maddox, James K. Abercrombie, and John F. Downey, all of Visalia, John Preston King, of Lindsay, and Russell & Heid, of Tulare (Neil M. Ruge, of Tulare, of counsel), for respondents.

HELD, Justice pro tem.

This action involves certain water rights on Tule river, a large natural water course having its source in the Sierra Nevadas in the easterly portion of the county of Tulare, in this state, and flowing thence in a general westerly direction in its natural channel in the direction of and into Tulare lake, in the county of Kings.

The plaintiffs, Claude M. Jones, W. W. Slayden, and Emma Akin, claiming ownership as tenants in common of a certain water ditch leading from the south side of Tule river in a general westerly and southwesterly direction for a distance of approximately four miles, together with the right to divert from Tule river, by means of said ditch, five cubic feet of water per second, commenced this action, in form to quiet title, on August 18, 1926. The ditch so claimed by plaintiffs has been variously known as the Crabtree-Akin ditch, the Osborn-Crabtree ditch, and the Jones-Slayden ditch. The water right claimed by plaintiffs is based upon appropriation, and is known as the Osborn-Crabtree right.

On December 30, 1929, a complaint in intervention was filed, in which the interveners in various groups claimed ownership to certain ditches leading from Tule river, together with certain appropriative water rights, as follows:

J. A. Wardlaw, R. V. Wardlaw, D. D. Hoag, and Lillian F. Hollenbeck, the Clement and Manier ditch, sometimes known as the Cameron and Manier ditch, and the right to divert 17 cubic feet of water per second.

Anna B. Wardlaw, the Rose or Marksbury ditch, and the right to divert 5½ cubic feet of water per second.

Wm. H. Traeger and Anna B. Wardlaw, the Foote ditch, and the right to divert 3¼ cubic feet of water per second.

H. A. Wilcox, Grace A. Traeger, Wm. G. Moser, and L. O. Brough, the Wilcox ditch, and the right to divert 6½ cubic feet of water per second.

Sena M. Wallace, Frank Harkey, C. J. Byers, and Wm. H. Traeger, the Geo. H. B. Vincent ditch, and the right to divert 6 cubic feet of water per second.

Defendants Fees and Haenggi claim as riparian owners, and defendant A. V. Wood (as successor in interest of Clyde Baker) claims by appropriation to the extent of twelve miners' inches, and also as a riparian owner.

Vernon Gill (successor in interest to defendant Beals Becker), F. W. Frank (successor in interest to defendant James Perrott), James E. Drumm (successor in interest of defendant W. O. Pickerill), Paul Showalter (successor in interest of defendant Albert Harris), and defendants F. A. Graham, E. A. Stellar, J. F. Becker, John G. Davis, John A. Todd, F. D. Bailey, W. C. Talbot, and D. S. Arbuckle, claim ownership as tenants in common of what is known as the Graham-Osborn ditch, and by appropriation the right to divert six cubic feet of water per second.

Julia P. Hobert (as successor in interest of defendant D. B. Kellerhals), Mary E. Faudree (as successor in interest of defendant L. E. Faudree), and defendants W. C. Talbot, R. T. Goul, Harvey Mounts, Goldstein & Iseman, Inc., Bank of America National Trust & Savings Association, C. W. Wilson, Emma R. Stellman, Amelia Talbot, Pearl E. Dicley, Walter W. Todd, May Sutch (formerly May Taylow), and Mabel G. A. Hoover, claim by appropriation the right to divert one hundred cubic inches of water per second under what is described as the Wheat and Baker right. These claimants, neither individually nor as a group, own any ditch or diversion works, but the water claimed by them is diverted by means of a canal or ditch owned by a corporation known as Pleasant Valley Canal Company, and known as the Pleasant Valley ditch or Pleasant Valley canal.

Defendants Henry Talley, Eva Sechrest, and W. N. Bowen claim ownership with the Springville Public Utility district of the Walker ditch (sometimes known as the Talley ditch) and by appropriation the right to divert forty cubic inches of water per second.

Defendant Pleasant Valley Canal Company claims the right by appropriation to divert six cubic feet of water through the Pleasant Valley ditch, and as against the plaintiffs, they claim the further right to divert forty miners' inches of water by purchase from F. H. Entriken et ux., and Clyde Baker et ux., consented to by James Akin, predecessor in interest of plaintiff Emma Akin.

Defendant Mt. Whitney Ditch and Water Company claims the right by appropriation to divert, at two points on the course of the stream, a total of four cubic feet of water per second.

As to the other defendants, the record is somewhat confusing. It does not appear that defendants Pleasant Valley Ditch Company, C. P. Itzenhauser, O. K. Snyder and Sophie R. Noller were served with summons. No appearance by any of them is on file, nor does it appear that they participated in the trial, or that their rights were adjudicated by the judgment.

Defendants C. A. Polson and Fannie F. Urbach appeared by demurrer to the complaint; their demurrers were overruled, but no answers were filed. The judgment recites that they participated in the trial, while in the reporter's transcript it appears that they did not. However, the rights of neither were adjudicated by the judgment.

One George Hirt, describing himself as "sued as John Doe", interposed a demurrer to the original complaint. That demurrer was overruled by the court, and no answer was filed. One of the defendants named in the complaint in intervention is "G. E. Myrick (substituted for George Hirt)".

Myrick appeared to this complaint, and claimed as a riparian owner. At the opening of the trial one of the attorneys for the other defendants indicated that he had been consulted with a view to a substitution of attorneys for Myrick, but nothing definite was agreed upon, and the trial proceeded in the absence of the attorney of record for Myrick. At the close of the trial, one of the attorneys for the other defendants announced that "Mr. Myrick doesn't intend to file an answer or appearance in this case". At the request of the attorney for plaintiffs, Myrick's default was then ordered entered. The judgment recites no appearance on the trial by Myrick, and in the findings the rights of plaintiffs are found to be "prior, paramount and superior to each and every claim and right of G. E. Myrick, successor to and substituted for defendant George Hirt, and it is true that said defaulting defendant has no right or claim in or to said waters as against said plaintiffs". The judgment, however, recites "that any and all rights of plaintiffs in this action in and to the waters of said Tule river are, and each of said rights is, subject and subordinate to the rights of each and all of the defendants in this action" with certain exceptions, not including in such exceptions the right of Myrick. It is apparent, therefore, that plaintiff appellants have just cause for complaint that with regard to this defendant, the judgment is not supported by the findings. After the demurrer of George Hirt to the complaint was overruled, neither he nor Myrick appeared by answer, Myrick's default was entered, the findings determined that the rights of plaintiffs were paramount to those of Myrick, yet the judgment subordinates the rights of plaintiffs to those of Myrick.

At the conclusion of the trial, the court found that, subject to the rights of all defendants except defendants Fees and Haenggi, the plaintiffs were owners as tenants in common of the Crabtree-Akin ditch (also known as the Osborn-Crabtree ditch) and of the right to divert, by means thereof, one cubic foot of water per second from Tule river, and to that extent found such rights to be superior to those of defendants Fees and Haenggi as riparian owners. Subject to the paramount claims of all defendants, the court found that the several interveners were entitled to divert an unspecified quantity of water from Tule river through the following ditches: J. A. Wardlaw, R. V. Wardlaw, D. D. Hoag, and Lillian F. Hollenbeck, through the Clement-Manier ditch (also known as the Cameron ditch); Anna B. Wardlaw, through the Rose (or Marksbury) ditch; Anna B. Wardlaw and Wm. H. Traeger, through the Foote ditch; H. A. Wilcox, Wm. G. Moser, L. O. Brough, and Grace Traeger, through the Wilcox ditch; and E. F. Wallace (successor in interest of Sena M. Wallace), Frank Harvey, C. J. Byers, and Wm. H. Traeger, through the Geo. B. Vincent ditch.

As to the defendants, the court found that the owners of the Baker and Wheat right were collectively entitled to take out of the Tule river, by means of the Pleasant Valley canal or ditch, two and one-half cubic feet of water per second; that the Pleasant Valley Canal Company was the owner of the Pleasant Valley canal or ditch, and through it was entitled to take from Tule river three and one-half cubic feet of water per second; and that the other defendants were entitled to take from said river the following: The owners of the Talley ditch, one cubic foot; the owners of the Graham-Osborn ditch, six cubic feet; the Mt. Whitney Ditch and Water Company, owners of the Mt. Whitney ditch, four cubic feet; that A. V. Wood, as riparian owner, was entitled to the entire ordinary flow, and in addition he was found to be the owner of the Entriken ditch, and the right to divert thereby twelve miners' inches of water from Tule river. His rights were found to be paramount to those of plaintiffs and interveners.

Defendants Fees and Haenggi were found entitled, as riparian owners, to the ordinary flow of the river, except as to the prior right of plaintiffs (excluding the interveners) to take one cubic foot of water per second.

The judgment expressly withheld any adjudication of rights as between the plaintiffs; or as between the interveners; or as between the defendants; or as between the plaintiffs and interveners.

From the judgment entered therein on July 31, 1933, the plaintiffs, and the interveners, have appealed. In support of the appeal, briefs have been filed only by plaintiffs, and by the interveners J. A. Wardlaw and R. V. Wardlaw, described as successors in interest of Anna B. Wardlaw in the Rose (Marksbury) ditch. In the opening brief of these interveners appears the following: "That since the filing of said notice of appeal all other interveners, save the undersigned J. A. Wardlaw and R. V. Wardlaw as proprietors of the Rose ditch have abandoned their intention to so appeal from said judgment." Therefore, as concerns appellants, the case narrows itself down to the respective rights of plaintiffs, in the Crabtree-Akin (known also as the Osborn-Crabtree and as Jones-Slayden) ditch, and the rights of interveners J. A. Wardlaw and R. V. Wardlaw in the Rose (or Marksbury) ditch.

Defendant Robert Haenggi, one of the respondents, has not participated in any of the briefs on appeal.

It is the contention of appellants that the findings are not in accord with the evidence; that contrary to the findings, the evidence establishes that the several appropriations by appellants or their predecessors in interest were prior in point of time to the appropriations made by such of the defendants as rely on appropriation, and prior to the issuance of patents by the United States to the predecessors in interest of such of the defendants as claim under riparian ownership.

[1-6] The court here found the ultimate facts that the rights of plaintiffs were not prior in time or paramount or superior to those of defendant-appropriators, nor, with certain reservations, to those of the defendant-riparian owners; also, that the rights of the interveners are not prior in time or paramount or superior to those of any of the defendants. These findings are in accord with the issues raised by the pleadings, and cannot be considered as conclusions of law. Fitzpatrick v. Underwood, Cal.Sup., 112 P.2d 3. There was implied in these findings a determination of all probative facts necessary to sustain them. 24 Cal.Jur. 974; Reiniger v. Hassell, 216 Cal. 209, 13 P.2d 737. Among the probative facts are that the appropriations by defendant were first in point of time (Civ.Code, sec. 1414), and that the diversions as against the riparian owners were made on land then belonging to the United States. San Joaquin & Kings River Canal & Irrigation Co. v. Worswick, 187 Cal. 674, 203 P. 999; Thorne v. McKinley Bros., 5 Cal.2d 704, 56 P.2d 204. The ultimate facts, carrying by implication a determination of probative facts, were, in the case at bar, founded on conflicting evidence. Therefore, if there exists in the record substantial evidence to support the findings, this court on appeal, may not disturb the same. Evans v. Fong Poy, 42 Cal.App.2d 320, 108 P.2d 942. The transcript of the evidence here consists of more than 3,000 pages. This has been carefully reviewed by us, and we find abundant, substantial evidence supporting the conclusions of the trial court. It is not within the province of an appellate court to interfere with those conclusions.

[7-10] Appellants contend, too, that the findings of the trial court are inconsistent. This inconsistency, it is claimed, arises from the fact that plaintiffs' ditch is downstream from that of defendants, and the trial court found that the appropriations by defendant-appropriators were prior in time to that of plaintiffs, and also found that defendant-appropriators gained rights by prescription. It is argued that if there was priority of appropriation by defendants, their rights could not at the same time arise out of prescription or adverse user; that one is inconsistent with the other. The ultimate fact to be found, however, is as to the respective rights of the parties, not as to how those rights were acquired. The trial court having arrived at the ultimate fact, any apparent conflict in the findings is immaterial; the judgment being supported by findings based on evidence sustaining those findings, the others will be disregarded. Epstein v. Gradowitz, 76 Cal.App. 29, 243 P. 877. It has been held that if inconsistent theories are relied upon, and evidence to support a finding on either theory appears in the record, the findings on the other theory may be disregarded as surplusage. Baird v. Ocequeda, 8 Cal.2d 700, 67 P.2d 1055; Empire W. S. I. District v. Stratford I. District, 10 Cal.2d 376, 74 P.2d 248. Moreover, it is a fundamental rule that findings will be so construed as to uphold, rather than to defeat the judgment. Garland v. Smith, 131 Cal.App. 517, 21 P.2d 688.

[11] The contention is made by appellants that there is no proof of beneficial use of the water by defendants. The statement is made in appellants' brief that the trial court found that certain of the defendants were wasteful in the use of waters diverted by them. We find no support of that statement in the record. There is a provision in the judgment that for the purpose of maintaining an economical use of the waters of Tule river, and for the proper measurement of the waters diverted, there be installed at the head of the ditches of defendants automatic measuring devices and a wasteway but we find no finding of any wasteful use. The court did find that all waters appropriated by the appropriator-defendants were

beneficially used. There is substantial evidence that there was a long-continued use of a specified quantity of water by the several defendants, and thereform arises a presumption that such use was necessary and beneficial. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. 3 Cal.2d 489, at page 548, 45 P.2d 972.

[12] The findings of the trial court that the cause of action of plaintiffs is barred by the provisions of sections 318, 319 and 321 of the Code of Civil Procedure is challenged as beyond the issues raised by the pleadings. While the answers of certain of the defendants, among them the Graham-Osborn claimants, do not in terms plead the statute of limitations, the plea was interposed by other defendants. The case was tried on the theory that the statute and adverse user were in issue as to all defendants; no objection was made to the introduction of evidence to support this theory, nor was any attempt made to limit it to those defendants who had pleaded the statute. The court was therefore authorized to find upon the issue, even though not directly tendered by the pleadings. Gray v. Janss Investment Co., 186 Cal. 634, 200 P. 401. The plaintiffs themselves introduced evidence on the issue, and were in no sense misled by the failure of some of the defendants to plead the statute. Short v. Orland Oil Syndicate, Ltd., 29 Cal.App.2d 326, 84 P.2d 324.

[13] The judgment is attacked by appellants on the ground of uncertainty. It is contended that the award by the trial court to the defendant-appropriators should have been limited to maximum amounts in acre feet per year, in addition to being fixed in cubic feet per second. In support of their contention, appellants cite Tulare Irr. District v. Lindsay-Strathmore Irr. District, supra, 3 Cal.2d at page 545, 45 P.2d 972. We do not find that case to hold that the limitation on the award called for by appellants is an essential of a valid judgment. The same contention as is here made was there argued, and while the suggestion was made by the court that it might sometimes be helpful to have fixed by the judgment an ultimate limit in acre feet per year in addition to the award in cubic feet per second, it was held that failure to do so was not reversible error.

[14, 15] Nor do we find any merit in appellants' contention that the judgment is uncertain in failing to establish the quantity of water which the upper riparian owners may divert. The action here was by appropriators downstream against an upstream riparian owner, and the court determined the extent of the right of the lower appropriators; it is none of their concern as to what amount of water the upper riparian owner is entitled to, it is sufficient if their rights as against him are fixed. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra, does not hold the contrary. There the action was one begun by riparian owners against upstream appropriators. Here downstream appropriators claim against upstream riparians. For the same reason, while the 1928 amendment to the Constitution (art. XIV, sec. 3) was effective at the time of trial and judgment herein, the judgment rendered here is not contrary to the terms of that constitutional provision.

[16] The judgment is modified by adding thereto a paragraph designated as "12a", and reading as follows: "That defendant G. E. Myrick has no right, title or interest in and to the waters of said Tule river and he is forever restrained and enjoined from in any manner interfering with the flow of said river in any manner so as to prevent any of the parties to this action from exercising any right, title or interest which they or any of them are found to own under the terms of this judgment."

As so modified, the judgment is affirmed. Respondents will recover their costs on appeal.

We concur: PULLEN, P. J.; TUTTLE, J.

44 Cal.App.2d 874

HATCH v. PENZNER et al.

Civ. 6577.

District Court of Appeal, Third District, California.

May 17, 1941.

Hearing Denied July 14, 1941.

1. Executors and administrators 🔑129(3)

In action by special administratrix to cancel transfers of property by decedent to defendant and to recover the property or reasonable value thereof on ground that transfers had been procured by fraud, where court gave judgment for plaintiff and later an accounting was had to determine value of property, and a decree was entered against defendants finding that the defendants were unable to respond to a monetary judgment against them was immaterial.

2. Executors and administrators 🔑129(3)

In action by special administratrix to set aside transfers of property by decedent to defendants on ground that transfers had been procured by fraud, where court entered judgment for plaintiff on ground that property belonged to decedent's estate, court retained jurisdiction to enforce the original judgment and defendants were not prejudiced by the accounting or entry of subsequent decree which merely enforced provisions of original judgment, and it was immaterial that the original judgment was termed an interlocutory judgment where defendants appealed from both judgments and presented every issue upon which they relied.

3. Executors and administrators 🔑129(3)

In action by special administratrix against decedent's daughter and her husband to set aside transfers of property to defendants by decedent on ground that transfers had been procured by fraud, evidence sustained finding that confidential relationship existed between defendants and decedent.

4. Deeds 🔑196(2)

The mere relationship of mother and daughter is insufficient evidence upon which to raise a presumption of fraud as respects transfers of property from mother to daughter.

5. Executors and administrators 🔑129(3)

In action by special administratrix to set aside transfers of property by decedent to defendants on ground that transfers had been procured by fraud, lack of consideration and unjust profit received by defendants shifted burden to defendants to show that the transaction was fair and free from undue influence or fraud.

6. Trusts 🔑103(2)

Where property is obtained by means of fraud, either actual or constructive, the transfers will be set aside at the instance of the owner or his representative and the grantee will be held to hold the title thereto as a "constructive trustee", and if the property has been sold by the grantee, the owner or his representative will be entitled to recover the proceeds of sale, or he may be entitled to judgment for the reasonable value of the property so converted, and such rule is peculiarly applicable where a parent conveys all of her estate to one child to the exclusion of other children without monetary consideration. Civ.Code, § 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trustee".

7. Executors and administrators 🔑129(3)

In action by special administratrix to set aside transfers of property by decedent to daughter and son-in-law on ground that transfers had been procured by "fraud", it was not necessary to prove that decedent was insane or totally incompetent to justify cancellation of transfers, and evidence of mental and physical weakness as result of physical ailments and chronic alcoholism, or both, coupled with confidential relationship between decedent and daughter, and lack of consideration for transfers, was sufficient to support findings and judgment for plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

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Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Lucile Hatch, etc., against Barbara Clark Penzner and another to set aside conveyances by deceased, Irma Clark Ryan, of real and personal property to defendants on ground that they were procured by fraud. From a judgment for plaintiff and a subsequent decree rendered in an accounting to determine value of property, the defendants appeal.

Affirmed.

Milton M. Cohen and Milton M. Cohen, Jr., both of Los Angeles, for appellants.

Henry G. Bodkin, Theodore C. Heyl, George H. Pratt, and Stuart Silliman, all of Los Angeles, for respondent.

THOMPSON, Justice.

This is an appeal from a judgment in favor of the plaintiff rescinding conveyances by the deceased, Irma Clark Ryan, of real and personal property to the defendants, on the ground that they were procured by fraud, and awarding plaintiff the reasonable value thereof. An accounting was had to determine the market value of the property. Findings were adopted and filed December 16, 1938. The judgment was entered December 24, 1938. A subsequent decree determining the value of the property was rendered September 5, 1939. A separate notice of appeal was given from each judgment.

The appellants contend that the findings and judgments are not supported by the evidence and that the subsequent decree determining the market value of properties which were converted by them is ineffectual and void.

Irma Clark Ryan was formerly the wife of Charles N. Hatch, by whom she had two daughters, the plaintiff Lucile Hatch, and Galen Hatch. Mr. and Mrs. Hatch were divorced about 1909. Mrs. Hatch subsequently married Albert J. Clark, who died July 30, 1930. Mr. Hatch died in July, 1929. The defendant, Barbara Clark Penzner, was born as the issue of the second marriage. Barbara is the wife of the defendant, William L. Penzner. Mrs. Clark later married William Ryan, from whom she was divorced in December, 1935. She thereafter resided by herself in Los Angeles. She was possessed of real and personal property of the aggregate value of about $135,000, most of which was in the form of stocks and bonds. She possessed little business experience or ability. In 1929 she executed a declaration of trust to the Citizens National Bank of Los Angeles of all of her property, which trust was revocable at will. Mrs. Ryan was afflicted with disease and chronic alcoholism which greatly impaired her mental and physical condition and rendered her unfit to transact business affairs much of the time. She lost a large part of her property. At the time of her death she was possessed of property of the aggregate value of only about $50,000. She had great confidence in her daughter Barbara and her husband, William L. Penzner, who also resided in Los Angeles.

In May, 1937, the defendants persuaded Mrs. Ryan to live with them in their home at Los Angeles by promising her they would take care of her and her affairs during her lifetime. About a month after she became a resident in their home, they selected an attorney who conferred with her and persuaded her to revoke the declaration of trust with the Los Angeles bank. About that time she was induced to and did make a bad investment in a certain beer garden enterprise. She also withdrew funds and paid numerous bills in behalf of Mr. and Mrs. Penzner aggregating the sum of about $34,000. Sometime in 1935 or 1936, the defendants visted Mrs. Ryan at the Las Encinas Sanitarium where she was then a patient, and induced her to sign a note payabe to them in the sum of $7,500, which they claimed was to be used for financing an investment. The note was not returned to the maker. Mrs. Ryan was sent for treatment to sanitariums on several occasions. Her daughter, Barbara Penzner, once filed a petition to have her mother declared incompetent. While Mrs. Ryan lived with the defendants she was often under the influence of liquor. The respondent testified that her mother told her the defendants "kept her drunk most of the time" and that they locked her in the bathroom. At the time the declaration of trust was revoked by Mrs. Ryan and when her property was turned over to her by the bank, she was accompanied by Mr. Penzner. Subsequently she was persuaded to transfer all of her property, including nearly forty thousand dollars worth of stocks and bonds to the defendants. She was suffering from several ailments together with chronic alcoholism. She rapidly became infirm and mentally and physically weak. A few days before her death she was taken by the defendants to Mrs. Woodall's Rest Home for care and treatment. Doctor Charles W. Thompson, the medical director of Las Encinas Sanitarium, who visited her, testified, that "she was very greatly confused, and she appeared greatly demented". She died August 6, 1937.

Upon petition therefor, Lucile Hatch was duly appointed special administratrix of the estate of her mother, Irma Clark Ryan. This suit to cancel the transfers of property and to recover the property or the reasonable market value thereof was commenced September 10, 1937. It is in the nature of an equitable action to rescind a trust on the ground of fraud.

[1] The finding of the court that the defendants are impecunious and unable to respond to a monetary judgment against them is immaterial. There is some evidence to support that finding, but it is conflicting. The appellants fail to indicate in their briefs how that finding would be material or prejudicial to them. The complaint asked for an order restraining the defendants from disposing of the stocks, bonds and other property involved, during the pendency of the action. That restraining order was waived at the trial on the assurance of the attorney for defendants that, "The property has been kept. * * * The estate is more valuable now than it was on October 8, 1937, by at least $10,000.00." Concerning that issue, this colloquy occurred: "Mr. Bodkin: * * * I take it that it will be stipulated that that property will not be disposed of during the pendency of this action? * * * Mr. Cohen: Yes; sure." Pursuant to that stipulation, it was assumed the properties would be retained by the defendants and that they would be delivered in kind to plaintiff in the event of a judgment in her favor, and not otherwise disposed of. The original judgment which was entered December 24, 1938, determined that the properties belong to the estate of Irma Clark Ryan, deceased; that they had been procured by the defendants by means of fraud, and that they should be delivered to plaintiff forthwith, or upon failure to do so within ten days from the date of the judgment, an accounting thereof should be had to ascertain the value of the properties and that a judgment would then be entered against defendants for that value. It was also decreed that the other properties obtained and held by them in exchange or on sale of estate properties should be delivered to the plaintiff. None of the properties was delivered to plaintiff. After a lapse of about eight months, the court proceeded to hold the accounting and determined the market value of the properties, entering a subsequent decree for the aggregate value thereof, together with a lien against certain real properties held by the defendants to secure loans of money made by them from the trust estate.

[2] The court retained jurisdiction in the equitable action to enforce the original judgment. Murphy v. Bucke's Department Store, 199 Cal. 194, 248 P. 668; Los Angeles A. T. Co. v. Superior Court, 94 Cal. App. 433, 271 P. 363; 10 Cal.Jur. 559, § 96. The defendants were not prejudiced by the accounting or the entry of the subsequent decree. It merely enforced the provisions of the original judgment. It is immaterial that the original decree was termed "interlocutory judgment". The defendants appealed from both decrees and they have presented on this appeal every issue upon which they rely.

[3-6] There is adequate evidence to support the finding that the deceased sustained a confidential relationship toward the defendants. Mrs. Ryan received no valuable consideration for the property which she transferred to them. They represented to her that Mr. Penzner was a competent, successful business man and that they would take care of her and her properties if she would convey the properties to them and live with them in their home. Relying on those promises, she did so. The court was warranted under such circumstances in finding that a confidential relationship existed between them and the mother. Cooney v. Glynn, 157 Cal. 583, 108 P. 506; Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Campbell v. Genshlea, 180 Cal. 213, 180 P. 336; Mead v. Mead, 41 Cal.App. 280, 182 P. 761; Forman v. Goldberg, Cal.App., 108 P.2d 983; 20 Cal. Jur. 443, § 41; 13 Cal.Law Rev. 174. It is true that the mere relationship of mother and daughter is insufficient evidence upon which to raise the presumption of fraud. Best v. Paul, 101 Cal.App. 497, 281 P. 1089. But the lack of consideration and unjust profit received by the defendants in the present case shift the burden to the defendants to show that the transaction was fair and free from undue influence or fraud. Campbell v. Genshlea, supra; Johnson v. Clark, 7 Cal.2d 529, 61 P.2d 767. In the case last cited it was held that where property was obtained by means of fraud, either actual or constructive, the transfers will be set aside at the instance of the owner or his representative, and the grantee will be deemed to hold the title thereto as a constructive trustee. Civ.Code, sec. 2224. If the property has been sold by the grantee, the owner will be entitled to recover the proceeds of sale, or he may be entitled to judgment for the reasonable value of the property so converted. Johnson v. Clark, supra. The preceding rule is peculiarly applicable where a parent conveys all of her estate to one child to the exclusion of other

children, without monetary consideration. Pleasants v. Hanson, 48 Cal.App. 626, 192 P. 183; Nobles v. Hutton, 7 Cal.App. 14, 93 P. 289.

[7] It was not necessary to prove that Mrs. Ryan was insane or totally incompetent to justify the cancellation of the transfers of her property to the defendants. The evidence of mental and physical weakness as the result of physical ailments or chronic alcoholism, or both, coupled with the confidential relationship between her and her daughter Barbara, and the fact that she conveyed all of her property without valuable consideration to the defendants to the exclusion of her other daughters is sufficient to support the findings and judgment. 12 C.J.S., Cancellation of Instruments, p. 976, § 26 a and b; Soule v. Wyatt, 30 Cal. App. 778, 159 P. 447; Pleasants v. Hanson, supra; Payne v. Payne, 12 Cal.App. 251, 107 P. 148; Nobles v. Hutton, supra.

The judgments are affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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44 Cal.App.2d 808

BURGESS v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 2644, 2645.

District Court of Appeal, Fourth District, California.

May 15, 1941.

Hearing Denied July 11, 1941.

1. Appeal and error ⇨931(1)

On appeal, District Court of Appeal must disregard conflicts in evidence and accept as true evidence supporting trial court's findings and judgments appealed from.

2. Appeal and error ⇨931(1)

On appeal, District Court of Appeal must draw all reasonable inferences from evidence which tend to support judgments appealed from.

3. Appeal and error ⇨1010(1)

A judgment will not be reversed on appeal when there is substantial evidence supporting trial court's findings or different inferences might rationally be drawn therefrom, though there might be honest difference of opinion as to effect of evidence.

4. Appeal and error ⇨1010(1)

A trial court's finding on question of mental capacity can be overthrown on appeal only when totally unsupported by substantial evidence.

5. Insane persons ⇨98

In mental incompetent's action by his guardian to recover corporation stocks pledged to defendant bank as security for notes evidencing loans thereby, evidence *held* sufficient to support trial court's findings that plaintiff was not a person entirely without understanding when he executed notes and other documents incident to transactions. Civ.Code, § 38.

6. Insane persons ⇨77

A person of unsound mind, but not entirely without understanding at time of executing notes for loans to him by bank and other documents incident to loan contracts, had right to rescind such contracts. Civ. Code, § 38.

7. Insane persons ⇨77

In mental incompetent's action by guardian to recover corporation stocks pledged to defendant bank as security for notes evidencing bank's loans to plaintiff, where parties stipulated that plaintiff's living expenses during time involved amounted to specified sum, considerable part of which was paid from moneys loaned, plaintiff was required to restore value with which bank parted in reliance on loan contracts in order to rescind them, as against contention that he received nothing from loans. Civ.Code, §§ 38, 39.

8. Principal and agent ⇨23(2)

Agency may be proved by circumstantial evidence.

9. Principal and agent ⇨23(5)

In mental incompetent's action by guardian to recover corporation stocks pledged to defendant bank as security for notes evidencing loans to plaintiff, evidence *held* sufficient to justify conclusion that man who handled plaintiff's affairs, property and income acted as plaintiff's agent in transactions with bank and receipt of moneys loaned.

10. Principal and agent ⇨131

A principal is bound by his agent's acts within scope of agent's authority.

11. Principal and agent 🔑92(2)

Payment to agent is in law payment to principal.

12. Insane persons 🔑74

While agency contract is subject to rescission by incompetent principal, mere right of rescission does not change such principal's obligation to restore things received by him through agent while agency relation existed, if principal was not entirely without understanding. Civ.Code, §§ 38, 39.

13. Insane persons 🔑76

A person of unsound mind, but not entirely without understanding, during time in which he contracted through agent for loans by bank on security of corporation stocks pledged thereto, cannot rescind contracts without restoring value of that with which bank parted in entering into contracts. Civ.Code, §§ 38, 39, 1691.

14. Insane persons 🔑76

One of unsound mind, but not entirely without understanding, during time in which he contracted through agent for loans by bank to which he pledged corporation stocks as security, is entitled to recover such stocks on paying amount owed bank. Civ.Code, §§ 38, 39, 1691.

15. Appeal and error 🔑1056(1)

In mentally incompetent person's action by guardian to recover corporation stocks pledged to defendant bank as security for notes evidencing loans to plaintiff, exclusion of evidence, offered by plaintiff before court decided that plaintiff was not entirely without understanding at times of loan contracts, that plaintiff's agent in procuring loans used much of money obtained for his personal purposes without any benefit to plaintiff, was rendered harmless by such decision, since plaintiff was then required to restore to bank all money advanced by it, not merely portion used to provide plaintiff with necessaries of life. Civ.Code, §§ 38, 39.

16. Trial 🔑56

In mental incompetent's action by guardian to recover corporation stocks pledged to defendant bank as security for notes evidencing loans to plaintiff, where parties stipulated that specified sum, much less than amount received by plaintiff's agent on notes and from sale of stock, would have provided plaintiff with necessaries of life during time involved, plaintiff's proffered evidence that such agent used much of money obtained for his own personal purposes without benefit to plaintiff was properly excluded as merely "cumulative".

> See Words and Phrases, Permanent Edition, for all other definitions of "Cumulative".

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Appeals from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Levi J. Burgess, an incompetent person, by his guardian, Hermine Nau, against the Security-First National Bank of Los Angeles to recover corporation stocks, pledged to secure notes for loans by defendant, or the value thereof. Judgments for defendant, and plaintiff appeals.

Affirmed.

Warner I. Praul and Paul D. McCormick, both of Los Angeles (A. I. McCormick, of Los Angeles, of counsel), for appellant.

Jennings & Belcher, of Los Angeles, for respondent.

MARKS, Justice.

Plaintiff, by the regularly appointed guardian of his person and estate, commenced two actions to recover stock, or its value if redelivery could not be had, which had been pledged to secure promissory notes evidencing loans made by defendant. The cases were consolidated for trial. Separate findings and judgments for defendants were filed and separate notices of appeal were given. There are two clerk's transcripts and one reporter's transcript. While the appeals were pending in the Supreme Court they were consolidated. Where necessary, we will refer to the action involving the pledges of stock prior to August 1st, 1937 (Civ.No.2644), as the first case, and to the one involving pledges made after September 1, 1937 (Civ.No. 2645), as the second case.

Prior to about 1930 Levi J. Burgess was a man of intelligence, education and culture. His wife and only child had died so that he had no immediate dependents. About that time he contracted an illness which, in its progress, preyed on his nervous system and finally caused general paresis of the brain. He was partially paralyzed, was taciturn and talked very little, usually only to answer remarks or questions directed to him, and then very briefly, except when he asked for food. However, in a limited way he could carry on a conversation. He had little memory, walked with a shuffling gait and required constant attendance. Both medical and lay witnesses pronounced him of unsound mind and insane in 1937. There can be no question of the fact that his mentality was very low at that time. Hermine Nau, his guardian, who was also his niece, testified that he had the mental capacity of a child of about the age of six years.

Levi J. Burgess met Raymond Feldhaus, a young man, in about 1929, and became attached to him. It is probable that Levi intended to adopt Raymond, but this was never done. The two lived together until late in 1937. Raymond took the name of "Burgess" and was generally regarded as a son. Levi usually spoke of him by the designation of "son" or "boy".

Raymond gradually assumed complete charge of Levi's modest fortune of a value between fifty and sixty-five thousand dollars. The two maintained a joint bank account before moving to California, but after arriving in Hollywood there was but one bank account. This account was in a branch of defendant bank in Hollywood, in the name of Raymond J. Burgess. Raymond also had possession of all Levi's securities.

Raymond had no property and no income of his own. For a number of years he devoted all his time to the care of Levi and was supported out of his income. He collected all of the income from Levi's property and paid all the bills. Just when Levi's mental faculties had deteriorated to the point of making this supervision advisable does not appear, but it is probable that this occurred several years prior to 1937. There is no intimation that prior to 1937, Raymond had failed to honestly administer his trust.

Miss Nau visited her uncle on occasions. She lived with him in his apartment in Hollywood from the latter part of December, 1936, to early in May, 1937. In March, 1937, there were unpaid bills that Raymond did not have sufficient money to meet. One was a $114 balance due on the purchase price of an automobile which was used for Levi's benefit. The legal owner threatened to repossess the car if the delinquent installments were not paid. One month's rent on the apartment, ninety, or ninety-five dollars, was in default, and the rent for the current month was past due. There were other pressing unpaid bills bringing the total, according to Miss Nau, to a sum of about $300. That it exceeded that amount is made evident by the addition of the sums due for rent and on the purchase price of the automobile.

In the presence of Levi, Raymond discussed with Miss Nau the necessity of borrowing money from the bank to pay these bills. Miss Nau testified concerning this conversation in part as follows:

"Q. Yes. Well, now, as a matter of fact, in that conversation, you, yourself, told Levi about the necessity of getting the money to pay these bills, didn't you? A. I don't remember exactly what I said to him. I think that I said to him, 'Levi, Ray owes a lot of money', something like that; I don't remember the exact conversation.

"Q. Well, didn't you tell Levi what it was for? A. Yes, I did.

"Q. Told him it was for rent on the apartment where Levi was living, didn't you? A. Yes, I think that was discussed in front of him.

"Q. And that there were other bills that this money had to be borrowed for, didn't you? A. Yes.

"Q. And you told those things to Levi Burgess yourself, didn't you? A. Yes, I did, but Ray also did. I mean, it was a discussion between Ray and myself in front of Levi.

"Q. And also to Levi, wasn't it? A. Yes, that is correct.

"Q. The situation was explained to Levi Burgess himself, wasn't it? A. Not fully.

"Q. Well, the fact that the bills were owing for rent and on the car, and for the other purposes, was explained to Levi, wasn't it? A. As I remember it, the statement was made that bills were owing, but I don't know whether they were specified, I can't tell you that, in front of him, I don't remember that.

"Q. Now, in your opinion of Mr. Burgess' mentality at this time, when the necessity of borrowing money was explained to him, he understood it, didn't he? A. No. * * *

"Q. Well, if you told him it was necessary to borrow money, in your opinion, he would understand that it was necessary to borrow money, wouldn't he, in your opinion? A. Yes, he would understand just exactly, he would hear you say those words, and he would know that you said them, but he would not understand fully. * * *

"Q. But when you explained to him that it was necessary to borrow money, you are satisfied that he understood what you were telling him, isn't that true? A. Yes, in a sense.

"Q. Yes. Now, as a matter of fact, Miss Nau, at that time did not Levi Burgess indicate that he understood that it was necessary to borrow money? (No answer.)

"Q. Didn't he so state that he understood that it was necessary to borrow money? A. He might have. I cannot recall the words of the conversation. He might have said yes. * * *

"Q. Yes, if you had told him that this was an instrument in connection with the borrowing of money, he would have understood what you told him in that respect, wouldn't he? A. He would have understood what you told him, but he would not have understood it by himself."

Miss Nau also testified that she knew that stock belonging to Levi Burgess was going to be deposited with the bank for the purpose of securing the loan. She testified that she went to the defendant bank when the first loan was actually made; that she was standing near the teller's window but did not hear the conversation between the note teller and Raymond; that she knew a loan was being made but did not know the details of the transaction. It is perfectly clear that she withheld from the bank any knowledge she might have had, or opinions she might have entertained concerning Levi's mental capacity to enter into a contract with the bank.

This loan was made on March 20, 1937, and was for $550. A collateral note for that amount payable to defendant was signed by both Levi and Raymond. A certificate for fifty shares of convertible preferred stock of the Goodyear Tire and Rubber Company, belonging to Levi, was pledged to secure the loan. As a part of the same transaction Levi and Raymond executed what is called an "Authority to receipt for and receive collateral". It was general in its terms, not confined to the then pending transaction, and provided that its "authority shall continue in force until you have received from me/us written notice of its revocation". It instructed the bank to recognize the signatures of either of them as duly authorized to receive, demand, receipt for or give instructions concerning the pledged securities, and ratified any and all acts done under its authority. Under the same date they signed an authorization to pay the money loaned on the note to Raymond F. Burgess, which was done. Levi and Raymond also executed a "General Loan and Collateral Agreement" which was very broad in its terms and was made to apply to the loan of $550 as well as to future financial accommodations. It was therein provided that the "agreement shall remain in full force until written notice of its termination is given by each of the undersigned to the Bank".

On April 27, 1937, the first note was renewed and increased by a second collateral note for $1,100, with the same stock pledged as security. On the same day Levi and Raymond executed a written instruction to pay the proceeds of the note to Raymond. The principal and interest of the first note was paid and the balance was deposited in Raymond's account.

On May 17, 1937, a third collateral note was executed for $2,100 with the same security. The second note was paid and the balance was deposited in the account of Raymond F. Burgess on the written instructions of Levi.

On July 20, 1937, a fourth collateral note was executed for $3,100 with the same security. The third note was paid and the balance was deposited in the account of Raymond F. Burgess in accordance with written instructions signed by Levi and Raymond.

Under date of July 31, 1937, in writing, Levi instructed the bank to sell the collateral, pay the fourth note and interest together with the expenses of sale, and deposit the balance remaining in the account of Raymond F. Burgess. This was done.

These are the transactions involved in the first case, wherein plaintiff sought to recover the fifty shares of the Goodyear Tire and Rubber Company convertible preferred stock pledged to secure the four notes, or their value, if redelivery could not be had.

The second case involved three separate collateral notes and the stock pledged to secure them.

The first note was dated September 18, 1937, was for $3,000, was signed by Raymond F. Burgess, and was secured by the pledge of fifty shares of Firestone Tire and Rubber Company six per cent preferred stock belonging to Levi. On the same day Levi signed a writing authorizing Raymond to pledge the stock as security for the loan. Levi also signed an assignment of the stock in blank. Both writings were delivered to the bank with the stock and note.

The second note in this series was dated October 6, 1937, was for $3,000, was signed by Raymond F. Burgess, and secured by the pledge of one hundred shares of Owens-Illinois Glass Company common stock belonging to Levi. On the same day Levi executed an authority authorizing Raymond to pledge the stock and an assignment of the stock in blank which was separate from the certificate.

The third note was dated October 13, 1937, was for $1,000, was signed by Levi J. Burgess and Raymond F. Burgess and was secured by the pledge of one hundred shares of Proctor and Gamble common stock belonging to Levi. Levi also executed a writing authorizing Raymond to pledge the stock and a blank endorsement of the certificate.

The defendant bank is holding the three notes in the total principal sum of $7,000, which are unpaid, together with the stock pledged to secure them, which has a market value of between eighteen and twenty-two thousand dollars.

Miss Nau returned to Hollywood in November, 1937, and was appointed guardian of the person and estate of Levi on November 24, 1937. There was no prior adjudication of his incompetency.

Under date of December 29, 1937, Miss Nau gave notice of rescission of the various transactions involved in these two actions, on the ground that Levi was of unsound mind. This letter contained the following: "The said Levi J. Burgess did not to the best of the knowledge and belief of the undersigned, receive from you anything of value in said transactions, nor any of them; but if such thing or things of value were by him actually received or applied to his use or benefit, the said Levi J. Burgess does hereby offer to restore the same. * * * In consideration of his offer above set forth to do equity the said Levi J. Burgess now demands of you, the Security-First National Bank of Los Angeles, the immediate possession of all his said property held by you, whether described herein or not, free of any claims or demands of yours or through you whatsoever, and if any of said property is no longer in your possession then the said Levi J. Burgess demands that you restore to him forthwith the value thereof at the time you parted with such property."

It was stipulated that the reasonable value of the support of Levi during the period covered by the notes was $2,500. It is not questioned that all the money represented by the notes was paid to Raymond and deposited in his account in the defendant bank and that he paid all of Levi's living expenses out of this account. The account was closed on December 8, 1937, by the withdrawal of the balance of $123.76.

Both of the complaints are drawn on the theory that Levi was a person totally without understanding; that his contracts were therefore void; that he was not required to restore the money the bank had paid to Raymond under his void contracts.

The bank defended on the theory that it was an innocent holder for value in due course; that it had no notice of any infirmity in the contracts; that it had no notice of the incompetency of Levi; that while Levi may have been incompetent he was not "a person entirely without understanding" (sec. 38, Civ.Code) and could not rescind without restoring to the bank the value with which it had parted. Sec. 39, Civ. Code.

The trial court found that while Levi was mentally incompetent in 1937, and before, he was not a person entirely without understanding; that the bank had no notice of his infirmity and was an innocent holder for value. Judgment was rendered for defendant in both cases. The bank, in the second case, was not claiming to own the pledged stock, but only a lien on it by reason of the pledges. The effect of the judgment is to permit plaintiff to recover his stock upon paying the indebtedness for which it is pledged.

The principal questions presented for decision are: (1) Are the findings that Levi, while incompetent in 1937, was not a person entirely without understanding, supported by the evidence? (2) What is the legal effect of such findings, if so supported, on plaintiff's right to recover his stock without restoring the value with which the bank had parted?

In approaching the question of the sufficiency of the evidence to support the findings to the effect that Levi Burgess, while a person of unsound mind, was not entirely without understanding, it should not be out of place to make the following observations.

[1-4] Levi Burgess was undoubtedly in a debilitated mental condition. Had the

trial court found that he was a person entirely without understanding, it is probable that we would be compelled to hold that the evidence supported such a finding. However, no such finding was made, and we are required to disregard conflicts in the evidence and accept as true evidence supporting the findings and judgments. We are also required to draw all reasonable inferences from the evidence which tend to support the judgments. Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123. As was said in Nielsen v. Frank, 117 Cal.App. 117, 3 P.2d 607, 608: "A judgment will not be reversed when there is substantial evidence supporting the findings (2 Cal.Jur., Appeal and Error, § 543, p. 921), or where different inferences might rationally be drawn therefrom (MacDermot v. Hayes, 175 Cal. 95, 170 P. 616), even though there might be an honest difference of opinion as to the effect of the evidence. In re Estate of Presho, 196 Cal. 639, 238 P. 944. The same rules apply to the determination of the question of mental capacity; and the findings of the trial court can be overthrown only when they totally lack the support of substantial evidence. Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L.R.A.(N.S.) 818, Ann.Cas.1913B, 1230."

It should be borne in mind that the defendant bank had no notice or knowledge of any kind as to the mental condition of Levi. It acted in good faith in all of the transactions and parted with its money in the ordinary course of its business and in honest reliance on the good faith of the person with whom it was dealing and on the signatures of Levi and the security of his pledged stock. Had Raymond Burgess been honest instead of being faithless to the confidence reposed in him, this case would not be here. Miss Nau cannot escape a suspicion of blame. She knew that Raymond was without property or income and that his signature on the note of March 20, 1937, gave no promise of the repayment of the loan. She knew that a loan was to be made and that the only signer of financial responsibility on the note was Levi and that his stock gave the only other security for the loan. She went to the bank with Raymond when the note and stock were delivered and the money paid to him. She now maintains that Levi was a person entirely without understanding at that time. Possessed of that knowledge, which she now says she had, she stood by and saw the bank accept the note and the pledged stock without informing it of what she now solemnly says was the true condition of Levi's mind. This fact might well have suggested to the trial judge the thought that her silence at the time the loan was made did not correspond with her testimony on the witness stand. Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A.L.R. 480. If this seeming conflict caused him to doubt those portions of her testimony which pointed to the total mental incapacity of Levi, it placed in question much of her testimony upon which plaintiff must rely on this appeal. Further, there may be a reasonable inference drawn from her actions and silence on March 20, 1937, to the effect that she then believed Levi to have possessed sufficient mentality to enter into a binding contract with the bank, which inference we are required to draw and which tends to support the findings and judgment.

The dividing line between mental incompetency in a general sense, and that mental incompetency that renders a person entirely without understanding, is sometimes difficult to draw.

In Jacks v. Deering, 150 Cal. 272, 88 P. 909, 910, the trial court found that Maria T. Divine, who had executed a mortgage and promissory note, "was then, and for several years prior thereto had been, physically very infirm; that at the time of the execution of the promissory note and mortgage her mental capacity had become greatly impaired, such impairment having commenced and continued several years prior to that time; that she was then a person of unsound mind, but was not entirely without understanding, nor has her incapacity been judicially determined; that at the time of her execution of the said promissory note and mortgage she did not have sufficient mental capacity to understand the nature, purpose and effect of the transaction in which she was engaged, or of the promissory note and mortgage; * * *." This finding was held sufficient to support a judgment foreclosing the mortgage as against the defense of its being void as executed by a person entirely without understanding.

In San Francisco Credit Clearing-House v. MacDonald, 18 Cal.App. 212, 122 P. 964, 966, it was said:

"It would seem, therefore, that a person may be insane in the general acceptation of the term; and yet his insanity may be of such a character as not to deprive him entirely of the power of knowing and understanding the nature of ordinary business transactions, and that such form of insanity, or rather unsoundness of mind, will not render a person legally incapable of entering into a valid contract. Motley v. Head, 43 Vt. 633; Dennett v. Dennett, 44 N.H. 531, 84 Am.Dec. 97.

"It follows that if Gage was not, as the trial court found, so far insane at the time of the compromise as to be considered a person entirely without understanding, he in person would have been legally capable of conducting and completing negotiations for the settlement of his claim against the defendant, and as a matter of course that which Gage could do in person might also be done by his agent and attorney in fact."

[5] Levi Burgess had not been adjudged an incompetent at the time any of the documents were signed. A careful review of all the evidence, some of which we have summarized, together with the reasonable inferences to be drawn from it, must be held to support the findings to the effect that Levi was not a person entirely without understanding when the documents here in question were executed by him.

[6] We must next proceed to a consideration of the effect which the findings that Levi, while a person of unsound mind, was "not entirely without understanding", had on his right to rescind and his duty to restore the value with which the bank had parted in reliance on his contracts. His right to rescind cannot be questioned. His duty to restore is fixed by the provisions of section 39 of the Civil Code and the other code sections therein referred to.

[7] Plaintiff argues that he is entitled to rescind; that he is not required to restore anything because he received nothing from the loans. This argument is based on a misconception of the admitted facts as it was stipulated that Levi's living expenses during the time involved amounted to $2,500. A considerable part of this sum undoubtedly found its source in some of the loans.

[8-11] Were it necessary to do so we might be justified in concluding that Raymond acted as Levi's agent in the transactions with the bank and in receipt of the money it loaned. The documents signed by Levi suggest agency. Raymond had handled Levi's affairs and all his property and income and had paid all his bills for several years prior to 1937. While it does not appear just when this control began, it does appear that Levi's mental malady was a progressive disease and it is not unreasonable to assume that it commenced before Levi's mind had deteriorated to the extent described in 1937. Agency, like any other fact, may be proved by circumstantial evidence. Here the circumstances in evidence and the conduct of the parties over a number of years point to the relation of principal and agent between Levi and Raymond. Of course, a principal is bound by the acts of his agent within the scope of his authority and payment to an agent is in law payment to the principal.

[12] The question of agency was suggested during the arguments. The only reply attempted is that the contract of agency, like any other, is subject to rescission by an incompetent person. While this is true, the mere right of rescission does not change the obligation to restore those things which the principal received through the agent while the relation existed, if the principal was not a person entirely without understanding.

[13] Defendant's arguments in support of the judgments are made under the provisions of section 39 of the Civil Code and the provisions of that code in the chapter on Rescission, and are based on the findings, conclusive here, that Levi, while a person of unsound mind, was not entirely without understanding during the time here involved, his incapacity not having been then judicially determined. Defendant maintains that plaintiff cannot escape the obligations of his contracts without restoring the value of that with which defendant had parted in entering into them. This is in accordance with the law in California in a case where, as here, the incompetent is not a person entirely without understanding. The rule is clearly stated in 14 Cal. Juris, page 339, as follows:

"Sections 38 and 39 of the Civil Code are enacted for the benefit and protection of incompetent persons and may not be invoked by persons dealing with them. The right to rescind is conferred solely upon the incompetent or his representative. And even where a person entirely without understanding makes a contract beneficial to him, the law supplies or presumes the existence of the requisite capacity, or for his protection estops the other to set up and sustain this objection. In case of a person not entirely without understanding, a suit for a rescission may be brought, or the contract may be rescinded by the act of the party himself. But in accordance with the general rules, he must restore everything of value received, or offer to do so."

In McNeese v. McNeese, 190 Cal. 402, 213 P. 36, 37, the Supreme Court said:

"Under section 1691 of the Civil Code two requirements are set forth as necessary to effect a rescission by the act of the party.

"'1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

"'2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so.'" See More v. Calkins, 85 Cal. 177, 24 P. 729; Hellman, etc., Bank v. Alden, 206 Cal. 592, 275 P. 794; Sharp v. Mortgage Security Corp., 215 Cal. 287, 9 P.2d 819; Winstanley v. Ackerman, 110 Cal.App. 641, 294 P. 449; Neale v. Sterling, 117 Cal.App. 507, 4 P.2d 250.

[14] The legal effect, if not the form, of the judgment in the second case is in accordance with these rules and permits plaintiff to recover his pledged stock by paying the amounts he owes defendant. This is true because defendant is claiming, not the ownership of the stock, but only the liens upon it by virtue of the pledges. When the debts are satisfied, the stock will be released to plaintiff.

[15, 16] Plaintiff complains of the refusal of the trial court to permit him to introduce evidence tending to show that Raymond had used much of the money obtained on the notes for his own personal purposes without any benefit flowing to Levi from such expenditures. This evidence was offered while plaintiff was contending that Levi was a person entirely without understanding and before that issue had been decided to the contrary. This evidence probably was competent at the time it was offered, because a person entirely without understanding is only liable "for the reasonable value of things furnished to him necessary for his support or the support of his family". Sec. 38, Civ.Code. When the court decided that Levi was not a person entirely without understanding, the error, if any, became harmless, because then Levi was required to restore all that the bank had advanced and not merely the portion of it which had been used to provide him with the necessaries of life. Further, the proffered evidence was merely cumulative. It was stipulated that $2,500 would have provided Levi with the necessaries of life during the time here involved. Raymond received over thirteen thousand dollars on the notes and from the sale of the pledged stock. From this it is perfectly clear that he must have been faithless to his trust and must have used much of the money for his own purposes.

The judgments are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

18 Cal.2d 75

WHITLEY v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 17793.

Supreme Court of California.

May 28, 1941.

1. New trial 🔑163(1)

Prior to 1939 amendment to statute relating to order granting new trial for insufficiency of evidence, where an order for new trial failed to state that new trial was granted for insufficiency of evidence, trial court could properly file nunc pro tunc order setting up that ground if in fact such ground had been relied on. Code Civ.Proc. § 657, subd. 7.

2. New trial 🔑163(1)

In amending in 1939 the statute relating to order granting new trial for insufficiency of evidence, Legislature would be presumed to have known and to have considered decisions construing existing statute. Code Civ.Proc. § 657, subd. 7.

3. Statutes 🔑206

In construing statute, effect must be given to each sentence, phrase and word if possible.

4. New trial 🔑163(1)

The 1939 amendment to statute relating to order granting new trial for insufficiency of evidence, so as to impose 10-day limitation for filing such order, where no time restriction existed prior to amendment, indicated legislative intent to change pre-existing law, and presumption was that Legislature intended to change the statute in all the particulars where there was a material change in language of amended provision. Code Civ.Proc. § 657, subd. 7.

5. Statutes 🔑227

A direction in statute is "mandatory," where consequences are attached to failure to act in accordance with direction.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

6. Statutes 🔑181(1)

In construing statute, court must look to the language used and must endeavor, if possible, to ascertain intention of Legislature.

7. Motions 🔑54

Where time within which judicial act must be done is jurisdictional, trial court cannot circumvent clear mandate of statute by filing an order "nunc pro tunc", and in such circumstance it is immaterial whether default is that of the court or of the litigant.

See Words and Phrases, Permanent Edition, for all other definitions of "Nunc Pro Tunc".

8. New trial 🔑163(1)

The failure of trial court to put in writing his order granting new trial for insufficiency of evidence as required by statute was a failure to comply with jurisdictional requirement, and was not a mere "error of record" which could be corrected by a nunc pro tunc entry. Code Civ.Proc. § 657, subd. 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Error of Record".

9. Courts 🔑116(1)

Courts of record have inherent power to correct their records so that they conform to the facts and speak the truth.

10. Courts 🔑116(1)

A court cannot, under form of amendment of records, correct judicial error or make of record an order or judgment not given.

11. New trial 🔑163(1)

The entry of minute order by superior court clerk in his records reciting that superior court granted motion for new trial for insufficiency of evidence was merely a synopsis of court's order, and was tantamount to a history of the order, and did not satisfy statutory requirement that, when motion for new trial is granted for insufficiency of evidence, a written order specifying such ground shall be filed within 10 days. Code Civ.Proc. § 657, subd. 7.

12. New trial 🔑163(1)

The statute, as amended in 1939, providing that, when motion for new trial is granted for insufficiency of evidence, a written order specifying such ground shall be filed within 10 days, and that court may direct a party to prepare the order, required an order in writing other than a minute entry by the clerk. Code Civ.Proc. § 657, subd. 7.

13. New trial 🔑7

The right to new trial is not a constitutional right.

14. Constitutional law 🔑**305, 318**

A hearing before judgment with full opportunity to present all the evidence and the arguments which the party deems important is all that can be adjudged final under guaranty of "due process of law", and rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings, and one hearing, if ample, before judgment, satisfies the requirement of due process. U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

15. New trial 🔑**½**

The right to move for new trial is purely statutory and Legislature can limit power of trial court in regard to time and manner in which such right may be exercised.

16. Constitutional law 🔑**305**
New trial 🔑**163(1)**

The statute, as amended in 1939, providing that, when motion for new trial is granted for insufficiency of evidence, a written order specifying such ground shall be filed within 10 days, and making performance of such act by trial court jurisdictional in character is not unconstitutional as depriving litigant of valuable property right of adjudication on sufficiency of evidence without "due process of law". Code Civ.Proc. § 657, subd. 7; U.S.C.A.Const. Amend. 14.

17. New trial 🔑**163(1)**

The statute, as amended in 1939, providing that, when motion for new trial is granted for insufficiency of evidence, a written order specifying such ground shall be filed within 10 days, is "mandatory" and not "directory", and applies to nunc pro tunc orders as well as to original orders, and hence nunc pro tunc orders made 7 and 11 weeks after clerk's entry of minute order specifying that motion for new trial for insufficiency of evidence was granted by trial court, were invalid. Code Civ.Proc. § 657, subd. 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Directory".

18. Certiorari 🔑**5(1)**

Certiorari cannot be used as a substitute for appeal.

19. Certiorari 🔑**5(1)**

An order which is not provided for in California procedure is not an "appealable order" within statute providing that writ of review may be granted when an inferior tribunal has exceeded its jurisdiction and there is no appeal, and in such a case, an application for writ of review is the proper remedy. Code Civ.Proc. § 1068.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

20. Certiorari 🔑**28(2)**

Where a statute prescribes a definite procedure, and the court acts contrary to the authority thus conferred, the court acts in "excess of jurisdiction", and certiorari will lie to correct the excess.

See Words and Phrases, Permanent Edition, for all other definitions of "Excess of Jurisdiction".

21. Certiorari 🔑**28(2)**

Nunc pro tunc orders granting new trial for insufficiency of evidence, not filed within 10 days after granting of motion for new trial for insufficiency of evidence as required by statute, were in "excess of jurisdiction" of superior court, and hence validity of orders was reviewable on certiorari. Code Civ.Proc. § 657, subd. 7; § 1068.

In Bank.

Proceeding by Mable Whitley against the Superior Court of the State of California, in and for the county of Los Angeles, and another for writ of certiorari to annul two nunc pro tunc orders of the Superior Court granting a motion for new trial on the ground of insufficiency of the evidence to sustain the verdict of the jury.

Orders annulled.

Merritt D. Jergins and Simon Miller, both of Long Beach, for petitioner.

J. H. O'Connor, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, for respondent Superior Court.

Joseph A. Ball and Frank C. Charvat, both of Long Beach, for respondents Belyea Truck Co. and Fred C. Clement.

CURTIS, Justice.

This is an application by the petitioner, Mable Whitley, for a writ of certiorari seeking to annul, vacate and set aside two nunc pro tunc orders made and entered in the Superior Court of the County of Los Angeles, granting a motion for new trial on the ground of the insufficiency of the evidence to sustain the verdict of the jury.

Petitioner, as plaintiff, instituted action against Belyea Truck Company, a California corporation, and Fred Clement to recover for personal injuries. After a trial by jury, verdict was rendered in her favor in the sum of $3,000, and judgment was entered accordingly on April 25, 1940. Defendants duly filed a notice of intention to move for a new trial, which notice enumerated all but one of the statutory grounds for a new trial, including the ground of insufficiency of the evidence to sustain the verdict. Code Civ.Proc. sec. 657. The trial court, after the hearing, orally granted the motion for new trial on May 28, 1940, and on this same day a minute order was entered by the clerk specifying that "the said motion is by the court granted upon the insufficiency of the weight of the evidence to support the verdict". On June 1, 1940, plaintiff filed her notice of appeal.

On ex parte motion of the defendants the trial court on July 17, 1940, signed and filed a "Nunc Pro Tunc Order Granting New Trial" as of May 28, 1940, wherein it was recited: "the clerk was instructed by said court to enter the order in his minute book granting a new trial and to recite the ground upon which the same was granted, to-wit: the insufficiency of the evidence." On August 14, 1940, without notice to plaintiff, the trial court signed and filed another document entitled "Nunc Pro Tunc Order Granting New Trial", which order contained substantially the same matters as were contained in the prior nunc pro tunc order, except that it was recited therein that the failure to file the written, formal order within the ten days following the granting of new trial was due to inadvertence of the court, and not of counsel, as had been erroneously stated in the prior nunc pro tunc order, which was thereby vacated. It is these nunc pro tunc orders which petitioner here seeks to have annulled.

The question for decision in this proceeding, therefore, is whether these nunc pro tunc orders awarding a new trial on the ground of the insufficiency of the evidence are valid, since neither was made within ten days after the motion was granted or "filed with the clerk".

Prior to the 1939 amendment to section 657, Code of Civil Procedure, subdivision 7 thereof read: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order it will be presumed that the order was not based upon that ground." Cal. Stats.1929, c. 479, p. 841. The amendment of this section became effective prior to the trial of this action and reads: "When a new trial is granted, on all or part of the issues, upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing and shall be filed with the clerk within ten days after the motion is granted; otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground. The court may direct a party to prepare the order." Cal.Stats.1939, c. 713, p. 2234.

Previous to the amendment of subdivision 7, the order granting a motion for new trial upon the ground of the insufficiency of the evidence was not required to be in writing and no time limit was imposed. Then in 1939 by the amendment two significant changes were made in this provision: (1) such order of the court now must be in writing; and (2) it must be filed within ten days after the motion for new trial is granted. There was no written order here granting a new trial upon the insufficiency of the evidence until the nunc pro tunc orders of July 17, 1940, and August 14, 1940, seven weeks and eleven weeks, respectively, after entry of the minute order on May 28, 1940. Petitioner contends that this new requirement—that such order in writing be filed within ten days—is mandatory, and that when more than the specified time limit has elapsed since the granting of the motion for new trial the court has no authority or power to file an order granting a new trial on the ground that the evidence is insufficient to sustain the verdict. In support of this argument, petitioner relies on several well-established principles of statutory construction, to which we now direct our attention.

[1-4] In a number of decisions prior to the 1939 amendment of said section 657, it was held that where an order for a new trial failed to state that it was being granted on the ground that the evidence was insufficient to sustain the verdict or decision, the trial court could properly file a nunc pro tunc order setting up that ground, if in fact it had been relied upon. Halpern v. Superior Court, 190 Cal. 384, 212 P. 916; Livesay v. Deibert, 3 Cal.App.2d 140, 39 P.2d 466; Kohlstedt v. Hauseur, 24

Cal.App.2d 60, 74 P.2d 314. The legislature is presumed to have known of these prior decisions and to have considered them at the time of the amendment. Estate of Moffitt, 153 Cal. 359, 95 P. 653, 1025, 20 L.R.A.,N.S., 207; Hoffman v. McNamara, 102 Cal.App. 280, 282 P. 990; Estate of Garthwaite, 131 Cal.App. 321, 21 P.2d 465; 23 Cal.Jur. 782, and authorities there cited. In construing statutory language, it is fundamental, if possible, to give effect to each sentence, phrase and word thereof. Estate of Garthwaite, supra; 23 Cal.Jur. 758, and authorities there cited. The fact that the legislature in 1939 amended section 657, subdivision 7, so as to impose a ten-day limitation for filing such order for new trial, where no time restriction existed at all prior to this recent enactment, demonstrates the legislature's intent to change the pre-existing law, and it must be presumed that it was intended to change the statute in all the particulars where there is a material change in the language of the amended provision. People v. Weitzel, 201 Cal. 116, 255 P. 792, 52 A.L.R. 811; Hoffman v. McNamara, supra; Lundquist v. Lundstrom, 94 Cal.App. 109, 270 P. 696. Manifestly, if this new requirement is not construed as mandatory, the rule regarding the filing of such order will remain the same as it was before the enactment of the amendment, which interpretation would render the amendment nugatory.

[5, 6] Another circumstance to be noted in our consideration of the intended character of this statutory language is the fact that a penalty is attached to a failure to act in time. The well-established principle of construction that where consequences are attached to a failure to act in accordance with legislative direction, such direction is mandatory, was recognized in the recent case of Thomas v. Driscoll, 42 Cal. App.2d 23, at page 27, 108 P.2d 43, at page 45, wherein the following discussion appears: "* * * Although imperative words are sometimes held to have only a directory meaning, this rule of interpretation is not applicable when a consequence or penalty is provided for a failure to do the act commanded. This is a California rule and is supported by the weight of authority in other jurisdictions. In Shaw v. Randall, 15 Cal. 384, where the court, in disposing of a contention that the statute was directory only, said: 'In construing the statute we must look to the language used and endeavor, if possible, to ascertain the intention of the Legislature. * * * Where a consequence is attached to a failure to comply * * * the consequence can be avoided only by a compliance with the statute.' This was followed in Perine v. Forbush, 97 Cal. 305, 32 P. 226, and in McCrea v. Haraszthy, 51 Cal. 146. The same doctrine is applied by the courts of Missouri in Hudgins v. Mooresville Consol. School Dist., 312 Mo. 1, 278 S.W. 769 and in Ousley v. Powell, Mo.App., 12 S.W.2d 102."

[7] Respondent, in support of its contention that the ten-day requirement is merely directory, cites Smith v. Jaccard, 20 Cal.App. 280, 128 P. 1023, 1026, and Hohnemann v. Pac. Gas & Elec. Co., 31 Cal.App.2d 692, 693, 88 P.2d 748, which involve the failure to meet the twenty-day limitation of section 953a, Code of Civil Procedure, for the filing of a reporter's transcript. But those cases are not in point here for the reason that those decisions expressly rest on the ground that the legislature, by omitting to provide a penalty for defaults, has indicated thereby that the time requirement is not mandatory. When the time within which the judicial act must be done is jurisdictional, the court cannot circumvent the clear mandate of the statute by filing an order nunc pro tunc. In such a circumstance, it is immaterial whether the default be that of the court or of the litigant. Analogous to the instant case is the situation discussed in Kraft v. Lampton, 13 Cal.App.2d 596, 57 P.2d 171, wherein the trial court failed to make its order granting a new trial within the sixty days allowed by the statute (Code Civ.Proc., sec. 660), and it was held that the court, chargeable with such jurisdictional default, cannot accomplish by an order nunc pro tunc what it is prohibited from doing otherwise.

[8-10] We are not here concerned with a mere error of record, but with a failure to comply with a jurisdictional requirement. This distinction is emphasized in Haynes v. Los Angeles R. R. Corp., 80 Cal.App. 776, 780, 252 P. 1072, 1073: "The rule is well settled in this state that every court of record has the inherent power to correct its records so that they shall conform to the facts and speak the truth * * * [citing cases]. It is equally well established that the court in the exercise of this power is not authorized to do more than to make its records conform to the actual facts, and cannot, under the form of

amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given * * * [citing cases]." The record before us discloses that no written order granting a new trial on the ground of the insufficiency of the evidence was made within the time in which the court was empowered to act, and a nunc pro tunc entry cannot create an order where one did not exist before. "A determination by the judge that his failure to put his order in writing was a clerical error is not of sufficient potency to outweigh the plain letter of the code section. * * * It was to prevent just such entries that the legislature must have intended by the amendment." Thomas v. Driscoll, supra, 42 Cal.App.2d at page 26, 108 P.2d at page 46.

[11, 12] The entry of the minute order on May 28, 1940, did not satisfy the requirement that a written order specifying the insufficiency of the evidence be filed within ten days after the motion is granted. The entry which the clerk makes in his records is a synopsis merely of the court's order, tantamount to a history of it (18 Cal.Jur. 663; Bailey v. Superior Court, 215 Cal. 548, 11 P.2d 865), and before the amendment of 1939, this record clearly was sufficient compliance with the provisions of section 657, subdivision 7 (Pol.Code, sec. 4178, subd. 3). Again referring to Thomas v. Driscoll, supra, we find at page 26 of 42 Cal.App.2d, at page 45 of 108 P.2d, the following analysis of legislative intent as indicated by the change in the statutory language: "* * * Unless something more than a mere minute entry is required that part of the amendment providing for a written order is meaningless. That the order should be written and 'filed with the clerk' is definitely intended is manifest from the provision that 'the court may direct a party to prepare the order'. Since the legislature could not have intended that a party should prepare a minute entry, and since the order 'shall be filed with the clerk' it is clear that the amendment requires an order in writing other than a minute entry by the clerk."

[13-16] There is no merit to respondent's contention that if the ten-day limitation be construed as a jurisdictional period, the statute is unconstitutional because it would operate to deprive the defendants in the original personal injury action here of valuable property rights—adjudication upon the sufficiency of the evidence—without due process. There is no constitutional right to a new trial. The general rule is stated in 12 Am.Jur., Constitutional Law, section 637, page 327: "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital under the guaranty of due process of law. Rehearings or new trials are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment satisfies the demand of the Federal Constitution in this respect." Furthermore, in this state the right to move for a new trial is purely statutory, and the legislature may, therefore, limit the power of the trial court in regard to the time and manner in which such right is exercised. Lancel v. Postlethwaite, 172 Cal. 326, 329, 156 P. 486. This being so, it is difficult to conceive of any valid objection, based on constitutional grounds, to a provision having the effect simply of requiring a written order to be filed within ten days if insufficiency of the evidence is to be availed of as the ground for a new trial, and making the performance of this act by the court jurisdictional in character.

[17] The above considerations impel the conclusion that the legislature by its amendment to section 657, Code of Civil Procedure, subdivision 7, intended to make it mandatory that a written order granting a new trial on the ground of the insufficiency of the evidence to sustain the verdict or decision be filed within ten days after the motion is granted or not at all, and that this time limitation applies to nunc pro tunc orders as well as to original orders made pursuant to this statutory provision.

[18-21] Finally, as an objection to a determination of the validity of these nunc pro tunc orders, respondent urges the point that a writ of review is not a proper proceeding in this case, as petitioner has her remedy by appeal. Respondent here calls attention to the general rule that certiorari may not be used as a substitute for appeal. 4 Cal.Jur. 1052. But it is likewise well recognized that an order which is not provided for in our procedure is not an appealable order within the meaning of section 1068, Code of Civil Procedure, and an application for a writ of review is the proper remedy. Treat v. Superior Court, 7 Cal.2d 636, 62 P. 147; Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001; Diamond v. Superior Court, 189 Cal. 732, 210 P. 36;

Quevedo v. Superior Court, 131 Cal.App. 698, 21 P.2d 998; Holquin v. Allison, 97 Cal.App. 126, 274 P. 1037. When a statute prescribes a definite procedure and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction and certiorari will lie to correct such excess. Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109.

Each of the nunc pro tunc orders purporting to grant a new trial on the ground of the insufficiency of the evidence should in our opinion be annulled, and it is so ordered.

We concur: SHENK, J.; TRAYNOR, J.; EDMONDS, J.; CARTER, J.

BASTAJIAN v. BROWN et al.

Civ. 6399.

District Court of Appeal, Third District, California.

May 21, 1941.

Hearing Granted July 17, 1941.

1. Trial 🔑400(1)

A trial judge may change his mind as many times as he chooses before signing and filing his findings of fact and conclusions of law, even though he may have theretofore indicated what his decision would be. Code Civ.Proc. §§ 632, 633.

2. Judgment 🔑390

Affidavit by trial counsel for a defendant that, upon receiving court's announcement of decision for defendants, findings of fact and conclusions and judgment were drafted and transmitted to principal counsel, who became ill and later died without having filed them, that a year later when proposed findings of fact, conclusions of law, and judgment contrary to announced decision of court were served upon affiant, affiant tried to locate defendant but was unable to do so, and that judge was notified that proposed findings, conclusions, and judgment did not conform to judgment announced by court, showed "neglect", but not neglect sufficient to support action under statute to set aside judgment, nor such circumstances as would evidence inherent power in the court to set aside findings of fact, conclusions of law, and judgment submitted by counsel for plaintiff and signed by court. Code Civ. Proc. §§ 473, 632, 633.

See Words and Phrases, Permanent Edition, for all other definitions of "Neglect".

3. Judgment 🔑390

On motion to set aside findings of fact, conclusions of law, and judgment for plaintiff, affidavit of defendant that court had announced a decision for defendants and that counsel informed defendant that there was nothing further to be done, that defendant paid counsel his fee, and more than a year later defendant ascertained for first time that judgment had been signed for plaintiff, that defendant's counsel had died without having findings of fact, conclusions of law, and judgment in conformity with court's announced decision signed or filed, showed that defendant was mistaken or misinformed, but was insufficient to authorize setting aside findings of fact, conclusions of law, and judgment for plaintiff. Code Civ. Proc. §§ 473, 632, 633.

4. Judgment 🔑304, 355

A court has power to correct mistakes in its records and proceedings, and to set aside judgments and orders inadvertently made which are not actually the result of the exercise of judgment, but it has no power having once made its decision after regular submission to set aside or amend for judicial error.

5. Judgment 🔑375

A court has inherent power and jurisdiction to vacate on motion an order or judgment obtained by extrinsic fraud, but, if such fraud is not proved, it must be held to have exceeded its jurisdiction in vacating an order or judgment.

6. Appeal and error 🔑105

Dismissal and nonsuit 🔑43(5)

A judgment of dismissal is reviewable on appeal, and except on a proper showing and in a recognized manner it cannot be vacated in the trial court.

7. Judgment 🔑393

On motion to vacate a judgment, the knowledge of trial court can be a controlling factor where corrections, amendments, and other changes are required to the end that the court's orders, judgments, and decrees

may truly speak the court's determination, but if the evidence establishes without contradiction that court's declarations in the order vacating and setting aside findings of fact and conclusions of law and judgment are not only unsupported by the evidence, but are contrary to the evidence, the declared knowledge of the court becomes only its unsupported "conclusion".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

8. Judgment ⚿355, 363

On motion to set aside findings of fact and conclusions of law and judgment where trial judge had proposed findings of fact and conclusions of law for more than ten days before signing them as well as a letter from opposing counsel objecting to them, any inquiry as to whether trial judge remembered the evidence when he signed and filed proposed findings of fact, conclusions of law, and judgment was immaterial, and, where there was no fraud, any error committed was "judicial error" reviewable only on appeal, and not an "inadvertence" or "mistake" which trial court could correct. Code Civ. Proc. §§ 473, 632, 633.

See Words and Phrases, Permanent Edition, for all other definitions of "Inadvertence", "Judicial Error", and "Mistake".

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Blanche H. Comstock, for whom S. B. Bastajian, as administrator with the will annexed of Blanche H. Comstock, deceased, was later substituted as plaintiff, against James E. Brown and others, for fraud. From an order vacating and setting aside findings of fact and conclusions of law and judgment for plaintiff, the plaintiff appeals.

Order reversed.

See, also, 112 P.2d 337.

Paul Vallée, Astor Elmassian, George C. Woods, and C. P. Von Herzen, all of Los Angeles, for appellant.

Reynolds & Painter, Thomas Reynolds, Sidney A. Cherniss, and Ray H. Kinnison, all of Los Angeles, for respondents.

MONCUR, Justice pro tem.

The above entitled action was commenced in the latter part of 1935 or the early part of 1936 by Blanche H. Comstock, who died during the pendency of the action. Appellant S. B. Bastajian was appointed administrator with the will annexed of her estate. Blanche H. Comstock, where necessary, will be referred to in this opinion as plaintiff, and said administrator will be referred to as appellant. The action was one for fraud. It was regularly tried and at the conclusion of the trial was taken under submission by the court and on May 14, 1936, the following minute entry was made: "394424. Blanche H. Comstock v. James E. Brown, et al. Cause heretofore tried and submitted, the court now orders judgment for defendants."

Thereafter and for over a period of one year no findings of fact and conclusions of law and judgment were submitted to the trial court. In the early part of May, 1937, findings of fact and conclusions of law and judgment were prepared by C. P. Von Herzen, one of the attorneys for plaintiff, and handed to the clerk of the court for submission to the trial judge. Service of a copy of the findings of fact and conclusions of law were acknowledged as follows: "Received copy of the within Findings of Fact and Conclusions of Law this 11th day of May 1937. Wilbur Bassett, attorney for defendants." On June 4, 1937, the trial judge signed the findings of fact and conclusions of law as proposed by Mr. Von Herzen and also on the same date signed the judgment. The findings and judgment were filed on that day. Notice of entry of judgment was served and receipt of copy of the notice was acknowledged on the 9th day of June, 1937, by Wilbur Bassett, attorney for defendants. No motion for a new trial was made and no appeal was taken by defendants.

On or about August 23, 1937, defendants filed and served the motion for an order of the court setting aside and vacating the findings of fact and conclusions of law and judgment signed by the court on the 4th day of June, 1937, upon the grounds that said findings, conclusions, and judgment did not conform to the true judgment rendered by the court, and that by reason of clerical mistakes, said findings, conclusions, and judgment which were actually signed did not conform with the judgment which the court directed to be prepared; that said judgment was rendered against said defendants through their mistake, inadvertence, surprise and excusable neglect; that said judgment was procured from the above entitled court by fraud and deception practiced on said court.

On September 29, 1937, the trial judge made an order granting the motion to set aside the findings and conclusions of law and the judgment, and as a basis for so declaring found that said findings of fact and conclusions of law and judgment did not conform to and set forth the true judgment rendered by the court in that the court intended to pronounce and did pronounce judgment in the action in favor of the defendants upon all of the issues presented, and decreed, among other things, that the deed conveying the premises involved in the action to defendant Brown was valid and in full force and effect, and conveyed good title to them, while said finding of fact and conclusions of law and said judgment inadvertently and erroneously contained findings against said defendants and in favor of the plaintiff, and inadvertently and erroneously decreed that said deed be set aside, which was not the judgment of the court; that said findings of fact and conclusions of law and said judgment were signed by the court inadvertently and by mistake, and did not express the intent of the court nor the true judgment rendered herein, and that the signing of the same by said court constituted a clerical mistake; that said findings of fact and conclusions of law and judgment were made and rendered against said defendants through mistake, inadvertence, surprise, and excusable neglect of said defendants and their counsel, under circumstances which involved the illness and death of the chief counsel for said defendants, all as particularly set forth in the affidavits on file herein; that at the time of the presentation of said findings of fact and conclusions of law and said judgment to the court for signature approximately one year had elapsed since the court had announced its decision and had judicially determined the issues of the case, and that said findings, conclusions, and judgment were signed by the court in reliance upon the representations of plaintiff's counsel then and there made to the court that the instruments so presented contained the true findings, conclusions, and judgment of the court in the action as previously announced by the court; that the statement to the court that said instruments so presented for signature did contain the true judicial determination of the issues of the action was untrue in that said instruments contained provisions contrary to the actual decision made and announced by the court, and inconsistent with and different from the judicial determination of the issues involved, and that the presentation of said findings of fact and conclusions of law and said judgment to the court for signature constituted a fraud and deception practiced upon the court in misrepresenting and misstating the true decision of the court after the lapse of a long period of time.

On behalf of the defendants affidavits were submitted in support of the motion to vacate and set aside the findings and judgment. The affidavit of James E. Brown, one of the defendants, asserts that upon being served with summons and complaint in the action he employed W. D. Spalding, as his counsel and retained him to defend said action, and was thereafter informed by said Spalding that the latter had associated Wilbur Bassett as associate counsel for defendants, and that said Bassett would conduct the trial of said action; that the action was tried on May 6th and 7th of 1936, and at the conclusion was ordered submitted; that on May 15, 1936, affiant was advised over the telephone by said Spalding that a decision had been rendered in said action in favor of the defendants on all of the issues, and that the court had found that said defendants were the lawful owners of the real property involved, and that their title was to be quieted against the plaintiff; that he immediately thereafter went to the office of Mr. Spalding, who repeated said information to him and he thereupon paid said Spalding the amount of his fee which he required and was advised that the action had been successfully terminated in favor of said defendants, and that there was nothing further to be done; that he thereupon left the office of said Spalding and thought no more of the matter and thought that the case had been concluded until more than a year later, in August, 1937, when he ascertained for the first time that judgment had been signed in said action to the effect that the deed to defendants was invalid. Affiant also learned that his attorney, W. D. Spalding, had died, and affiant thereupon consulted Thomas Reynolds and retained him to investigate and ascertain why a judgment had been signed different from the one announced by the court; that said judgment was taken against defendants through mistake, inadvertence and surprise, and affiant is informed and believes and alleges that said erroneous judgment occurred as a result of the illness and death of W. D.

Spalding, who passed away shortly after the trial of said action, and that said Wilbur Bassett, associate counsel, believed that said Spalding had rendered and filed a correct judgment, and that by reason of his illness and death said Spalding had not done so, and that nobody had informed affiant or Margaret Brown, his wife, of any of the said facts and circumstances, and affiant believes that he should be relieved against said judgment.

Wilbur Bassett, one of the attorneys for defendants, submitted an affidavit substantially as follows: that he was one of the attorneys of record for the defendants in said action; that he was requested to act as one of the attorneys of record by W. D. Spalding and that said Spalding requested him to become associated with him in said action and to try the action, and that he and said Spalding appeared at the trial in behalf of said defendants and affiant conducted said trial; that thereafter, on May 14, 1936, the court announced its judgment; that upon receiving notice of such pronouncement he prepared a draft of findings of fact and conclusions of law and judgment and transmitted the same to Mr. Spalding; that he presumed that said Spalding had immediately filed said findings and judgment in accordance with the proposed draft, and said Spalding said no more thereafter about the matter to him, and he truly believed that his duties in said matter were at an end and that said Spalding had complied with the court's direction and had filed herein the proper findings and judgment in accordance with the direction of said court; that he has since ascertained that said Spalding immediately after the trial of said action became and was very ill and continued to be ill for some months, and thereafter said Spalding died, and he is informed, believes, and alleges that by reason of such illness and death said Spalding failed to file the findings and judgment herein; that more than a year following the date of said trial the attorneys for the plaintiff prepared and filed findings of fact and conclusions of law and judgment, and a copy thereof was served upon affiant as one of the attorneys of record; that affiant read said findings and judgment and immediately noted that the same were not at all in conformity with the judgment announced by the court; that he thereupon endeavored to locate the defendant James E. Brown by telephone and by letter, but the address of said defendant was not listed in any directory and after seaching for said defendant affiant was unable to find him, he thereupon directed a letter to the trial judge and pointed out to him that said findings and judgment were not in conformity with the judgment of said court; that the circumstances stated were brought about as a result of the illness and death of said Spalding, and he believes that said judgment was rendered through mistake, inadvertence, and surprise of said defendants and their counsel.

The letter which Mr. Bassett addressed to the trial judge is dated May 12, 1937, and is as follows: "Findings drawn by C. P. Von Herzen have been left at my office. I drew findings a year ago in this cause and sent them to W. D. Spalding. Brown was his client and I was employed to try the case for Spalding. I do not know where Brown is and you know Spalding has been dead several months. I have no file. My recollection is that Von Herzen is not entitled to any such findings. VI and VII are pure bunk. Why Spalding did not close this case I do not know, except that his health became shaky, and he did only what he had to. (Signed) Wilbur Bassett."

Affidavits of Thomas Reynolds and Sidney A. Cherniss, attorneys for defendants at the time of the motion in question here were presented, which affidavits add nothing material to the facts presented in the affidavits of defendant James E. Brown and Wilbur Bassett.

Defendant James E. Brown filed a supplemental affidavit in support of the motion to the effect that he did not at any time employ Wilbur Bassett but was advised by said Spalding that Wilbur Bassett had been employed by said Spalding to try said action; that he understood that Bassett's sole duties were to conduct the trial of said action but said Spalding was to retain charge of said case for and on behalf of defendants Brown; that all of the conferences and conversations were with Spalding, and on or about May 21, 1936, he paid Spalding the fees which he requested for the services rendered by him and the said Bassett in the trial of the action; and that the plaintiff, Blanche Comstock, died on or about the 3rd day of July, 1937.

Wilbur Bassett also filed a supplemental affidavit stating, in addition to the matters set forth in his prior affidavit, that he was employed in said matter by W. D. Spalding for the purpose of conducting the trial of said action; that he was not employed by the defendants James E. Brown and Margaret Brown and had no authority whatsoever from them, but was called in by Spalding only for the purpose of trying the action; that pursuant to his employment he conducted the trial of said action, and at the conclusion of said trial his employment was concluded; that said Spalding at all times retained charge of said action, and required no further services from affiant; that during the time he was engaged in connection with said action the defendant James E. Brown at one time stated to him that said defendants had a contract with said Spalding relative to legal services in the matter, which contract said Brown proposed to stand on; that under such circumstances he had no authority whatsoever to represent the defendants Brown at the conclusion of the trial of said action, and when the proposed findings and judgment were served upon affiant by the plaintiff's attorneys in 1937, affiant had no authority to proceed in the absence of specific instructions from Brown, and that affiant was unable to find said Brown and obtain such authority; that Brown's remarks to him had been of such character as to lead him to believe that Brown looked solely to Spalding and he did not know what Brown would desire to have done and he had no authority to represent said Brown.

Near the conclusion of the presentation of evidence on the part of defendants in support of the motion, Mr. Sidney Cherniss, one of the attorneys for defendants, said that defendants had no desire to press the charge of fraud against counsel personally.

In opposition to the motion, the affidavit of C. P. Von Herzen was presented and in which it was stated that at all stages of the proceedings had in said action, he, C. P. Von Herzen, had dealt with Wilbur Bassett as attorney representing the defendants, James E. and Margaret Brown; that said attorney appeared at the hearing of the original demurrer, which was sustained, and that thereafter said attorney appeared at the hearing of the demurrer to the second amended complaint, which was overruled. All papers, notices, amended complaints and other documents served in connection with said litigation were served upon said attorney Wilbur Bassett. The cover of the answer served upon him following the overruling of the demurrer to the second amended complaint bears the following: "Wilbur Bassett, Attorney-at-Law, 900 Van Nuys Building, Los Angeles"; that at no time, until the trial of the action, did affiant meet or have any conversation with W. D. Spalding, one of the attorneys of record for the said defendants, and in the trial of said action said W. D. Spalding took no active part in the questioning of witnesses, the argument to the court, nor the various motions and arguments made during the trial of the cause; that the copy of the notice of trial served upon affiant was signed "Wilbur Bassett, Attorney for defendants Brown, et ux." Telephone conversations had concerning the deposition of the plaintiff were had by him with the said Wilbur Bassett and, so far as he can now remember, no conversation of any kind or character, or communication by letter, or otherwise, was had with the other attorney for the defendants, W. D. Spalding; that following the trial of the case, he conferred with the clerk of the court concerning the judgment arrived at by the court and on that occasion the presiding judge of said cause advised him that he should await the filing of findings regarding discussion of certain phases of said action, and that at that time he would be glad to go into said phases which affiant desired to have considered; that he awaited the filing of findings approximately one year and finally, no findings being filed, he prepared and served upon said Wilbur Bassett proposed findings of fact and conclusions of law and judgment, and had the same filed with the clerk of the court for presentation to the trial judge; that approximately ten days thereafter he stopped at the courtroom and talked to the clerk of the trial judge and was at that time informed that a communication had been received from said Wilbur Bassett stating that certain of the findings, as prepared by him, were "pure bunk"; that he had prepared proposed findings of fact and conclusions of law and sent them to W. D. Spalding, who had died in the interim and that he did not know what had happened to said proposed findings, conclusions, and judgment; and he did not know how to get in touch with defendants Brown; that the judge thereupon informed affiant that he would await the submission of the other findings which would probably be forthcoming in a few days and that thereupon which findings the court was going to sign would be ascertained; that said findings, conclusions, and judgment were prepared, served, and filed by affiant on or about the 2nd or 3rd day of May, 1937; that nothing was done by the court, following the receipt of said letter about the 10th or 15th of May, 1937, until on or about June 4, 1937, when the trial judge signed the findings, conclusions, and judgment as proposed by affiant and on said day the clerk of said court mailed a postal card to said Wilbur Bassett, stating that said findings and judgment were signed and filed on said day. Thereafter, and on or about the 9th day of June, 1937, affiant prepared a notice of entry of judgment, caused the same to be served upon said Wilbur Bassett, and filed it in the records of the above entitled court, which said notice stated that judgment was entered in favor of the defendants, James E. and Margaret Brown, upon their promissory note and against said defendants upon their deed; that affiant at no time received any communication from said Wilbur Bassett with respect to any of the matters concerning the findings of fact, conclusions, and judgment proposed by affiant and subsequently signed by the trial judge, either by mail, telephone, or otherwise, and, as far as affiant knows, said Wilbur Bassett made no attempt whatsoever to communicate with him in any way; that no motion for new trial, or notice of intention to make such motion, nor a motion to set aside and vacate the judgment, nor for a new and different judgment has ever been served upon him; that no notice of appeal has ever been filed or served upon him and no steps of any kind or character taken by the attorney for the defendants to in any way indicate that he was not satisfied with the judgment as entered; that the findings, conclusions, and judgment prepared by him were his understanding of the judgment as the court desired to have the matter and he prepared the same as he believed the court determined the issues and controversy between the parties to the action; that said findings of fact were submitted by him to the court pursuant to what he understood the court desired to do in determining the case; that following the receipt of the letter by the court from Wilbur Bassett, the trial judge informed the clerk of the court and affiant that he was going to await a reasonable time to see what the defendants were going to suggest by way of amendments to said findings, or if they were going to submit different findings; that approximately two or three weeks thereafter affiant was informed by the trial judge, while riding in the elevator in the Hall of Records, that he had determined to sign the findings submitted by affiant.

George C. Wood submitted an affidavit in opposition to the motion and stated that he was one of the attorneys for plaintiff in the above entitled action; that he was present during the trial of said cause and had various dealings with the attorneys for defendants, James E. and Margaret Brown, during said trial; that all of his communications were had with Wilbur Bassett and none of them with W. D. Spalding; that affiant was informed and believed that Wilbur Bassett was handling the entire case; that said Wilbur Bassett appeared at the hearing on the demurrers and conducted the trial of said cause; that said Wilbur Bassett had appeared at the time of the taking of the deposition of the plaintiff and the controversy arising with respect to the signing thereof was with Wilbur Bassett; that a proposed settlement of the case was discussed by affiant with said Wilbur Bassett following the taking of said deposition, and at no time did the said Wilbur Bassett indicate in any way that he was not in complete and actual charge of the entire case; that the only time affiant saw or had any conversation with said W. D. Spalding was during the trial of said action, at which time said W. D. Spalding sat in with said Wilbur Bassett, but took no part in the trial of the case, or in the arguments presented to the court; that W. D. Spalding died on December 18, 1936, more than seven months following the trial of the cause, and that public announcements of said occurrence appeared in the public press and in the legal publications, the Los Angeles Daily Journal, Los Angeles News, and several other similar publications devoted to the publication of legal news; that the March, 1937, issue of the Southern California Telephone Directory lists the name and address of the defendants as follows: "Margaret Brown, r. 422 S. Bedford Dr., Bev. Hls, Crstvw. 14268"; that affiant on August 25, 1937, went to the address given by the defendants, James E. and Margaret Brown, at the time of the trial, 1136 Hauser street, Los Angeles, California, and there ascertained that they had left a forwarding address to 422 S. Bedford drive, Beverly Hills. At the Beverly Hills address affiant found the defendants, James E. and Margaret Brown, and upon stating that he was there for the purpose of ascertaining whether they could be found he was informed by James E. Brown that anyone who wanted him could find him and that he was available at all times. The trial judge and the court clerk did not present and file affidavits.

From the transcript it appears that after submission of the motion but before the court ruled thereon, plaintiff's attorneys informed the court of the appointment of S. B. Bastajian as administrator with the will annexed of Blanche H. Comstock, deceased, and on or about September 7th of 1937, said S. B. Bastajian was substituted as plaintiff in the action. Following submission of the motion the court made an order granting the motion.

[1] It is not contended that the minute entry ordering judgment for defendants was the decision of the court; also, it seems to be conceded that even though the trial judge may indicate what his decision will be, he may change his mind as many times as he chooses before signing and filing his findings of fact and conclusions of law. In the case of Phillips v. Hooper et al., Cal.App., 111 P.2d 22, 23 it is said: "Appellant further contends that the statements made by the trial court, during the trial, indicate that the court had an erroneous theory of the case, and based its judgment on this erroneous theory. It has been held that the findings of fact must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision. Goldner v. Spencer, 163 Cal. 317, 125 P. 347. And no antecedent expressions of the judge can in any way restrict his absolute power to declare his final conclusion, in the only manner authorized by law, to wit, by filing his 'decision' (findings of fact and conclusions of law), provided in sections 632 and 633 of the Code of Civil Procedure. Scholle v. Finnell, 173 Cal. 372, 159 P. 1179; Fisk v. Casey, 119 Cal. 643, 51 P. 1077; Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113; Risinger v. Anderson, 10 Cal.App.2d 455, 51 P.2d 1119."

[2] The motion to set aside the findings and judgment was based upon section 473 of the Code of Civil Procedure, and it is also contended by respondents that the court has inherent power, aside from the authorizations contained in said section, to vacate and set aside its findings and judgment under the circumstances disclosed herein. Many authorities have been cited in support of the contention of respondent and it is urged that, under the circumstances appearing, a clerical error occurred in the signing and filing of the findings and judgment. In view of the conclusion we have reached we deem it unnecessary to discuss these authorities, as we are satisfied that the signing of the findings and conclusions of law and judgment by the court constitute judicial acts. It is not questioned that, where proper circumstances are made to appear, power rests in the court to vacate and set aside its findings and conclusions of law and judgment entered thereon where the court is satisfied that, under the showing made, such circumstances appear. The affidavit of Wilbur Bassett shows neglect, but does not show that neglect which is sufficient to support the action here taken under said section 473, and also it does not show such circumstances as would evidence inherent power in the court sufficient to authorize the making of the order from which this appeal is taken.

[3] The affidavit of respondent James E. Brown shows a mistake as to the law governing in matters such as we have here, based upon the information which he stated was given to him by Mr. Spalding. It seems hardly possible that Mr. Spalding, a practicing attorney, would have so informed Mr. Brown, in the light of the fact so well known to every practicing lawyer, that after a court has announced its intended decision, that submission of findings of fact and conclusions of law and judgment are necessary, that generally a motion for a new trial is made and that, following its disposition, there may be an appeal; but whether Mr. Brown was mistaken or misinformed, in the view we take we deem such fact immaterial to a determination of the question presented on this appeal. It is established that the findings of fact and conclusions of law and judgment prepared and submitted to the trial judge were in his hands for more than ten days, that they were served upon Mr. Bassett, and that the letter written to the trial judge stated that Mr. Spalding was deceased and that two paragraphs of the findings submitted by Mr. Von Herzen were "pure bunk"; that the trial judge stated that he was holding the findings for a reasonable length of time to afford opportunity for submission of amendments or proposed new findings, and that he would sign findings, conclusions and judgment submitted unless amendments or different findings were proposed; that no amendments or additional, or other findings were proposed or submitted and that, after a lapse of approximately two weeks, he signed and filed the findings

which had been submitted to him through the clerk by Mr. Von Herzen.

[4] Under these circumstances it appears to us that the cases of Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988; Owen v. Crocker-Huffman L., etc., Co., 38 Cal.App. 649, 177 P. 299, and King v. Superior Court, 12 Cal.App.2d 501, 56 P.2d 268, are determinative of the question here involved. In the case of Stevens v. Superior Court, supra, 7 Cal.2d at page 112, 59 P.2d at page 989, it is said:

"The contention that the minute entry made by the clerk is controlling rather than the written formal order of the court cannot be sustained. Bailey v. Superior Court, 215 Cal. 548, 11 P.2d 865; Willis v. Superior Court, 214 Cal. 603, 7 P.2d 303; Rose v. Superior Court, 140 Cal.App. 418, 35 P.2d 605. The question, therefore, is whether the recitals disclose an inadvertence or mistake which the court had power to correct of its own motion or on ex parte application.

"While a court has power to correct mistakes in its records and proceedings, and to set aside judgments and orders inadvertently made, which are not actually the result of the exercise of judgment, it has no power, having once made its decision after regular submission, to set aside or amend for judicial error. Freeman on Judgments, vol. 1, page 432, § 220; Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869; Holtum v. Greif, 144 Cal. 521, 78 P. 11; Egan v. Egan, 90 Cal. 15, 27 P. 22; Wiggin v. Superior Court, 68 Cal. 398, 9 P. 646.

"We are of the opinion that the instant case presents an attempt to correct judicial error, even though the trial court recites that the first order was made by inadvertence. It appears that the inadvertence consisted of misinterpreting and misconstruing a waiver of all claims to a new trial, other than on the issue of damages, as a waiver of all grounds upon which a new trial was claimed on that issue, except the ground of the insufficiency of the evidence. Both the first and second orders recite that the motion was denied because the court so understood the waiver, that the court was of the opinion that the plaintiff was entitled to a new trial on the ground of the giving of an erroneous instruction. The second order recites that this construction of the waiver was the result of oversight, neglect, accident, and mistake in the reading of the waiver and in the conclusion as to its effect; that upon a further reading it appeared the waiver did not operate to waive any ground previously urged. This is not a case where the order as entered by the clerk is not the order made by the court (Lauchere v. Lambert, 210 Cal. 274, 291 P. 412; People v. Curtis, 113 Cal. 68, 45 P. 180; Kaufman v. Shain, 111 Cal. 16, 43 P. 393, 52 Am.St.Rep. 139; Robbins v. Jenkins, 9 Cal.App.2d 580, 581, 50 P.2d 826; Beall v. Erickson, 113 Cal.App. 36, 297 P. 960); * * * where there was an irregularity which made the order or judgment premature (Whitney v. Superior Court, 147 Cal. 536, 82 P. 37; Harris v. Minnesota Investment Co., 89 Cal.App. 396, 398, 265 P. 306; Burbank v. Continental Life Ins. Co., 2 Cal.App.2d 664, 38 P.2d 451; nor where the court was ignorant of some fact material to the action taken by it (Watkins v. McCartney, 70 Cal.App. 137, 232 P. 982). The situation here more closely approaches the cases of Egan v. Egan, supra; Coombs v. Hibberd, 43 Cal. 452, and Owen v. Crocker-Huffman L. & W. Co., 38 Cal.App. 649, 177 P. 299, in all of which it was held that, all of the matters before the court at the time of the making of the second order having been considered by it at the time of the making of the first order, it cannot, simply because upon a re-examination of the same matters it has reached a different conclusion, give effect to the second determination of the same issue by modifying or annulling the original order or judgment. This is judicial error and is subject to review only upon appeal, the same as any other mistake due to a failure to give proper consideration to a bit of evidence or to the effect of evidence. 'Misapprehension as to the nature and extent of the testimony or of the effect of the testimony is not inadvertence,' according to Owen v. Crocker-Huffman L. & W. Co., supra. Paraphrasing this language, we must say that misapprehension as to the effect of the waiver is not inadvertence".

In the case of Owen v. Crocker-Huffman, etc., supra, 38 Cal.App. at page 652, 177 P. at page 300, it is said : "Misapprehension as to the nature and extent of the testimony or of the effect of the testimony is not inadvertence. To warrant a practice by which the trial court, after an order has been regularly and deliberately entered, could after reflection for a day, re-examine or recall the testimony and reach a different conclusion and set aside his order, thus regularly and deliberately made, would introduce a most dangerous rule. The reason for making the order can mean nothing less than that upon a reexamination of the testimony the court has reached a different conclusion. * * * If, as has been held, orders or judgments may be set aside when entered prematurely or by inadvertence, it should be, it seems to us, on a proper showing. 'The term "inadvertence," in Code sections 4501, 4502, allowing the Supreme Court after the term to vacate or correct mistakes in judgments given through inadvertence or oversight, does not apply to any judgment which was given upon the deliberate consideration and judgment of the court, though the court may have since adopted a different ruling as correct. It will be seen that the case provided is where judgment is given through inadvertence or oversight, and not where an opinion is formed *from inadvertence and oversight*.' Russell v. Colyer, 51 Tenn. 154, 4 Heisk. 154, 176; 20 Words and Phrases, Permanent Edition, p. 376.

[5, 6] The record herein is absolutely devoid of any showing of fraud. Therefore, the finding of fraud by the trial court in its order is solely its conclusion. Concerning the matter of fraud under circumstances as claimed herein, we think that the question is determined by the case of King v. Superior Court, supra, where at page 513 of 12 Cal.App.2d, at page 274 of 56 P.2d, it is said:

"We conceive the correct rule to be applied to cases of this kind is that a court has inherent power and jurisdiction to vacate, on motion, an order or judgment obtained by extrinsic fraud, but, if such fraud is not proved, it must be held to have exceeded its jurisdiction in vacating an order or judgment. Upon a proper application being filed, it had the power to inquire into the existence of extrinsic fraud, but, upon the entire failure of any proof of such fraud, any action taken which could only be supported by its existence was in excess of its jurisdiction and subject to annulment in a proceeding of this kind.

"A judgment of dismissal is reviewable on appeal, and, except on a proper showing and in a recognized manner, it cannot be vacated in the trial court. An attempt to do so is beyond the power of the trial court. Holtum v. Greif, 144 Cal. 521, 78 P. 11; Robinson v. Southland Produce Co., 112 Cal.App. 106, 296 P. 303; Kaufman v. Superior Court, 115 Cal. 152, 46 P. 904; Hopkins v. Superior Court, 136 Cal. 552, 69 P. 299."

[7] Unquestionably, in a matter of this kind, the knowledge of the trial court can be a controlling factor where corrections, amendments, and other changes are required to the end that the court's orders, judgments, and decrees may truly speak the court's determination, but in this particular instance here involved and where the evidence clearly and without contradiction establishes that the court's declarations in the order vacating and setting aside the findings of fact and conclusions of law and judgment are not only unsupported by the evidence but are contrary to the evidence, the declared knowledge of the court becomes only its unsupported conclusion. At the time the trial judge signed the findings of fact and conclusions of law and judgment and caused them to be filed he had had them before him for a period of over ten days and had ample time for deliberation and determination as to whether he should make his decision in accordance with the findings of fact and conclusions of law submitted to him.

The affidavit of Mr. Von Herzen, which is uncontradicted, establishes the fact that the trial judge was giving the matter of the signing of the findings of fact and conclusions of law his consideration, and Mr. Bassett's letter to the trial judge, and which he undoubtedly received, called his attention to the fact that defendants, through Mr. Bassett, were objecting to the findings of fact and conclusions of law and judgment as submitted by Mr. Von Herzen.

[8] Under these circumstances, any inquiry as to whether the trial judge remembered the evidence at the time he made his decision, which was the signing and filing of the findings of fact and conclusions of law, becomes immaterial. As was said in the case of Stevens v. Superior Court, supra, 7 Cal.2d at page 114, 59 P.2d at page 990: "This is judicial error and is subject to review only upon appeal, the same as any other mistake due to a failure to give proper consideration to a bit of evidence or to the effect of evidence," and as was stated in Owen v. Crocker-Huffman L. & W. Co., supra, "misapprehension as to the nature and extent of the testimony or of the effect of the testimony is not inadvertence."

This is not a case where judgment was given through inadvertence or oversight but rather it is one where an opinion has been formed from inadvertence and oversight. Therefore, neither such inadvertence nor mistake may herein be successfully urged. Also, the record is absolutely devoid of any showing of fraud of any kind or character, and the trial court in its order should not have made the finding of fraud contained therein.

We conclude, for the reasons hereinabove set forth, the trial court erred in vacating and setting aside the findings of fact and conclusions of law and judgment, and its order must be and it is reversed.

We concur: THOMPSON, Acting P. J.; TUTTLE, J.

45 Cal.App.2d 14

JUNEAU v. JUNEAU.

Civ. 2554.

District Court of Appeal, Fourth District, California.

May 22, 1941.

1. Venue 🔑68

On motion for change of venue on ground of residence of defendant, a counter affidavit seeking to retain action in original county on ground of convenience of witnesses should contain names of witnesses together with testimony expected from each so that court may from issues judge materiality of testimony and afford opposing counsel an opportunity to stipulate to testimony proposed. Code Civ.Proc. § 395.

2. Divorce 🔑66

Where wife in divorce proceeding, in support of motion for change of venue, filed affidavit reciting that she was a resident of county other than that in which proceeding was instituted and husband's counter affidavit merely recited that he did not believe that wife was a permanent resident of such other county, statement was not a sufficient "denial" to create an issue with respect to residence, and motion for change of venue should have been granted. Code Civ.Proc. § 395.

See Words and Phrases, Permanent Edition, for all other definitions of "Denial".

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Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Suit for divorce by Edward A. Juneau against Bertha G. Juneau, wherein defendant filed a cross-complaint. From an order denying motion for change of venue, defendant appeals.

Reversed.

John Eley, Jr., of Los Angeles, for appellant.

John J. Brennan, of San Diego, for respondent.

GRIFFIN, Justice.

It appears from a bill of exceptions settled and allowed by the trial court that on June 15, 1939, plaintiff Edward A. Juneau filed his complaint for divorce. Summons was duly issued. On June 21, 1939, an order for publication of summons was signed. Service by publication was duly made. A copy of the complaint was mailed to appellant Bertha G. Juneau at her last known residence in Detroit, Michigan, on September 2, 1939. On October 2, 1939, she received the copy so mailed. On October 3, 1939, an interlocutory decree of divorce by default was granted respondent. On October 24, 1939, appellant filed a motion to set aside that decree. On October 31, 1939, the motion was granted on condition that appellant file her answer forthwith. On the same day she filed her answer she also filed a cross-complaint together with a notice of motion for change of venue based upon an affidavit, setting forth as the ground for such change that at all times herein mentioned she "was, has continued, and still is" a resident of Los Angeles County. Respondent filed an opposing affidavit alleging that "at the time of the filing of this action . . . he did not know nor was not able to find out the whereabouts of the defendant-cross-complainant and had no knowledge or information that she was in Los Angeles County or any information as to where she was at the time. And further, your affiant does not believe that the defendant-cross-complainant was, or is, a permanent resident of Los Angeles County". He also set up certain facts which would indicate that he and his witnesses would be greatly inconvenienced by the change of venue. Upon considering the affidavits of the parties and after hearing argument thereon, the court made its order denying the motion for change of venue. Appeal was taken by appellant from that order.

Appellant now contends that the affidavit filed by the respondent did not constitute a sufficient counter-affidavit, or make a sufficient showing to retain the cause in San Diego County on the grounds of convenience of witnesses or the promotion of the ends of justice, or on any other grounds, and that the court erred in denying the motion; and that respondent's purported denial of appellant's claimed place of residence was not sufficient to raise a conflict, citing McKune v. McKune, 48 Cal. App. 204, 191 P. 958; Code Civ.Proc. sec. 395; Warner v. Warner, 100 Cal. 11, 34 P. 523; that the affidavit as to convenience of witnesses was insufficient because the respondent did not, in any manner, set forth the names of any witnesses or indicate the nature of the testimony which he expected from the witnesses; and that without such a statement the court is unable to determine the materiality of the evidence or the necessity of testimony from such witnesses citing Pascoe v. Baker, 158 Cal. 232, 110 P. 815; Baird v. Smith, 21 Cal.App.2d 221, 68 P.2d 979; First-Trust Joint Stock Land Bank v. Meredith, 16 Cal.App.2d 504, 60 P.2d 1023, 62 P.2d 369; Loehr v. Latham, 15 Cal. 418; San Jose Hospital v. Etherton, 84 Cal.App. 516, 258 P. 611; and that to resist an application of the appellant to have the trial in the county of her residence, the respondent must show that he used diligence to ascertain the residence before the suit was filed, citing Thurber v. Thurber, 113 Cal. 607, 45 P. 852; and Mahler v. Drummer Boy Gold Mining Co., 7 Cal.App. 190, 93 P. 1064.

It is true that respondent's affidavit fails to name the witnesses and omits any recitation of facts about which he expects them to testify. Respondent apparently recognizes the rule laid down in San Jose Hospital v. Etherton, supra, to the effect that the motion for change of venue should be granted where the plaintiff's counter-affidavits failed to state the names of the witnesses or matters to which they were expected to testify, but claims the instant case comes within an exception to the rule because the interlocutory decree had been previously granted and the court already knew the name of the corroborating witness, and that the nature of the testimony was a matter of record in the case and that the court considered the files and records in making the determination, and cites in support thereof Perky v. Perky, 190 Cal. 492, 493, 213 P. 492; and Blevins v. Blevins, 178 Cal. 318, 173 P. 402.

[1, 2] The interlocutory decree was first granted by a judge other than the judge hearing the instant motion. The names of the witnesses and the nature of their testimony were not known to the latter and nowhere appear of record. The court's certificate to the bill of exceptions recites that the record before us on appeal "correctly sets forth all of the proceedings had during the hearing of the said motion and all of the evidence offered * * *." The circumstances, as contended by respondent, do not create an exception to the rule under the authorities cited. On a motion for change of venue on the ground of residence on the defendant, a counter-affidavit seeking to retain the action in the original county on the ground of convenience of witnesses should contain the names of the witnesses, together with the testimony expected from each so that the court may, from the issues, judge of the materiality of their testimony and afford opposing counsel an opportunity to stipulate to the testimony proposed. San Jose Hospital v. Etherton, supra. Appellant's affidavit recites definitely that at all the times mentioned, she was a resident of Los Angeles County. Respondent's affidavit merely recites that he does not believe that she was a permanent resident of that county. This statement is not a sufficient denial to create an issue in this respect. McKune v. McKune, supra. Therefore, the motion for change of venue should have been granted.

The order is reversed.

We concur: BARNARD, P. J.; MARKS, J.

45 Cal.App.2d 64

ROTHSTEIN et al. v. JANSS INV. CORPORATION et al.

Civ. 12311.

District Court of Appeal, Second District, Division 1, California.
May 27, 1941.

1. Evidence ⊂⇒434(8)

Evidence of fraudulent representations inducing execution of a contract is generally admissible as an exception to the parol evidence rule.

2. Evidence ⊂⇒434(8)

A party cannot contract against the effect of fraudulent representations inducing execution of the contract.

3. Fraud ⊂⇒23

Where purchaser's action for fraud against vendor is based on conditions that are visible and it is admitted that a personal inspection was in fact made, the purchaser cannot claim that he relied upon alleged misrepresentations with regard to the visible conditions.

4. Fraud ⊂⇒17, 23

Personal inspection is no defense to purchaser's action against vendor based upon misrepresentation of condition of property, where conditions are not visible and are known only to vendor, and under such circumstances vendor is bound to disclose those facts to purchaser.

5. Fraud ⊂⇒31

Where vendor has misrepresented to purchaser condition of property, purchaser induced thereby to make purchase may either bring action for rescission or for damages.

6. Fraud ⊂⇒31

One induced by deceit or fraud to enter into a contract may, upon discovery, either repudiate and rescind the contract, or he may allow the contract to stand and sue for damages.

7. Fraud ⊂⇒17

The vendors of lot containing a fill of some nineteen feet had duty to disclose existence of fill to purchasers, notwithstanding option agreement, under which property was purchased, stating that property had been personally inspected, that no agent had power to modify or make any representation not contained therein, and that no representation not contained in option would be binding. Civ.Code, § 1572, subd. 3; § 1668; § 1710, subd. 3.

8. Contracts ⊂⇒94(1)

Fraud vitiates terms of any contract. Civ.Code, § 1668.

9. Fraud ⊂⇒49

Under complaint alleging that vendors of lot, against whom purchasers sought to recover damages for fraud, refrained from advising purchasers that lot was a filled-in lot, although vendors were aware of that fact, and that property would not have been purchased if truth had been known, purchasers were entitled to prove that vendors had knowledge of filled condition of property, or that they believed condition existed. Civ. Code, § 1572, subd. 3; § 1710, subd. 3.

10. Evidence ⊂⇒434(11)

In action for fraud in inducing purchasers to purchase lot under option agreement limiting authority of vendors' agent to make representations, where it was stipulated that vendors knew that property was filled ground, purchasers should have been permitted to show by parol evidence that fill was of considerable extent, that purchasers were led to believe that property was not filled, and that they discovered filled condition only after commencing excavation. Civ.Code, § 1572, subd. 3; § 1710, subd. 3.

11. Principal and agent ⊂⇒156

In action against vendors and their agent for fraud in inducing purchase of lot under option agreement limiting agent's authority to make representations, agent would be personally liable for any fraudulent representation made by him, and court erroneously found for agent on that issue without a trial thereof. Civ.Code, § 1572, subd. 3; § 1710, subd. 3.

12. Fraud ⊂⇒59(3)

The measure of damages for fraud in inducing purchase of realty is the difference between consideration paid for property and actual value of property, with additional damage, if any. Civ.Code, § 3343.

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Charles Rothstein and others against the Janss Investment Corporation and others, to recover for fraud in inducing plaintiffs to enter into a contract for the purchase of realty. Judgment for defendants, and the plaintiffs appeal.

Judgment reversed and cause remanded.

L. G. Shelton, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles (Keith Bullitt, of Los Angeles, of counsel), for respondents.

DORAN, Acting Presiding Justice.

Plaintiffs appeal from a judgment in favor of defendants in an action for damages for fraud in inducing plaintiffs to enter into a contract for the purchase of real property. Plaintiffs, husband and wife, bought a lot in the neighborhood of Westwood Village from two defendant corporations, through their agent, defendant Spradling. The property was purchased under an option agreement, which contained the following provision: "I have personally inspected the above described property and have read this option. I understand its provisions and I am purchasing the property described therein subject to said provisions with the clear understanding that no salesman or agent of the optionor has any power to modify said option or to make any representations or promises not contained therein and that no agreement, understanding or representation orally made or written and not contained in said option or in the optionor's regular form of agreement for sale of real estate will be binding upon either myself or upon the optionor or its salesman or agents. Furthermore, I understand that neither the optionor nor its salesmen nor agents in any way promise or guarantee a resale."

In their complaint, plaintiffs allege that defendant Spradling, as agent, represented to plaintiffs that the real property was a solid lot and did not contain a fill; that plaintiffs relied thereon and were thereby induced to purchase the said property; that the representation was false and fraudulent; and known by Spradling to be so; and that subsequently, after plaintiffs had entered into a contract for the purpose of excavating the said lot and constructing a dwelling thereon, plaintiffs discovered that the lot in question contained a fill of some 19 feet. Later, by amendment, the following allegations were added to the complaint "That the corporate defendants herein were well aware at the time said lot was sold to plaintiffs that said lot was a filled-in lot but said corporate defendants refrained and desisted from advising plaintiffs of such fact, and had they not done so, plaintiffs would not have purchased said property at the price paid said defendants therefor." The material allegations of the complaint, including the amendment, were denied by defendants.

At the trial plaintiffs offered to prove the cost to them of laying the foundation made necessary because of the fill, and, to quote from the transcript, "that this foundation had to be placed there because of the fill which was represented to this purchaser as not being there, and that the plaintiff relying upon representations of the defendant represented to his architect that he need not look at the property, that it was level and he could make his plans accordingly; and after he made the contract and after he started work, and after he started to dig the foundation that the plaintiffs learned of this fill for the first time; and then it was then too late at that time to ask for a rescission." Objection to the offer was interposed upon the grounds, among others, that it was incompetent, irrelevant and immaterial and that it was contrary to the clause of the option agreement, above quoted. The objection was sustained.

It was stipulated at the trial that the defendants knew that the property in question was filled ground; but there was no stipulation as to the depth or extent of the fill. No other evidence was permitted, except the contract itself and an additional stipulation that Spradling was agent for the defendants.

[1, 2] Appellants contend that the trial court erred in refusing to permit the introduction of parol evidence to show that the contract was induced by fraud. Respondents concede that it is well settled law that evidence of fraudulent representations inducing the execution of a contract is generally admissible as an exception to the parol evidence rule (Mooney v. Cyriacks, 185 Cal. 70, 195 P. 922) and that a party can not contract against the effect of his own fraud (Wedge v. Security-First National Bank, 219 Cal. 113, 25 P.2d 411), but claim that such propositions are not applicable to the instant case, in that there is here presented an "exception to the above mentioned exception" to the parol evidence rule. Respondents contend that the sole question involved is whether a corporation seller, by expressly limiting in writing the authority of its agent to make representations and by

notifying the buyer in writing accordingly, can protect itself against claims for damages based on alleged false representations by said agent which exceed said written limitation of authority; and respondents confine their argument principally to that one question, relying largely upon Speck v. Wylie, 1 Cal.2d 625, 36 P.2d 618, 95 A.L.R. 760, for an affirmative answer thereto.

It should be noted, however, that under the pleadings as framed by the amendment above quoted there was placed in issue the question of whether the contract had been induced by fraud, not only through representations the agent Spradling may have made, but also through the acts or conduct of the Janss Investment Co. itself and those of its allied defendant corporation. Moreover, under the pleadings, the major issue was whether there had been any fraud on the part of the Janss Co. and the other defendant corporation, inducing plaintiffs to enter into the purchase of the property; and the question of whether the agent had misrepresented the property through fraudulent statements was only of minor or secondary importance. It must be emphasized that plaintiffs' complaint, as amended, was broad enough to include any fraudulent act or conduct on the part of the defendant corporations by which plaintiffs were deceived as to the filled condition of the real property under purchase. Furthermore, that portion of plaintiffs' offer of proof above quoted was sufficient to include either an express or implied representation. The language used did not limit plaintiffs to proof of an express representation, nor did it limit plaintiffs to proof only of representations made through an agent. If the Janss Co. under the circumstances was bound to disclose to plaintiffs the fact that the property was filled, and failed so to do, such failure would constitute actionable fraud (Sec. 1572, sub. 3, Civil Code), and deceit (Sec. 1710, sub. 3, Civil Code), and proof of such failure would be admissible as lying within the scope of the pleadings, and would be covered by plaintiffs' offer of proof, as a tacit representation that the property was not filled.

[3-7] It then becomes necessary to determine whether, under the circumstances of this case, it was the duty of the Janss Investment Co., and its associates in the matter, to disclose to plaintiffs the filled condition of the property. When and where the action by the purchaser is based on conditions that are visible and that a personal inspection at once discloses and, when it is admitted that such personal inspection was in fact made, then manifestly it cannot be successfully contended that the purchaser relied upon any alleged misrepresentations with regard to such visible conditions. But personal inspection is no defense when and where the conditions are not visible and are known only to the seller, and "where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee". Clauser v. Taylor, 44 Cal.App.2d 453, 112 P.2d 661, citing, among other authorities, O'Shea v. Morris, 112 Neb. 102, 198 N.W. 866, 867, and Restatement of the Law of Contracts [1932] Vol. 2, p. 897, sec. 472, sub. b. The Clauser case holds directly that when a vendor sells real property, which he knows has been filled and the value of which is materially affected by such filling, without disclosing to the vendee the fact that such property has been filled, and the vendee makes no inquiry relative to whether or not the property has been filled, the vendee may rescind the transaction upon learning the true facts. The action in that case was one for rescission, the action here is one for damages. Either remedy is available to a vendee induced to purchase through fraud. It is well settled that where one is induced by deceit or fraud to enter into a contract, he may, upon discovery, either repudiate and rescind the contract, or he may allow the contract to stand and sue for damages. See 12 Cal.Jur. 781, 782, and numerous authorities there cited. It is apparent from the allegations and the offer of proof in the instant case that by the time plaintiffs discovered the true condition of the property they had proceeded so far with their plans and had so far obligated themselves that rescission would have afforded an inadequate remedy.

In the case of O'Shea v. Morris, supra, it was found that the plaintiff believed, and was reasonably led and induced to believe, by the character and location of the grounds and improvements, that defendants were the owners of all of the property in question; and, under the circumstances, it was there held that defendants were in duty bound to advise plaintiff that a certain driveway and garage were not entirely on defendants' property, and that the concealment of such a fact, and knowingly permitting plaintiff to believe that all of the house, driveway and garage were upon the property, was a fraud and deceit against the plaintiff.

In Kretzschmar v. Janss Investment Company, 1932, 126 Cal.App. 698, 14 P.2d 1069, 1070, the plaintiff entered into a written option with the Janss Company for purchase of a certain piece of land for use as a garden. The option expressly stated that the purchase was to be made subject "to any rights of way or other easements now of record". The option was executed on February 14, 1924. There was a wash running across the land, where flood waters at times flowed, and on April 22, 1924, the Janss Company dedicated to the Los Angeles County Flood Control a strip of land through the lot upon which the above option was held, and on the same day such dedication was recorded in the office of the county recorder of Los Angeles county. The purchaser apparently did not know of this contemplated dedication or that a work of the kind afterwards constructed upon the easement was to be placed on the lot. The day after such dedication the purchaser entered into a formal contract of sale with the Janss Company for the lot in question. This contract contained the following provision: "A perpetual easement is hereby reserved to the seller and its successors and assigns, in and over said real property, for the construction, maintenance and operation therein or thereon of drainage pipes or conduits and pipes, conduits, poles, wires and other means of conveying to and from lots in said tract gas, electricity, power, water, telephone and telegraph service, sewage and other things of convenience to the owners of lots in said tract." The lot agreed to be sold was described in this contract according to a recorded map, specifically referred to. This map so referred to was the one that dedicated the right of way or easement to the Los Angeles County Flood Control and was placed of record the day before the contract was signed. The contract also contained the following clause: "The buyer hereby certifies that he has personally inspected the property herein described, has examined and checked map of same and knows that this property is the identical property he selected and purchased."

The purchasers, in accordance with the contract, entered upon the lot so agreed to be sold and expended in the improvement thereof for the purpose of gardening thereon the sum of $2,000 before they had actual notice of the dedication of the easement to the Flood Control. Some two years after the purchasers went into possession of the lot the Flood Control entered thereon and constructed a storm drain across it, upon the easement granted by the Janss Investment Company. The easement as granted had a width of 75 feet and there was evidence that in parts of its length through the lot that earth had been taken from the ditch and placed along the easement so that the space occupied was 100 or more feet across. There was erected along this right of way a wire fence some five or six feet in height. These works so erected cut the lot into two parts, leaving the improvements erected by the purchasers upon one part, completely cut off from the other part of the lot by the ditch, banks of earth and two wire fences.

The purchasers in the Kretzschmar case instituted an action in damages against the Janss Investment Company for fraud by reason of the facts above recited. Although upon appeal, this court was required to reverse the judgment therein granted the plaintiffs, because of lack of evidence to support the finding as to damages, it was stated in the opinion (at page 702 of 126 Cal.App., at page 1071 of 14 P.2d): "The contract of sale which respondents accepted referred to the map upon which the easement was shown, but there is no evidence that respondents ever saw this map nor that their attention was ever called to it. This map was filed for record but a few hours before this contract was presented to respondents. It would seem that in common justice that appellants should have at this time by some act on their part directed respondents' attention to the material change that had been made in the lot by the dedication of this easement. The contract reserved the right to construct drainage pipes and conduits upon the property. Appellants cite authorities to the effect that conduit may mean canal or ditch. This may be true in some cases when the surrounding circumstances justify the use of the word in its broadest sense, but here when read in connection with the contract as a whole, no such meaning can be attached to the term. The option, when entered into, defined the limits of the contractual relation of the parties, and respondents were justified in standing upon its terms. Respondents never consented to any change or modification of this option. *The property covered by the option did materially change in character* *and appellants had knowledge of this change, but failed to call it to the attention of respondents and so deprived them of the right to withdraw from the purchase. The instant case is one where one is induced to enter into a contract by 'the suppression of that which is true, by one having knowledge, or belief of the fact.'* Civ.Code, § 1572, subd. 3." (Italics added.) Although the Kretzschmar case involved a failure to disclose a material change in the property which occurred after the option to purchase was taken, in principle there is little if any difference between deceiving a purchaser to induce him to exercise his option and, as charged in the instant case, deceiving a prospective purchaser to induce him to take an option.

Certainly, it may not be successfully contended that a fill to the depth of 19 feet is not a material factor in considering the purchase of a piece of real property. In so far as the purchase of a building lot for residential purposes is concerned, such a fill represents the difference between a piece of real estate and a hole in the ground.

[8] As to the purported waiver of liability quoted above from the option in question, even if it were not generally settled that fraud vitiates the terms of any contract, the policy of this state with regard to such provisions has been expressly set forth in Section 1668 of the Civil Code, wherein it is stated: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

[9, 10] Under the allegations of the complaint above set forth, plaintiffs were entitled to prove that the defendant corporations had knowledge of the filled condition of the property, or that they believed the condition existed. While it is true, as pointed out above, that it was stipulated at the trial that defendants knew the property was filled, there was no stipulation as to the extent of the fill. Whether the existence of a fill is a material factor on the sale of a piece of real property depends upon the nature and extent of the fill; and consequently the duty in the instant case to disclose the filled condition depended not so much upon knowledge of the presence of the fill as upon knowledge of, or belief in the extent thereof. In order to show this knowledge or belief, for example, it would be material to show that the defendant corporations had let the contract for grading the property in question, or that defendant corporations had filed a map showing such fill, in accordance with a city ordinance requiring the same pursuant to the provisions of the Act of 1929 requiring the recording of subdivision maps (Stats.1929, p. 1790), and other such evidence tending to show knowledge upon the part of the Janss Investment Company and the other defendant corporation of the condition of the property. Plaintiffs should have been allowed to show, as they proposed to do at the trial, that the fill was of considerable extent, requiring more than an ordinary foundation to be built under the house that plaintiffs constructed; that plaintiffs were led to believe the property was not filled and accordingly told their architect he need not look at the property; and that the discovery of the filled condition was made only after the excavation was started for the foundation.

[11] Since it appears that the major issue here involved is not the question of representations made by the agent, but that of the fraud of the principal corporations in inducing the contract for the purchase of the property, it follows that the trial court erred in refusing to permit the introduction of parol evidence to show that the contract was induced by fraudulent concealment. It is of course true that defendant Spradling would be personally liable for any fraudulent representations made by him, and the court likewise committed error in finding for the said defendant on this issue without trial thereof.

[12] Since the cause must be remanded for a trial of the issues, it may be well to call attention to the present rule as to damages in such cases as embodied in the provisions of section 3343 of the Civil Code, added by Statutes of 1935, p. 1612, to the effect that "one defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction". The measure of damages thus set forth is the difference between the consideration paid for the property and the actual value of the property, with additional damage, if any. This would appear to abrogate the former rule as set forth in Rogaff v. Bartles, 1931, 115 Cal.App. 429,

1 P.2d 517, and cases there cited, wherein it was held that the measure of damages was the difference between the actual value of the property and the value it would have had if the representation had been true.

For the foregoing reasons, the judgment is reversed and the cause remanded.

We concur: WHITE, J.; DESMOND, Justice pro tem.

45 Cal.App.2d 31

GARCIA v. SUPERIOR COURT IN AND FOR SAN BERNARDINO COUNTY et al.

Civ. 2655.

District Court of Appeal, Fourth District, California.
May 26, 1941.

1. Paupers 🔑37(1), 51

The obligation of adult children to support their parents who are unable to maintain themselves is imposed by a provision of the Civil Code, whereas county's right of reimbursement for aid granted, together with the procedure to be followed to secure such reimbursement from children of aid recipient, was established by provisions of the Welfare and Institutions Code. Civ. Code, § 206, St.1937, p. 1005, § 2224, as amended in 1940.

2. Paupers 🔑51

Whether it was duty of board of supervisors, under provisions of Welfare and Institutions Code and in view of statutory obligation of all adult children to support indigent parents, to request the maintenance of suit for reimbursement for aid granted against all children who filed income tax returns would not affect county's right to recover in suit filed against only one of two children who filed income tax returns, where no action was brought to require board of supervisors to perform such duty, if any existed. Civ.Code, § 206; St.1937, p. 1005, § 2224, as amended in 1940.

3. Contribution 🔑3

Where certain obligations of different persons are several rather than joint, contribution from one obligor to the other may not be required.

4. Contribution 🔑3

A person who satisfied more than his share of a joint obligation was entitled to claim contribution from others jointly obligated with him. Civ.Code, § 1432.

5. Parties 🔑29

Where different persons are severally but not jointly obligated to another, the obligee may sue one or more of such obligors at obligee's election.

6. Paupers 🔑51

The statutory obligation of adult children to support their parents who are unable to support themselves is a "several obligation" resting on each child, and hence adult son of aid recipient, from whom county elected to seek reimbursement for aid granted, could not force trial judge to bring other children of aid recipient into the action as defendants to a cross-complaint, since such son as cross-complainant could not recover judgment against the other children. Civ. Code, §§ 206, 1432; St.1937, p. 1005, § 2224 as amended in 1940.

See Words and Phrases, Permanent Edition, for all other definitions of "Several Obligation".

◆

Original proceeding by Lewis V. García for a writ of mandate addressed to the Superior Court of the State of California in and for the County of San Bernardino, and others to compel respondents to bring in other parties as cross-defendants to an action brought against petitioner by the County of San Bernardino to reimburse county for aid granted to petitioner's mother.

Peremptory writ of mandate denied, and alternative writ discharged.

Louis J. Euler, of Los Angeles, for petitioner.

Jerome B. Kavanaugh, Dist. Atty., and Donald S. Gillespie, Deputy Dist. Atty., both of San Bernardino, for respondents.

MARKS, Justice.

This is a proceeding in mandamus instituted in this court to compel respondents to bring in other parties by way of cross-complaint in an action brought against petitioner by the County of San Bernardino.

Margaret Garcia was an aged widow, a resident of San Bernardino, and was without means of support. She had four children: petitioner, Lewis V. Garcia, a son; Margaret Garcia, Mrs. Helen Gorman and Mrs. Florestine Stalheber, her adult daughters, all residents of California.

Mrs. Garcia had been granted aid under the provisions of the Welfare and Institutions Code, St.1937, p. 1005, and was receiving $24.20 per month. Under the provisions of section 2224 of that code, as amended in 1940, the board of supervisors of San Bernardino county made an investigation and found that Lewis V. Garcia had filed an income tax return under the personal income tax act of California. The board then instructed the district attorney of San Bernardino county to file suit against Lewis V. Garcia to obtain judgment for the money the county had advanced and was going to advance to his mother. This action was filed against Lewis V. Garcia, alone, in February, 1941. Garcia appeared and sought leave to file a cross-complaint bringing his three sisters in as cross-defendants. Leave to do so was denied him and he brought this proceeding to compel the Superior Court of San Bernardino county to permit him to file the cross-complaint and bring into the action the other children of Mrs. Garcia so that the liability of each child to contribute to her support might be determined in the one action.

It is alleged in the cross-complaint that the four persons already named are the four adult children of Mrs. Garcia; that they are residents of the state of California; that on December 24, 1940, an agreement was entered into between Lewis V. Garcia and the welfare department of San Bernardino county wherein it was determined that the sum of $40 per month was a proper amount to be contributed by the four children of Mrs. Garcia for her support, which was to be apportioned as follows: Lewis V. Garcia $20, Helen Gorman $5, Florestine Stalheber $5, and Margaret Garcia $10, to be paid by furnishing rent and paying certain insurance premiums; that Lewis V. Garcia and Margaret Garcia paid the contributions specified but that Helen Gorman and Florestine Stalheber failed and refused to pay theirs; that they are pecuniarily able to make the payments.

In the petition for the writ it is further alleged that Mrs. Helen Gorman filed an income tax return under the personal income tax act of California. Defendants have stipulated that such a return was filed by her.

The duty of adult children to support their parents who are unable to maintain themselves is of long standing in California. § 206, Civ.Code. See, § 270c, Pen.Code. The right of a county to reimburse itself for aid given to such a parent is of more recent origin. See, § 2224, Institutions and Welfare Code.

[1] It seems rather clear that the obligation of support was placed on the children by the provisions of the Civil Code and the right of reimbursement, together with the procedure to be followed to enable a county to reimburse itself for aid given the parent, is established by the provisions of the Welfare and Institutions Code. That the latter code has nothing to do with creating the obligation of support of a parent by an adult child but is largely procedural seems clear from a study of the two codes though a contrary opinion has been expressed by way of dicta. County of Lake v. Forbes, 42 Cal.App.2d 744, 109 P.2d 972.

The duties of the county officials where aid is granted seem rather clear under the Welfare and Institutions Code. The board of supervisors is required to make an investigation to determine if a spouse or an adult child, resident of the state, of the person receiving aid, had filed a return under the personal income tax act. If no return had been filed the matter ended and nothing further need be done. If a return had been filed, then the board is required to further investigate the financial resources of the spouse or child and determine if such person is financially able to contribute to the support. The section continues:

"If in the opinion of the board of supervisors the spouse or adult child who has filed such a return is pecuniarily able to support or contribute to the support of the recipient of aid, the board of supervisors shall request the district attorney or other civil legal officer of the county granting such aid to proceed against such kindred in the order of their responsibility to support. Upon such demand the district attorney or other civil legal officer of the county granting aid shall, on behalf of said county, maintain an action, in the superior court of the county granting such aid, against said relative, in the order named, to recover for said county such portion of the aid granted as said relative is able to pay, and to secure an order requiring the payment of any sums which may become due in the future for which the relative may be liable." See, County of Los Angeles v. Hurlbut, 44 Cal.App.2d 88, 111 P.2d 963.

[2] The exact meaning of the portion of the section we have quoted is clouded by the indiscriminate use of words and phrases in the singular with words and phrases indicating the plural. As the first important step in the investigation is the discovery of an income tax return, if made, it would seem to follow that if more than one adult child had filed an income tax return it would be the duty of the board to at least request the filing of suit against the children so filing returns. See County of Lake v. Forbes, supra. As the obligation of support is placed on all children (§ 206, Civ.Code) it might well be argued that upon finding that a child or children had filed a return or returns, the direction should be given to the district attorney to file suit against all the children so the court could justly apportion the obligation to support the parent. However, these observations cannot influence this decision because no action was brought against the board of supervisors to require its members to perform such a duty if one existed.

[3-5] The controlling question here is this: The county having elected to bring the suit against one adult child, a resident of the state, can that child force the trial court to bring in the other children so that their several liabilities for support may be determined? The answer to this question must be found in another, namely: Is the obligation of the children to support, joint, or is it several? If it is several, there can be no contribution from one to the other (Adams v. White Bus Line, 184 Cal. 710, 195 P. 389; Tulare County v. Kings County, 117 Cal. 195, 49 P. 8; Tucker v. Nicholson, 12 Cal.2d 427, 84 P.2d 1045), while if the obligation is joint, one who satisfied more than his share of the demand might claim contribution from the others jointly obligated with him. § 1432, Civ.Code; 6 Cal.Jur. 499. Further, where different persons are severally, but not jointly, obligated to another he may sue one or more of them as he desires. Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365.

The case of Tuller v. Superior Court, 215 Cal. 352, 10 P.2d 43, is decisive of the issue presented here. There, an adult daughter sued her father for support. The father demurred to the complaint because the mother was not joined as a defendant. The demurrer was sustained and the trial judge refused the request of the daughter to file an amended complaint in which both the father and mother were made defendants although the mother was present in court and expressed her willingness to become a defendant. In speaking of the duty of support the Supreme Court said:

"Passing for the moment the question of the propriety of mandamus as a remedy under these circumstances, we think it is clear that the lower court was in error in making the orders complained of. Section 206 of the Civil Code reads in part as follows: 'It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. * * *' It is contended that this section establishes a joint liability of the father and mother, which cannot be enforced in an action against one without joinder of the other. Such an interpretation of the section is unreasonable on its face, for it would also necessitate joinder of the children of such person, if any existed. Nothing in the language of the statute beyond the equivocal term 'their' suggests that the obligation is not individual and several as to each person named therein. * * * We are at a loss to understand how this technical rule of procedure invoked by defendant Tuller can be fastened upon an action for which no procedure at all is specified, in the absence of a clearly defined statutory purpose making the liability joint.

"The demurrer should unquestionably have been overruled, and the order sustaining it was palpably erroneous."

[6] As the obligation to support Margaret Garcia was a several obligation resting on each of her children, and as the

County of San Bernardino elected to pursue its remedy against but one of those children (even if this were mistakenly done), the child named as defendant has no right to force the trial judge to bring the other children into the action as defendants to a cross-complaint as the cross-complainant cannot recover judgment against any of them even though the county might have done so had it elected to proceed against them. The obligations of the children are to their mother and to the county and not to each other.

The petition for a peremptory writ of mandate is denied and the alternative writ is discharged.

We concur: BARNARD, P. J.; GRIFFIN, J.

MEYBERG v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. *

Civ. 13143.

District Court of Appeal, Second District, Division 1, California.

May 27, 1941.

Hearing Granted July 17, 1941.

Certiorari 🔑31

Where petition for writ of review shows on its face that matter involved was moot when petition was filed because fine fixed by trial court had been fully paid, petition must be denied.

◆

Proceeding by Leonard J. Meyberg for a writ of review to review proceedings of the Superior Court in and for the County of Los Angeles.

Writ denied.

R. K. Gandy, of Santa Monica, and R. B. Turnbull, P. M. Joseph, and M. S. Meyberg, all of Los Angeles, for petitioner.

YORK, Presiding Justice.

The order heretofore entered herein denying the petition for writ of review was made for the reason that, upon the face of the petition itself, it appeared that the matter was moot at the time the petition was filed, in that the fine fixed by the trial court had been fully paid.

Mr. Justice WHITE did not participate in this decision by reason of having been disqualified.

I concur: DORAN, J.

MEYBERG v. SUPERIOR COURT, IN AND FOR LOS ANGELES COUNTY. *

Civ. 13144.

District Court of Appeal, Second District, Division 1, California.

May 27, 1941.

Hearing Granted July 17, 1941.

Certiorari 🔑31

Where petition for writ of review shows on its face that matter involved was moot when petition was filed because fine fixed by trial court had been fully paid, petition must be denied.

◆

Proceeding by Mitchel S. Meyberg for a writ of review to review proceedings of the Superior Court in and for the County of Los Angeles.

Writ denied.

R. K. Gandy, of Santa Monica, and R. B. Turnbull, P. M. Joseph, and M. S. Meyberg, all of Los Angeles, for petitioner.

YORK, Presiding Justice.

The order heretofore entered herein denying the petition for writ of review was made for the reason that, upon the face of the petition itself, it appeared that the matter was moot at the time the petition was filed, in that the fine fixed by the trial court had been fully paid.

Mr. Justice WHITE did not participate in this decision by reason of having been disqualified.

I concur: DORAN, J.

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* Subsequent opinion 121 P.2d 685.

MEYBERG v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. *

Civ. 13145.

District Court of Appeal, Second District, Division 1, California.

May 27, 1941.

Hearing Granted July 17, 1941.

Certiorari 🔑31

Where petition for writ of review shows on its face that matter involved was moot when petition was filed because fine fixed by trial court had been fully paid, petition must be denied.

◆

Proceeding by Lorraine K. Meyberg for a writ of review to review proceedings of the Superior Court in and for the County of Los Angeles.

Writ denied.

R. K. Gandy, of Santa Monica, and R. B. Turnbull, P. M. Joseph, and M. S. Meyberg, all of Los Angeles, for petitioner.

YORK, Presiding Justice.

The order heretofore entered herein denying the petition for writ of review was made for the reason that, upon the face of the petition itself, it appeared that the matter was moot at the time the petition was filed, in that the fine fixed by the trial court had been fully paid.

Mr. Justice WHITE did not participate in this decision by reason of having been disqualified.

I concur: DORAN, J.

MEYBERG v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. *

Civ. 13146.

District Court of Appeal, Second District, Division 1, California.

May 27, 1941.

Hearing Granted July 17, 1941.

Certiorari 🔑31

Where petition for writ of review shows on its face that matter involved was moot when petition was filed because fine fixed by trial court had been fully paid, petition must be denied.

◆

Proceeding by James Meyberg for a writ of review to review proceedings of the Superior Court in and for the County of Los Angeles.

Writ denied.

R. K. Gandy, of Santa Monica, and R. B. Turnbull, P. M. Joseph, and M. S. Meyberg, all of Los Angeles, for petitioner.

YORK, Presiding Justice.

The order heretofore entered herein denying the petition for writ of review was made for the reason that, upon the face of the petition itself, it appeared that the matter was moot at the time the petition was filed, in that the fine fixed by the trial court had been fully paid.

Mr. Justice WHITE did not participate in this decision by reason of having been disqualified.

I concur: DORAN, J.

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45 Cal.App.2d 1

ELSON v. NYHAN et al.

Civ. 11510.

District Court of Appeal, First District, Division 1, California.

May 22, 1941.

Hearing Denied July 17, 1941.

1. Automobiles 🔑105

If receiver were appointed in proceeding supplemental to execution, to sell and transfer certain licenses for operation of motor vehicles for hire issued pursuant to police code of city and county of San Francisco, sale of the licenses could not be consummated without approval of the police commission after notice of the application had been filed and published and the payment of a fee.

2. Receivers 🔑8

Appointment of receiver rests entirely within the discretion of the trial court.

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* Subsequent opinion 121 P.2d 685.

3. Appeal and error ⚿945

A reviewing court is never justified in substituting its discretion for that of the court sitting nisi prius, but, if there has been a plain miscarriage of justice, the reviewing court will rectify trial court's abuse of discretion. Const. art. 6, § 4½.

4. Appeal and error ⚿955

The action of trial court in ruling on question of appointment of receiver will not be disturbed on appeal in absence of showing of abuse of trial court's discretion.

5. Receivers ⚿1

When it appears that no reasonably certain benefit will result to one litigant and a distinct disadvantage will result to another through appointment of a receiver, the court should weigh carefully the propriety of appointing a receiver.

6. Execution ⚿405

In proceeding supplemental to execution, refusal of trial court to appoint receiver to sell and transfer licenses issued pursuant to provisions of police code of city and county of San Francisco for operation of motor vehicles for hire was not abuse of discretion.

◆

Appeal from Superior Court, City and County of San Francisco County; I. M. Golden, Judge.

Action by Doris Elson against Mrs. James Nyhan and others for personal injuries. Plaintiff recovered judgment and, upon return of execution unsatisfied, Wallace T. Fletter, as assignee, instituted proceedings supplemental to the execution and filed petition for appointment of a receiver in aid thereof. From an order discharging an order to show cause why receiver should not be appointed and from an order denying petition for such appointment and finally discharging the first mentioned order, Wallace T. Fletter appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Ackerman, Wayland & Mathews and Lloyd S. Ackerman, all of San Francisco, for appellant.

O'Connor, Neubarth & Moran and Harold H. Cohn, all of San Francisco, for respondents.

WARD, Justice.

This is an appeal from two orders; one discharging an order to show cause why a receiver after judgment should not be appointed, and the other denying a petition for such appointment and finally discharging the first mentioned order.

Certain questions presented may be passed without decision namely, are taxicab permits or licenses subject to creditors' claims; does the law authorize the appointment of a receiver in aid of execution where the judgment sought to be enforced is an ordinary money judgment, and does an appeal lie from an order refusing to appoint a receiver? This appeal may be decided upon the sole ground of the court's discretionary power to deny the petition for the appointment of a receiver.

The facts of the case may be summarized as follows: Appellant's assignor recovered a money judgment in a personal injury action against Mrs. James Nyhan, James Nyhan and Robert Wetherill, following which, execution having been returned unsatisfied, appellant assignee instituted proceedings supplemental to the execution and filed his petition for the appointment of a receiver in aid thereof. The trial court thereupon issued a temporary restraining order and order to show cause why a receiver should not be appointed. Following a hearing thereon the court made and entered its order and decision discharging the aforesaid order to show cause and permitting amendment to the petition for appointment of receiver by the addition of a paragraph alleging James Nyhan and one C. J. Galena to be co-partners doing business under a fictitious name. After hearing, an order was made denying the appointment of a receiver and again discharging the order to show cause. The appeal is from said orders as above specified.

From the record it appears that the only purpose in seeking the appointment of a receiver was to sell and transfer five licenses issued pursuant to the provisions of the Police Code of the City and County of San Francisco to James Nyhan for the operation of motor vehicles for hire.

The petition for the appointment of a receiver sets forth the recovery of the judgment by Doris Elson, its finality, the assignment thereof, the failure of the defendants in the negligence action to apply their property in satisfaction of the judgment, the issuance of a writ of execution and the return thereon and that Mr.

and Mrs. Nyhan are the owners of five licenses permitting operation of vehicles for hire. The return to the order to show cause recites that adequate public liability insurance was carried to cover the judgment in the personal injury action; that the appellant assignee, who purchased the judgment for the sum of $1,500, is an official of a rival taxicab company and is not proceeding in good faith about the matters set forth in the petition.

The record shows that licenses similar to those held by the Nyhans have been transferred for a monetary consideration ranging from $100 to $1,000; that shortly prior to the hearing of the petition for the appointment of a receiver, $700 or $800 was paid for such a transfer; that the value of the permits in question may run as high as $5,000. Doubtless the exigency of the occasion necessitating a sale and the financial ability of the buyer play a part in fixing the price. It may be conceded that at a forced sale a receiver would not be required to obtain more than the face value of the judgment, approximately $2,500. A reasonable inference may be drawn, also, that Nyhan would be at a greater disadvantage in a sale by a receiver than in a private transfer. According to the petition, the exact interest of the partnership of Nyhan and Galena in the licenses is not disclosed.

[1] Assuming that a receiver should be appointed, no sale could be consummated without the approval of the Police Commission after notice of the application had been filed and published and the payment of a fee. All other holders of existing licenses may appear before the Commission and contest upon the ground that public convenience and necessity do not require the operation of the vehicles represented by the permits in question. The burden of proof is "upon the applicant to establish by clear and convincing evidence which shall satisfy the Police Commission beyond a reasonable doubt" that the permits should issue. Police Code of the San Francisco Municipal Code, sec. 1077. The applicant is required in other respects to supply any and all additional information. "All such permits or licenses granted hereunder shall be transferable only upon the consent of the Police Commission after written application." Police Code of the San Francisco Municipal Code, sec. 1079; see, also, secs. 1075, 1076, 1077, 1078, Ordinance No. 11.01111 of the City and County of San Francisco.

Should the application be denied, the possibility of an appeal to the board of permit appeals might be involved (Charter of the City and County of San Francisco, sec. 24; Stats. 1931, pp. 2991, 2992), or that of an application to the state court for relief from an alleged arbitrary action on the part of the Board of Police Commissioners.

Evidence was introduced that it was the policy of the Commission to refuse to recognize involuntary transfers. The transcript on appeal relative to the first order discharging the order to show cause contains the following: "* * * the court thereafter gave its opinion that the appointment of a receiver as prayed would be an idle act since the San Francisco Police Commission would not recognize a transfer thereof upon such receiver's sale." The transcript is silent as to any such expression by the court in finally ruling on the petition and said order after further evidence was taken.

[2-4] The appointment or refusal to appoint a receiver rests entirely within the discretion of the trial court. Bank of Woodland v. Heron, 120 Cal. 614, 52 P. 1006; 23 R.C.L. pp. 39, 40; 53 Corpus Juris sec. 20, p. 34. "An appellate court is never justified in substituting its discretion for that of the court sitting nisi prius." Lent v. H. C. Morris Co., 25 Cal. App.2d 305, 308, 77 P.2d 301, 302. When there has been a plain miscarriage of justice the appellate court will rectify an abuse of discretion by the trial judge. Const. California, art. VI, sec. 4½. In Sunset Farms, Inc., v. Superior Court, 9 Cal.App.2d 389, 405, 50 P.2d 106, 113, the court said: "The rule is established that the appointment of a receiver rests largely in the discretion of the trial court and that its action in appointing a receiver or its refusal of an application for the appointment of such an officer will not be disturbed in the absence of a showing that the court's discretion has been abused."

[5, 6] Receivers are often legal luxuries, frequently representing an extravagant cost to a losing litigant. When it appears that no reasonably certain benefit will result to one litigant, and a distinct disadvantage will result to another, courts should weigh carefully the propriety of

appointing a receiver. Under all of the circumstances as they appear in the record, we are unable to say that the trial court abused its discretion in refusing to make the appointment.

The orders appealed from are affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

45 Cal.App.2d 24

TULLEY v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

Civ. 11729.

District Court of Appeal, First District, Division 1, California.

May 26, 1941.

1. Process 🔑115

A nonresident United States army officer who was in the state on official business during national emergency was not, as a matter of "public policy", exempt from process in a civil action brought by his divorced wife to recover from him money allegedly due under a written contract for the support of a minor child of the parties. Act Cong. March 8, 1918, 40 Stat. 440; Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. Appendix, § 510 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

2. Army and navy 🔑34

Principles of public policy are not so clear that all creditors of nonresident members of the armed forces in the United States army in a national emergency while on official business within the state are to be prohibited, as a matter of law, from suing the nonresident members of the armed forces, though the court in applying the principles would deem that a national emergency comparable to a state of war existed. Act Cong. March 8, 1918, 40 Stat. 440; Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 510 et seq.

3. Process 🔑115

Courts should only exempt nonresident members of the armed forces who are in the state during the period of emergency from process in a civil action, where the Legislature has not acted in the matter.

4. Process 🔑115

If Congress has determined that public interest does not require that nonresident members of the armed forces within a state during period of emergency shall be absolutely free from civil process, the District Court of Appeal should not determine that public policy requires such an extreme protection. Act Cong. March 8, 1918, 40 Stat. 440; Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 510 et seq.

5. Prohibition 🔑5(2)

Prohibition to command a court to quash service of summons on ground that petitioner is exempt from service of civil process can only be granted if petitioner, as a matter of law, is entirely free from service of civil process.

6. Prohibition 🔑5(2)

The quashing of service of process, on ground that a defendant is free from service of civil process, should not be commanded in a prohibition proceeding, except where compelling reasons of public policy exist.

◆

Prohibition proceeding by Edgar T. Tulley against the Superior Court of the State of California, in and for the County of Alameda, and others.

Alternative writ discharged, and peremptory writ of prohibition denied.

G. C. Ringole, of San Francisco, for petitioner.

Myron Harris, of Oakland, for respondents.

PETERS, Presiding Justice.

Petition for a writ of prohibition.

The question presented is whether, as a matter of public policy, and independent of statute, a nonresident officer of the armed forces of United States who is temporarily in this state on official business is exempt from process in a civil action brought by his divorced wife to recover from the officer money alleged to be due under a written contract for the support of the minor child of the parties.

The petition sets forth the following facts. Petitioner is the defendant in an action in Alameda County brought by his divorced wife to recover the sum of $4,800, the alleged balance due on a contract entered into in 1927 between the plaintiff and defendant by which defendant agreed to pay plaintiff $100 a month for the support of a child of the marriage, now eighteen years of age. Petitioner is a Lieutenant Colonel in the Army, and, since divorcing the plaintiff, has remarried. It appears from the affidavits introduced by him on his motion in the court below to quash service of summons, and attached as exhibits to the present petition, that in 1931 the Judge Advocate of the United States Army rendered an opinion that the above-mentioned contract was not a binding contract, and that petitioner should be required to contribute nothing for the support of his wife, and should pay only such amounts as are reasonably necessary for the support of the child. According to the affidavit, the Judge Advocate General returned the matter to the Corps Area Commander, Eighth Corps Area, to fix the amount affiant should pay. The amount was set at $50 a month, which petitioner at all times has paid in full. In addition, the petitioner has paid certain sums for the medical care of the child. The Alameda County action was brought to recover the difference between the amount paid and what plaintiff claims is due under the contract. Petitioner claims in this proceeding that he was not amenable to process at the time he was served with summons. Of course, in this proceeding, we are not concerned with the merits of the controversy, nor can we properly consider the legal effect of the Judge Advocate's decision on the provisions of the contract. Those are matters which can properly be considered only on the trial on its merits.

It appears from a copy of orders of the War Department that on January 26, 1940, petitioner, who is a resident of Pennsylvania, and who has been in the army since 1914, was relieved of his assignment at Fort Crook, Nebraska, effective at such time as would enable him to comply with the further provision of the order that he sail from San Francisco on an army transport April 27, 1940, to report for duty in the Philippines. Thereafter, by order of the authorities in Nebraska, he was granted a leave of absence for one month ten days "effective on or about 12 March, 1940". The petitioner was served in the Alameda County action on April 24th or 25th, 1940. One month and ten days from March 12th would have expired prior to April 24th or 25th, the day he was served. This is perhaps the basis of the averment in his affidavit, Exhibit "E", that affiant was in the performance of his official duties at Fort Mason, San Francisco, when a copy of the complaint and summons were served upon him. He further states that he arrived at Fort Mason on April 22, 1940, and that after his arrival he had his quarters and slept at Fort Mason. He arrived in California on April 1, 1940, and spent some time at Oceanside before coming to Fort Mason. In the affidavit of the plaintiff it is averred, and not denied by petitioner, that he was served at Hostess House at Fort Mason, which is used for guests and visitors, and not entirely for military purposes.

There is one other fact necessary to mention. Attached to the points and authorities accompanying the petition is a copy of a proclamation of the President of United States, dated September 8, 1939, which recites that in view of the world war conditions "a national emergency exists in connection with and to the extent necessary for the proper observance, safeguarding and enforcing of the neutrality of the United States and the strengthening of our national defense within the limits of peace-time authorizations".

[1] It is the contention of petitioner that, as a matter of public policy, members of the armed forces of the United States during the present emergency should not be subject to civil process in a state where they are not residents while they are temporarily within such state in the service of their country. The contention is that the courts of this state have no jurisdiction over such persons in a civil action. If it be assumed that the question can properly be raised by prohibition (Hammons v. Superior Court, 63 Cal.App. 700, 219 P. 1037) we are of the view that the public policy involved is not so clear and positive that, as a matter of law, it requires that every nonresident member of the armed forces be completely immune from all civil process while temporarily within this state.

It is conceded that if the claimed exemption exists, it exists solely as a matter of public policy. See annotation in 85 A.L.R. 1340. Both parties rely upon the case of Murrey v. Murrey, 216 Cal. 707, 16 P.2d 741, 85 A.L.R. 1335. That case held that a nonresident reserve officer of the United States, while in this state for training purposes, at his own request and during peacetime, was amenable to the civil process of this state. The court traced the history and background of the doctrine that certain nonresidents, as a matter of public policy, are immune from process, but held that that doctrine should not be extended to include members of the armed forces during peacetime. The court pointed out that under the common law the privilege of exemption from process extended only to parties to judicial proceedings, their witnesses, and members of the court, whose presence was necessary to the proper carrying out of the judicial functions. The court stated (216 Cal. page 710, 16 P.2d page 742): "This exemption from service of process is, of course, in derogation of the right which every creditor has to collect his debt by subjecting his debtor to suit in any jurisdiction where he may find him. Since this is so, the privilege should not be extended beyond the reason of the rule upon which it is founded. Fitzhugh v. Reid, (D.C.), 252 F. 234. California, as a matter of public policy, recognizes this 'judicial' exemption. Hammons v. Superior Court, 63 Cal.App. 700, 219 P. 1037."

The court recognized the fact that in recent years the privilege has, in some instances, been extended to nonresidents within the jurisdiction engaged in the performance of a public duty during times of emergency. 50 Cor.Jur., 557, sec. 246. The court discussed at length the leading case on that subject—Filer v. McCornick, D.C., 260 F. 309. In that case the person claiming the exemption was the president of a Utah bank. During 1918 the federal government was actively engaged in selling its securities for the purpose of raising funds for the carrying on of the war in which this country was then engaged. A conference of leading bankers of the western states was called by the Governor of the Federal Reserve Bank of this district in San Francisco, for the purpose of discussing ways and means of speeding up the sale of the government securities. While in this state for that purpose the president of the Utah bank was served with process in a civil action. The Federal court held that while present in this state to perform such a public duty in the then emergency the Utah resident, as a matter of public policy, was immune from service of civil process.

The Supreme Court in the Murrey case, supra, held that the doctrine of the Filer case, supra, did not apply to a nonresident reserve army officer training in this state during peace-time. In so holding the Supreme Court stated (216 Cal. page 712, 16 P.2d page 743, 85 A.L.R. 1335):

"Defendant contends that the theory of the Filer case, supra, applies in the instant case. He contends that he was in this state solely for the purpose of performing a public duty and that, therefore, on grounds of public policy, he should be held to be exempt from service. As a matter of public policy, it is undoubtedly true that during a time of war or other national emergency, the exemption discussed in the Filer case, supra, would be extended to those in the military service. * * *

"It is conceivable, of course, that a rule that applies during a period of great national emergency might not be applicable to a situation where no such emergency exists. No case seems to have been decided by the courts of this state on the question presented. The few authorities from other jurisdictions are in hopeless conflict. Some jurisdictions have statutes conferring the exemption. In some states the statutes provide that one engaged in military service shall be exempt from arrest. In these jurisdictions some courts hold that the exemption should be extended, as a matter of public policy, to civil process. Land Title & Trust Co. v. Rambo, 174 Pa. 566, 34 A. 207. Other jurisdictions refuse to extend the exemption beyond the terms of the statute. Hart & Foster v. Flynn's Ex'r, 8 Dana 190, 38 Ky. 190; Kirkpatrick v. Irby, 3 McCord (S.C.) 205. Iowa apparently holds that the exemption from civil process exists independently of statute. Northwestern Cas. & Surety Co. v. Conaway, 210 Iowa 126, 230 N.W. 548 [68 A.L.R. 1465]."

[2-4] Petitioner relies on the language of the Murrey case that "it is undoubtedly true that during a time of war, or other national emergency, the exemption discussed in the Filer case, supra, would be extended to those in the military service." He contends that, although this country is officially at peace, under the President's proclamation above-mentioned, and, considering the realities of the present world conditions, a national emergency comparable to war exists, and the above-quoted doctrine applies. We agree that a national emergency now exists, and that the rule that should be applied to this case is the same that should be applied during a period of war. We also agree that for the purposes of this case the record shows that when petitioner was served on April 24th or 25th, 1940, his leave of absence had expired, and he was in this state on that date not on a mere vacation, but was here on official

business. Nevertheless, we do not agree that in this case principles of public policy are so strong and clear that all creditors are to be prohibited, as a matter of law, from suing all nonresident members of the armed forces in this state during the period of the emergency. While it is true that there is dicta in the Murrey case, supra, supporting petitioner's position, that dicta was based on the theory that such relief should be granted if by statute or otherwise some other adequate remedy did not exist. The courts should only act where the legislature has not acted in the matter. The Federal government, both in the last war and in the present emergency, has recognized that those in the armed forces should be entitled to some protection from suit while they are in the service of their country. Under a statute of 1918 (U. S. Stats. Vol. 40, Part 1, p. 440) the Congress conferred upon those engaged in military service during the last war certain limited rights in relation to service of process and in relation to certain types of action. But, even in the last war, the Federal Congress did not consider it necessary in the public interest to confer the unlimited right to be free from civil process claimed by petitioner in the present proceeding. Certain limited rights were then conferred on those in military service. In the present emergency, effective as of October 17, 1940, the Congress passed the Soldiers' and Sailors' Civil Relief Act of 1940. Title 50 U.S.C.A. Appendix, § 510, et seq. By its express terms that act is made applicable to every court, federal or state. By that act it is required that whenever a default judgment is sought against a person in the military service, the court must appoint an attorney to protect such person's interests and may require the plaintiff to post a bond; that if a judgment is secured against a person in military service it may be set aside by such person within ninety days of the termination of such service provided the defendant can show he has a meritorious defense. Another section of the act provides that the court, including any state court, in which an action involving a person in military service is pending, may, and in certain cases must, grant a continuance, during the period of such service and for sixty days thereafter. Other sections provide stays of execution, for the vacating of attachments, and for tolling the statute of limitation during periods of military service. The balance of the act deals with certain specified types of action of which the one here involved is not one. That statute contains the solemn declaration of the Congress of United States as to what it believes public policy requires. The Congress has not deemed it necessary, in the public interest, to grant those in military service an absolute exemption from civil process. Certainly, if the Congress has considered the problem, and has determined that the public interest does not require that an absolute freedom from civil process be conferred on those in military service, this court should not, and cannot, determine that public policy requires such an extreme protection. Whatever might be the rule in a situation where the legislature, the policy making organ of government, has not spoken, when that body has spoken, it is not for the courts, by judicial mandate, to limit or expand the policy thus adopted.

[5, 6] While it is true that the above-mentioned federal statute was passed subsequent to the commencement of the action in which petitioner is a defendant, it is an announcement of policy by the law-making body that normally should be the exclusive judge of policy, as to what it considers reasonable and necessary under such circumstances. Under that statute, or independent of that statute, the trial courts possess ample powers to protect the rights of those in the military service of United States. It is inconceivable that, in a proper case, the trial court, upon a proper showing, would not grant a reasonable continuance to one engaged in military service to permit him to properly prepare his defense, and, if necessary, continue such case during the period of the defendant's foreign service. If the trial court should abuse its discretion in such a case there exists ample remedies to control such abuse. But that is not this case. Petitioner is seeking prohibition, which can only be granted if defendant, as a matter of law, is entirely free from service of civil process. Such a drastic limitation on plaintiffs' rights should not be allowed except where compelling reasons of public policy exist. Inasmuch as trial courts, either under the federal statute, or independently thereof, possess the power to amply protect those in the armed forces during the present emergency, no compelling reason exists for extending the rights of defendants in this regard.

The alternative writ is discharged and the peremptory writ of prohibition is denied.

We concur: KNIGHT, J.; WARD, J.

45 Cal.App.2d 60

MERRON et al. v. TITLE GUARANTEE & TRUST CO. et al.

Civ. 12420.

District Court of Appeal, Second District, Division 1, California.

May 27, 1941.

1. Appeal and error 🔑544(2)

Where an appeal was taken upon the judgment roll alone, appellate court was confined to a consideration of questions of whether judgment was supported by the findings, or whether, upon the findings made, another and different judgment should have been entered.

2. Appeal and error 🔑907(3)

Where appeal was taken on the judgment roll alone, appellate court, in determining whether judgment was supported by court's findings, was required to assume that such findings were based on substantial evidence.

3. Malicious prosecution 🔑73

Court's finding, in suit for malicious levy of attachment, that none of defendants caused attachment to be levied with any malicious intent or acted maliciously or illegally or without probable cause, was sufficient to support a judgment for defendant.

4. Malicious prosecution 🔑55

In order to establish right of recovery in action for malicious levy of attachment, plaintiff must allege and prove malice and want of probable cause in bringing the original action or in procuring the issuance of the ancillary proceeding therein.

5. Malicious prosecution 🔑33

Where no appeal was taken from an order refusing to discharge an attachment, such order was "res judicata" with respect to propriety of such attachment in action for malicious levy of attachment, notwithstanding fact that appellate court in opinion affirming judgment in favor of attachment creditor stated that such attachment should have been discharged.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

6. Appeal and error 🔑907(3)

Where appeal was taken on the judgment roll alone from judgment denying recovery for malicious levy of attachment, appellate court was required to assume that there was substantial evidence justifying trial court's finding that defendant did not act without probable cause.

7. Malicious prosecution 🔑64(2)

In action for malicious levy of attachment, evidence that attaching creditor acted in good faith upon the advice of counsel would warrant finding that there was probable cause for attaching creditor's action and support a judgment denying recovery.

8. Malicious prosecution 🔑16

Malice and want of probable cause go to the very gist of an action for malicious levy of attachment, and a finding adverse to plaintiff on such point would be decisive of the action.

9. Attachment 🔑356
Malicious prosecution 🔑14

The failure of plaintiffs in action for malicious levy of attachment to establish that they had suffered any damage foreclosed any possibility of recovery either for malicious attachment or mere wrongful attachment.

10. Appeal and error 🔑544(3)

Where an appeal is taken on the judgment roll alone, the appellate court is confined to a consideration of whether reversible error appears on the face of such record.

11. Appeal and error 🔑1008(1)

Where the record in appeal taken on the judgment roll alone contained findings of facts upon the issues raised by the pleadings which supported the conclusions of law reached by trial court, judgment of the trial court must be affirmed.

12. Appeal and error 🔑837(2)

Where an appeal was taken on the judgment roll alone, from judgment denying recovery for malicious levy of attachment, resort could not be had to facts stated or assumed in previous appeals in the same action or in the attachment action as a basis for holding that trial court's findings were contrary to the evidence, since it could not be known what other evidence contradictory of appellants' claims may have been introduced at the trial.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Action by Marion Merron and others against the Title Guarantee & Trust Company and others for malicious attachment. From an adverse judgment and order denying their motion to vacate the judgment and enter a judgment for plaintiffs under § 663 of the Code of Civil Procedure, plaintiffs appeal.

Judgment and order affirmed.

H. M. Mayes, of North Hollywood, for appellants.

M. J. Rankin, Milo V. Olson, and Elliott H. Pentz, all of Los Angeles, for respondents.

WHITE, Justice.

Plaintiffs in an action for "malicious attachment" appeal from a judgment adverse to them entered after trial before the court without a jury, and from an order denying their motion to vacate the judgment and enter a judgment for plaintiffs under section 663 of the Code of Civil Procedure. For a more extended statement of the facts involved, reference may be had to the opinion of this court upon a prior appeal by plaintiffs from a judgment entered after a demurrer to their complaint was sustained. Merron v. Title Guarantee & Trust Co., 27 Cal.App.2d 119, 80 P.2d 740. On that appeal the judgment of the superior court was reversed and the cause remanded with directions to permit the plaintiffs to amend their complaint should they be so advised. It appears from the present record, however, that although an amendment to the complaint was proposed, it was subsequently withdrawn, and the action went to trial upon the issues raised by the complaint and the answers thereto of the respective defendants.

[1-4] As the present appeal is upon the judgment-roll alone, this court is confined to a consideration of the question of whether the judgment is supported by the findings, or whether, upon the findings made, another and different judgment should have been entered. Goldberg v. List, 11 Cal.2d 389, 79 P.2d 1087, 116 A.L.R. 900. Examination of the clerk's transcript discloses that the defendants by their answers denied that the attachment was levied with "any malicious intent", and the trial court found "that none of the defendants caused said attachment * * * to be levied with any malicious intent whatsoever", and further, that "it is not true that the defendants * * acted maliciously or illegally or without probable cause * * *". This finding alone, which it must be assumed was based on substantial evidence, fully supports a judgment for defendants in an action for malicious levy of an attachment. "The plaintiff in such an action must allege and prove malice and want of probable cause in bringing the original action or in procuring the issuance of the ancillary proceeding therein, or he is not entitled to recover." Vesper v. Crane Co., 165 Cal. 36, 41, 130 P. 876, 878, L.R.A.1915A, 541.

[5-7] Appellants' point on this appeal appears to be that malice should be inferred from lack of probable cause, and that such lack of probable cause is shown by the fact that plaintiff title company in the original action was unsuccessful as against Marion Merron, and from the further alleged fact that the attachment was wrongfully issued in any event, for the reason that the debt sued upon was for a balance due upon a real estate purchase contract wherein the vendor retained title as security. It is true that the District Court of Appeal for the Third District, in its opinion affirming the judgment in favor of the plaintiff title company and against Sarah Stahler, said (Title G. & T. Co. v. Stahler, 15 Cal.App.2d 239, 59 P.2d 515, 516): "The first point urged upon this appeal is that the court erred in refusing to vacate this attachment. In that appellant is correct. The vendor, under an executory contract for the sale of real property, having retained title as security for the purchase price, is not entitled to an attachment. * * *" However, the court also said, "No appeal, however, was taken from the order refusing to discharge the attachment and it cannot be reached under the present appeal." So far as this court is advised, therefore, the order refusing to dissolve the attachment still stands and is res judicata. Moreover, this court must assume, on an appeal on the judgment-roll alone, that there was substantial evidence justifying the trial court in concluding that there was probable cause. Evidence, for instance, that the attaching plaintiff acted in good faith upon the advice of counsel would support such a conclusion. Baranger & Co. v. Meyer, Cahn & Talbott, 34 Cal.App. 158, 166 P. 862, and cases there cited.

[8] Malice and want of probable cause go to the very gist of this action (Vesper v. Crane Co., supra), and a finding adverse to appellants on this point renders unnecessary any further discussion, so far as an

action for malicious attachment is concerned.

[9] The trial court further found that plaintiffs had suffered no damage. This finding, also, forecloses any possibility of recovery by appellants, either for malicious attachment or mere wrongful attachment.

[10-12] As has repeatedly been held, when an appeal is taken on the judgment-roll alone, the appellate court is confined to a consideration of whether reversible error appears on the face of such record. When, as here, the record contains findings of fact upon the issues raised by the pleadings which support the conclusion of law reached by the trial court, the inquiry of this court is at an end. Hammond Lumber Co. v. Timourian, 122 Cal.App. 448, 10 P.2d 181; Wright v. Bank of Lassen County, 132 Cal.App. 336, 22 P.2d 748; Citizens National Trust & Savings Bank v. Maher, 6 Cal.2d 386, 57 P.2d 917. Resort cannot be had, as appellants urge, to facts stated or assumed in previous appeals in this action or in the attachment action as a basis for holding that the findings in the present case are contrary to the evidence, for we do not know what other evidence in contradiction of appellants' claims may have been introduced at the trial.

The judgment and the order denying the motion to vacate the judgment and enter judgment for plaintiffs are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

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45 Cal.App.2d 17

SAFEWAY STORES, Inc., v. KING LUMBER CO.

Civ. 2589.

District Court of Appeal, Fourth District, California.

May 22, 1941.

1. Payment 🔑82(3)

Where check indorsed by payee's agent was cashed by subsequent indorser and deposited to its account and payee filed affidavit of forged indorsement and drawee bank compelled subsequent indorser's bank to reimburse it, and thereafter subsequent indorser's bank deducted the amount of check from indorser's account, subsequent indorser's payment to bank which reimbursed drawee bank was "involuntary", since it was made because of bank's exercise of banker's lien upon indorser's account. Civ. Code, § 3054.

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary".

2. Principal and agent 🔑109(4)

Ordinarily, an agent authorized to receive checks in payment for his principal may not have authority to indorse and collect the checks, but the course of dealing may be such as to give the agent "apparent authority" to indorse and collect checks, and if a principal by his acts has led others to believe that he has conferred such authority upon his agent, he cannot be heard to assert as against third persons who have relied thereon in good faith that he did not intend to confer such power. Civ.Code, § 2317.

See Words and Phrases, Permanent Edition, for all other definitions of "Apparent Authority".

3. Principal and agent 🔑137(1)

Where principal makes it possible through his acts for his agent to inflict injury, the result of such injury should not be passed on to innocent persons who have dealt with the agent in good faith under his apparent authority, but the principal is bound by his acts and is "estopped" by his own conduct from denying the authority of the agent to act.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

4. Principal and agent 🔑109(4)

Where agent was placed in charge of a business and for considerable length of time indorsed checks payable to principal and was clothed with apparent authority to do all things that were essential to the ordinary conduct of the business, subsequent indorser which, relying on apparent authority of agent, cashed a check payable to principal and indorsed by agent without any reason to suspect any limitations of his authority, was entitled to rely on "apparent authority" of agent and could recover from the principal amount of check which subsequent indorser was compelled to pay after principal had filed affidavit that agent's indorsement was forgery. Civ.Code, §§ 2300, 2317.

5. Estoppel 🔑72

Where one of two innocent persons must suffer, the loss should be borne by him whose acts made the loss possible.

6. Interest 🔑44

In the absence of an express contract, interest is awarded only from the time money falls due.

7. Interest 🔑13

Where debtor knows precisely what he has to pay and when he has to pay, he is liable for interest if he neglects to pay.

8. Interest 🔑44

A subsequent indorser which cashed check indorsed by payee's agent in reliance on apparent authority of payee's agent to indorse check, and which was required to pay amount of check after payee filed affidavit of forged indorsement, was entitled to recover amount paid with interest from date indorser was required to pay check, but was not entitled to interest from date of check, since amount claimed did not fall due until indorser's account was charged with amount of check. Civ.Code, § 3287; Const. art. 20, § 22.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Safeway Stores, Incorporated, against the King Lumber Company for money had and received and on a liability for prior endorsement of a check. From a judgment for the plaintiff, defendant appeals.

Modified and as modified affirmed.

Charles V. Barfield and John H. Finger, both of San Francisco, for appellant.

Calvin H. Conron, Jr., of Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent brought this action to recover $337.32 from defendant and appellant on two counts, one based on money had and received, and the other, based on a liability for prior endorsement of a check. The material allegations of the complaint were denied. The case went to trial on these issues with no affirmative defenses alleged. Findings of fact consistent with the allegations of respondent's complaint were made and judgment favorable to respondent on the first count was entered for the recovery of the principal sum plus interest from September 19, 1939. A motion for a new trial was made and denied. This appeal followed.

Appellant corporation, whose principal place of business was in Bakersfield, opened a branch lumber yard in Arvin, a town approximately twenty-five miles southeast of Bakersfield. The town had no banking facilities. A Mr. B. Oeschger was first employed by appellant corporation in the year 1936 in its Bakersfield Lumber Yard. In 1938 he was transferred to Arvin to open and act as manager of the company's new lumber yard. At Arvin his duties were to sell merchandise, to make statements of accounts of sales, to receive money and checks on account of sales, to advertise the business in Arvin newspapers, and to hire and discharge employees. He was also authorized to pay wages, advertising and petty cash transactions, from such money as was on hand. He made reports to the main office of all such transactions. These reports were made in compliance with the company's bookkeeping system which had been in effect since the year 1905. The system did not require him to differentiate between cash receipts and check receipts. Accordingly, it was impossible in the main office to determine whether any particular payment on account was a check or a cash transaction. About two months after opening the Arvin Yard, Oeschger embarked upon a practice of endorsing checks which he had received in the course of his duties in payment for merchandise sold and upon accounts opened, and cashing them at various places of business in Arvin. The endorsements were in the name of King Lumber Company, by Oeschger as manager. The claimed reason for doing this was that he needed cash to make disbursements in his business as manager. He cashed at least thirty such checks at respondent's Arvin store during the period of time between his arrival in Arvin and the transaction here involved. A Mr. Shields was respondent's manager at Arvin during that period. Oeschger also cashed numerous checks payable to King Lumber Company at the Arvin Drug Store, as often as twice a week, for the same claimed reason. This practice was discussed between the druggist and Shields, the Safeway Store manager. No trouble of any kind had developed from Oeschger's practice of endorsing such checks and cashing them during this period. During all of this time Oeschger paid certain wages, advertising and miscellaneous small bills, and had actual authority to do so out of receipts from the business. Mr. King, an officer of appellant corporation, testified that no officer of the corporation had authorized Oeschger to endorse checks payable to the King Lumber Company.

Shortly before September 19, 1939, Oeschger presented to Shields a check drawn by one Ike M. Davis upon the Bank of America, payable to King Lumber Company in the amount of $337.32, and endorsed "King Lumber Company, by B. Oeschger," and asked to have it cashed, stating he needed change for the business. Shields at first refused to cash it. Later that day, Oeschger asked for a part of the money and Shields then gave him the entire amount to avoid bookkeeping. Shields forwarded the check to the Bakersfield main office of the Safeway Stores, Inc., and it was deposited for collection by that company but returned on account of some minor discrepancy. Shields then, on September 19, 1939, returned this check to Oeschger and took a receipt therefor. Two hours later Oeschger returned and delivered to Shields another corrected check. This check was then deposited through the Safeway account at the Anglo-California National Bank and cleared the Davis account at the Bank of America. The check was endorsed by the Safeway Stores, Inc., for deposit previous to a guaranteed endorsement of the Anglo-California National Bank.

It did not appear upon Oeschger's statements to the company that Davis had paid his account, due to Oeschger's omission to report the transaction. Mr. King, of the Lumber Company, inquired at the Arvin Branch about the Davis account. In checking over a list of delinquent accounts, according to the records kept thereof at the Bakersfield office, on November 4, 1939, he was told by Oeschger's assistant that the Davis account was paid. On November 15, 1939, an investigation of the Arvin office was made by Mr. King, and a $560 shortage was discovered.

Prior to that time the company claimed to have had no knowledge that Oeschger had been short in his accounts. It is also claimed that it had no knowledge that Oeschger had been endorsing checks. The firm had never notified any Arvin merchant that Oeschger did not have authority to cash checks payable to King Lumber Company. There is no convincing evidence that Oeschger did not use the money received from the check in the business.

On December 21, 1939, three months after the check was cashed, the secretary of the appellant corporation filed an affidavit with the Bank of America to the effect that the indorsement, "King Lumber Company, by B. Oeschger, Manager", upon the check in question was a forgery. Davis was given credit upon his account with the company for the check. The King Lumber Company was reimbursed for Oeschger's shortage by its bonding company. On January 18, 1940, the amount of the check was apparently charged to the account of Safeway Stores, Inc., at the Anglo-California National Bank by the bank, and the check, together with the affidavit of forged endorsement, was given to respondent. Previously, the Bank of America had delivered the check and affidavit to the Anglo-California National Bank and charged its account. The funds so collected from the Safeway account by the Anglo-California National Bank were forwarded to clear the charge of the Anglo-California National Bank made by the Bank of America, and the Bank of America credited the funds to the King Lumber Company account. Appellant then delivered the funds to the bonding company. After a formal demand upon King Lumber Company for reimbursement, this action was filed on January 26, 1940.

It is appellant's contention that respondent was not forced to pay, by reason of its prior endorsement, the sum of $337.32 to the Anglo-California National Bank; that any such payment made by respondent to that bank was wholly voluntary; that the finding that the appellant endorsed the check for value received was contrary to the evidence; that the finding that appellant was indebted to respondent on account of monies had and received by appellant from respondent for the use and benefit of appellant was also unjustified. It is argued that upon payment of the check by the drawee bank, the transaction was closed, citing 9 C.J.S., Banks and Banking, p. 722, § 354-a; and that payment to the holder in due course discharges the instrument, citing Civ.Code, secs. 3132, 3147 and 3200.

[1] It is quite clear from the evidence that the affidavit and check were delivered to the Anglo-California National Bank coupled with a demand for reimbursement. The Anglo-California National Bank being in possession of respondent's account, had a banker's lien and exercised it by charging the amount of the check to respondent's account. Civ.Code, sec. 3054. The Anglo-California National Bank previously had been compelled by the Bank of America to reimburse the latter bank, and it therefore became the duty and obligation of respondent to pay this amount to the Anglo-California National Bank. This payment was involuntarily made because the bank had and exercised a banker's lien upon respondent's account.

[2] Primarily, ostensible authority is defined to be such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. Civ.Code, sec. 2317. Ordinarily, as an abstract principle of law, an agent authorized to receive checks in payment for his principal may not have authority to endorse and collect the same. On the other hand, the course of dealing may be such as to give the agent apparent authority to do these very acts. This authority may be implied from the facts of the particular case. If a principal by his acts has led others to believe that he has conferred this authority upon his agent, he cannot be heard to assert, as against third persons who have relied thereon in good faith, that he did not intend to confer such power.

The issue was presented to the court whether Oeschger was permitted by appellant to conduct its business under such methods and for such a length of time as was sufficient to warrant the conclusion that he was authorized to endorse checks, and we are of the opinion that the evidence upon the subject supports the conclusion that Oeschger had the authority. The conduct of the agent with reference to appellant's business was sufficient to establish, by implication, that such authority was given notwithstanding the direct testimony of the principal that the agent had no such authority.

[3, 4] The only fair inference to be drawn from the facts is that the respondent knew and relied on the ostensible authority of Oeschger to perform the acts in question, and that there is abundant proof of want of ordinary care on the part of the appellant in the conduct of its business which was sufficient to lead respondent to believe that Oeschger was clothed with full and ample power and authority in the premises. Where a principal makes it possible, through his acts, for his own agent to inflict injury, the result of such injury should not be passed on to innocent persons who have dealt with the agent in good faith under his apparent authority. The law forbids the principal to deny authority in the agent where his own conduct has invited those dealing with him to assume that the agent possessed such authority. In such a case, a principal is bound by his acts and is estopped by his own conduct from denying the authority of the agent to act. Robinson v. American Fish & Oyster Co., 17 Cal.App. 212, 119 P. 388. Where, as here, an agent is by his principal put in charge of a business as the apparent manager thereof, he is clothed with apparent authority to do all things that are essential to the ordinary conduct of such business at that place, and third persons acting in good faith and without notice of, or any reason to suspect, any limitations of his authority, are entitled to rely on such appearance. Leavens v. Pinkham & McKevitt, 164 Cal. 242, 128 P. 399; Civ. Code, sec. 2300.

[5] It is a familiar rule of law that where one of two innocent persons must suffer, the loss should be borne by him whose acts made the loss possible. Henry Cowell Co. v. Santa Cruz Bank, 82 Cal. App. 519, 255 P. 881. The evidence fully supports the court's findings and the findings support the judgment based upon the common count for money had and received.

[6, 7] Finally, appellant complains about the allowance of interest from September 19, 1939, the date of the check, rather than from January 18, 1940, the date of the payment by respondent to the Anglo-California National Bank. The difference in this interest would amount to $7.80. The legal rate of interest upon a loan or forbearance of any money, or on accounts after demand or judgment rendered in any court of this state, is seven per cent. Art. XX, sec. 22, Const. In the absence of an express contract, the law only awards interest on money from the time it falls due. City of Los Angeles v. City Bank, 100 Cal. 18, 34 P. 510. When-

ever the debtor knows precisely what he has to pay, and when he has to pay, he shall be charged with interest if he neglects to pay. Meyer v. Buckley, 22 Cal.App. 96, 133 P. 510; Sec. 3287, Civ.Code; Courteney v. Standard Box Co., 16 Cal. App. 600, 117 P. 778; Martyn v. Western Pacific Railway Co., 21 Cal.App. 589, 596, 132 P. 602.

[8] It cannot be said that the money claimed fell due prior to the time respondent's bank account was charged with the amount. The de minimis non curat lex rule (2 Cal.Jur. pp. 1009–1010, sec. 600) is probably applicable. Nevertheless, the judgment pertaining to the interest should be and is modified by deducting interest in the amount of $7.80.

As so modified, the judgment is affirmed. Respondent to recover costs on appeal.

We concur: BARNARD, P. J.; MARKS, J.

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45 Cal.App.2d 37

HACIENDA HOMES, Inc., v. PECK et al.

Civ. 11671.

District Court of Appeal, First District, Division 2, California.

May 27, 1941.

Hearing Denied July 24, 1941.

1. Quieting title ⇨16

A vendor under a contract for sale of a lot was not precluded from maintaining a quiet-title suit against vendee on ground that vendor was not the "real party in interest" because vendor had conveyed lot to a third party after execution of contract and before commencement of suit, where vendor and third party executed a contemporaneous agreement stipulating that deed was delivered to third party as security for a loan, and a reconveyance had been made to vendor, and date of reconveyance was not shown.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Party in Interest".

2. Appeal and error ⇨197(3)

Appellant could not argue for first time on appeal that evidence was not within issues of pleading where evidence had been admitted without objection.

3. Limitation of actions ⇨197(1)
Quieting title ⇨44(3, 4)
Vendor and purchaser ⇨44

In vendor's suit to quiet title as against vendee under contract for sale of a lot, evidence warranted judgment for vendor on ground that vendor owned lot, that vendee had no interest therein, that vendee's rights were protected when vendor mortgaged lot and surrounding property after execution of contract, that there was no fraud by vendor in inducing vendee to enter into contract, and that vendee's cross-complaint was barred by limitations.

4. Vendor and purchaser ⇨95(1)

A vendor's continued efforts to collect installments from vendee under a contract for sale of a lot and forbearance to declare a forfeiture did not constitute a "waiver" of forfeiture clause in contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

5. Vendor and purchaser ⇨101

Where contract for sale of land contained a forfeiture clause and a clause making time of the essence, and there was no evidence that vendee, who was in default, intended to comply with contract, vendee could not claim that vendor's notice of forfeiture was insufficient because signed by vendor's agent, since no notice of forfeiture was necessary under the circumstances.

6. Quieting title ⇨44(3)

In vendor's suit to quiet title as against vendee under a contract for sale of a lot, evidence sustained finding that vendor's failure to tender a deed to vendee was excused because such a tender would have been futile.

7. Quieting title ⇨7(2)

Where a contract for sale of a lot contained a forfeiture clause and a clause making time of the essence, and vendee defaulted in performance of contract, and vendee failed to show that vendor had committed any act contrary to contract or which prevented vendee from complying with its terms, vendor was entitled to have its title quieted as against vendee.

Appeal from Superior Court, Contra Costa County; Percy S. King, Judge.

Suit by Hacienda Homes, Inc., against J. Lydell Peck and others to quiet title to realty, wherein J. Lydell Peck filed a counterclaim and cross-complaint. From a judgment for plaintiff, defendant J. Lydell Peck appeals.

Affirmed.

G. Raymond Dougherty, Elizabeth M. Maxwell, Phil Garvey, and James F. Peck, all of San Francisco, for appellant.

Brobeck, Phleger & Harrison and M. B. Plant, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Defendant appeals from a judgment in favor of plaintiff in an action to quiet title to real property.

On July 1, 1925, plaintiff who owned a large subdivision of property entered into a written contract for the sale of a parcel of the property to defendant for $7,253.67; the contract acknowledged receipt of a $5,000 down payment which was made by defendant's release of a claim for a legal fee; the contract provided for payment of the balance in monthly installments of $75 plus interest, and for the payment by defendant of certain road assessments and taxes; the contract contained a forfeiture clause and a clause making time of the essence. On the same day plaintiff executed a mortgage on the entire property to Anglo-California Trust Company to secure the payment of bonds in the amount of $650,000, but expressly protecting the rights of defendant in the lot covered by his contract. On November 27, 1926, plaintiff executed as grantor a deed of grant, bargain and sale to Mercantile Trust Company, now known as American Trust Company. Contemporaneously with the execution of the deed the parties executed an agreement stipulating that the transaction was a mortgage, and also protecting defendant's interest in the particular lot. Defendant never took possession of the property and paid none of the balance of the purchase price except $8.02 on May 24, 1928; he paid no road assessments or taxes after March, 1929, and paid the interest only until November 30, 1930. Plaintiff and American Trust Company wrote many letters to defendant requesting payment but defendant failed to respond except to suggest that he be allowed to trade his equity for a lot which would be fully paid up. He was advised to take up that question with an officer of the trust company but failed to do so. A conference between the parties on April 3, 1934, brought no offer by defendant to pay, and a letter written by plaintiff's attorney on April 18, 1934, brought no response. On May 16, 1934, American Trust Company notified defendant that unless he performed his contract by June 16, 1934, his rights thereunder would be forfeited. Defendant made no reply and on August 17, 1934, plaintiff commenced the instant action to quiet title. Defendant filed his original answer, counterclaim and cross-complaint in December, 1934, alleging that plaintiff breached the contract by encumbering the property. On December 31, 1936, defendant filed an amended answer, counterclaim and cross-complaint alleging that plaintiff induced him to enter into the contract by fraudulently misrepresenting its intentions because it intended to encumber the property without protecting defendant, and that plaintiff twice encumbered the property without protecting defendant; hence defendant sought to rescind the contract and recover the $5,000 down payment. Plaintiff and cross-defendant answered that the vendee's rights were protected in the encumbrances, and that the cross-complaint was barred by the statute of limitations. During the trial of the case upon stipulation of counsel defendant's amended answer, cross-complaint and counterclaim was amended to allege that plaintiff never tendered a deed to defendant. The trial court found that plaintiff owned the property, that defendant had no interest therein, that defendant's rights were protected in the encumbrances, that there was no fraud, and that defendant's cross-complaint was barred by the statute of limitations. The judgment quieted plaintiff's title and denied a recovery to defendant; defendant's motion for a new trial was denied and he appeals upon a bill of exceptions.

[1-3] Appellant contends that as the property had been conveyed to American Trust Company, respondent was not the real party in interest and could not maintain this quiet title action. Plaintiff does not direct our attention to any of the evidence on this subject matter, but a reference to the respondent's exhibits 3 and 4 discloses that the parties executed a contemporaneous agreement stipulating that the deed was delivered to the trust company to secure a loan and that a reconveyance was made to respondent. Though the date of

this reconveyance does not appear we must assume that it was complete and within time for all purposes of the judgment, and thus an answer to the claim that respondent was not the owner of the property or of the contract of sale. It is too late now for appellant to argue that the finding and the evidence was not within the issues of the pleading. Respondent was in court to prove its title against all attacks and against all adverse claims. The evidence was admitted without objection, and fully supports the finding.

[4, 5] There is no merit in appellant's contention that the continued efforts of respondent to collect the installments and forbearance to declare a forfeiture constituted a waiver of the forfeiture clause of the contract. Buckey v. McGraw, 206 Cal. 541, 275 P. 221. The same authority is an answer to appellant's contention that the notice of forfeiture was insufficient because signed by respondent's agent. There being no evidence that appellant intended to comply with the terms of the contract no notice of forfeiture was necessary.

In his special defense and cross-complaint appellant tendered the issue of fraud because of the conveyance to the trust company. The evidence disclosed that this transaction was the usual one made under similar circumstances and that appellant's interests were fully protected. The only evidence in the record supports the finding that there was no fraud.

[6] The trial court found that respondent's failure to tender a deed was excused because such a tender would have been futile. We have recited sufficient evidence in the statement of facts to support the finding. There was no evidence to the contrary.

It is not necessary to discuss the question whether appellant's cross-complaint for a rescission of the contract and a return of the portion of the purchase price paid is barred by the statute of limitations. The cause of action there pleaded was founded upon the alleged fraud and rescission, neither of which was supported by any competent evidence.

[7] All the points raised by counsel for appellant are highly technical and all have frequently been decided adversely. The contract was drawn in the usual form of an agreement of sale of real property. The rights of the vendee were fully protected, and he has not shown any act of the vendor which was contrary to the express terms of the contract, or which in any manner prevented him from complying with its terms. Time was expressly made the essence of the contract, which also provided that "If any of the promises herein to be performed by the buyer remain unperformed after performance shall be required under the terms hereof * * * then, at the option of the seller, the seller shall be released from all obligation in law or equity to perform any of the covenants in this contract required by him to be performed, and the buyer shall thereupon forfeit all rights under this contract and all rights to any and all moneys theretofore paid." Here the default of the appellant is conceded. The only excuse offered is the alleged fraud, of which there was not the slightest evidence. The right of the vendor under such circumstances to have its title quieted cannot be denied. Such action "amounted to no more than the calling of the defaulting vendees into court to show why it should not be decreed that under the terms of the contract all their rights thereunder were at an end. In the absence of some sufficient equitable showing to excuse their failure to comply with the terms of the contract, plaintiffs, while standing on their contract, were entitled to such a decree, so as to cut off the possibility of any future claim by the vendee to equitable relief, which might embarrass or cloud his title. Glock v. Howard [& Wilson Colony Co.], 123 Cal. [1] 10, 11, 55 P. 713, 43 L.R.A. 199, 69 Am.St. Rep. 17." Oursler v. Thacher, 152 Cal. 739, 745, 93 P. 1007, 1009; 25 Cal.Jur. p. 705.

The case presented is the simple one of a failure to abide by the plain terms of a written contract. Appellant knowingly and willingly, after repeated notice and demands, voluntarily relinquished all his rights under the contract. All the equities support the judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

45 Cal.App.2d 42

HERCULES GLUE CO., Limited, v. LITTOOY.

Civ. 11676.

District Court of Appeal, First District, Division 2, California.
May 27, 1941.

1. Judgment ⚷304, 306

A court of record may amend a final judgment to correct a clerical error appearing on face of record, but may not alter its judgment because of errors purely judicial.

2. Appeal and error ⚷1203(1)

Where trial court ordered specific performance of a contract for assignment of invention, on condition that plaintiff pay expenses incurred by defendant in securing patent, as shown by memorandum to be filed by defendant, defendant filed memorandum showing expenses of certain amount, which plaintiff deposited with clerk, and defendant appealed unsuccessfully after filing assignment with clerk, trial court, on remittitur, could order additional deposit for patent costs incurred by defendant pending appeal.

◆

Appeal from Superior Court, City and County of San Francisco County; Louis H. Ward, Judge.

Suit for specific performance by the Hercules Glue Company, Limited against John F. Littooy. From an order for defendant, plaintiff appeals.

Modified, and, as modified, affirmed.

Byrne, Lamson & Jordan, of San Francisco, for appellant.

Walter H. Linforth, Wm. M. Cannon, Wm. M. Abbott, Cyril Appel, Ivores R. Dains, and Herbert Chamberlin, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

In an appeal from an order made after final judgment in an action for specific performance the single question presented is whether, after a decree has become final and has been affirmed on appeal, the trial court has power and jurisdiction to modify it by adding conditions to those contained in the decree which the plaintiff is required to fulfill before the specific performance theretofore ordered shall become effective.

Plaintiff brought an action in equity for specific performance of a contract with defendant requiring the latter to assign to plaintiff a certain invention made by defendant, known as "Fluxit 4-X", and for which defendant had made application for letters patent of the United States. The defendant filed a cross-complaint seeking compensation for services and other relief. On July 2, 1935, a decree favorable to plaintiff was recorded, which provided: "That within ten days from the signing and filing of this decree the said defendant and cross-complainant, John F. Littooy, execute and deliver to the Clerk of this court for plaintiff and cross-defendant, Hercules Glue Company, Ltd., a good and sufficient assignment, acknowledged before a Notary Public, assigning to plaintiff and cross-defendant the invention known as 'Fluxit 4-X', the application or applications for Letters Patent thereon filed by defendant and cross-complainant, and any and all Letters Patent which may have been issued to defendant and cross-complainant on said invention as a result of any application therefor filed by said defendant and cross-complainant; and within ten days from the signing of this decree said defendant and cross-complainant, John F. Littooy, shall deliver to and furnish to plaintiff and cross-defendant, Hercules Glue Company, Ltd., a written memorandum of said defendant and cross-complainant's costs and expenses incident to, or involved in, filing said application or applications or in securing any such patent, and the assignment of the same to the plaintiff and cross-defendant, relating to said invention covering said formula known as 'Fluxit 4-X', and file a copy thereof with the Clerk of this court; that plaintiff and cross-defendant shall, within five days thereafter, if it be dissatisfied with the correctness of said memorandum, file written objections to said memorandum in this court and deliver and furnish defendant and cross-complainant with a copy thereof; that if plaintiff and cross-defendant does not so object to said memorandum within said five day period, it shall forthwith deposit the money called for by said memorandum with the Clerk of this court for said defendant and cross-complainant and thereupon the Clerk of this court shall deliver said assignment to plaintiff and cross-defendant; that if objections be so made to said memorandum by plaintiff and cross-defendant, this court shall ascertain and fix the correct amount to be paid by plaintiff and cross-defendant to defendant and cross-complainant on account of said costs and expenses and, upon said amount being so fixed and determined by this court, plaintiff and cross-defendant shall forthwith deposit said sum with the Clerk of this court for defendant and cross-complainant, and thereupon the Clerk of this court shall deliver said assignment to plaintiff and cross-defendant; that if defendant and cross-complainant shall not so furnish said memorandum within said ten day period, he shall forego his right to any such costs and disbursements and the Clerk shall forthwith, after the expiration of said ten day period, deliver said assignment to plaintiff and cross-defendant."

On August 20, 1935, defendant filed with the clerk of the court a memorandum "of his costs and expenses incident to, or involved in filing application for letters patent on an invention known as 'Fluxit 4-X'" amounting to $178.50. On August 23, 1935, the plaintiff deposited the sum of $178.50 with the clerk and, on October 25, 1935, defendant filed with the clerk an assignment of his interest in the invention. The assignment was not delivered to plaintiff and the deposit was not paid to defendant because the latter took an appeal from the decree. In Hercules Glue Co. v. Littooy, 25 Cal.App.2d 182, 76 P.2d 700, this court affirmed the decree and, after a hearing was denied by the Supreme Court, the remittitur was filed in the trial court on April 28, 1938. On May 14, 1938, the defendant filed a notice of motion for an order requiring plaintiff to make an *"additional deposit for patent costs"* in the sum of $250 incurred by defendant in connection with the securing of the patent pending the appeal from the decree. This motion was granted and the resulting order is the subject of this appeal.

[1] The question presented is not a new one. The power and jurisdiction of a court of record to amend a final judgment to correct a clerical error appearing on the face of the record is not disputed, In re Estate of Goldberg, 10 Cal.2d 709, 76 P.2d 508; 14 Cal.Jur., p. 996, though want of power and jurisdiction of such a court to alter its judgment because of errors purely judicial is equally well settled. O'Brien v. O'Brien, 124 Cal. 422, 426, 57 P. 225; Lankton v. Superior Court, 5 Cal.2d 694, 696, 55 P.2d 1170. But it is said that a court of equity has inherent power to make its decrees effective, and that, when it has jurisdiction of the parties and of the subject matter, its decree will be complete to terminate the litigation if possible. 10 Cal.Jur., p. 559; 21 Cor.Jur., p. 134. Some authorities limit the power of additional or supplemental orders to cases in which the power is reserved in the final decree; others take the broader view that a court of chancery has the inherent power "to supervise the execution of its orders, and even to modify them in ways affecting only the details of their performance". Los Angeles A. T. Co. v. Superior Court, 94 Cal.App. 433, 440, 271 P. 363, 366.

[2] The supplemental order directing payment of the additional expenses incurred by the respondent pending his appeal from the decree would seem to be an incident "affecting only the details" of the performance of the decree. It is true that no reservation was made in the decree to adjust future expenses incurred by the respondent and that the incurring of these expenses was of his own doing, but the plain purport of the decree was that appellant should have specific performance of the contract giving it a clear title to the patent on the condition that respondent should be reimbursed for the expenses incurred by him in protecting the patent rights. The dispute between the parties was over their respective claims to the patent. This dispute was determined in favor of the appellant, but the court, sitting in equity, deemed it fair that appellant should reimburse the respondent for what he had put out for appellant's benefit. In this exercise of its discretion the chancellor proceeded under the authority of Los Angeles A. T. Co. v. Superior Court, supra, and we find no error in the order appealed from except that there was before the court at the time the motion for an additional deposit was heard the cost bill of plaintiff for costs incurred upon the former appeal amounting to $79.09, which should have been deducted from the award made to the defendant. This bill was allowed plaintiff in the minute order, but seems to have been inadvertently omitted from the order appealed from.

The order is modified by reducing the amount to be deposited from $250 to $170.91 and as so modified is affirmed. Each party will stand its own costs on this appeal.

We concur: STURTEVANT, J.; SPENCE, J.

DUTTON v. INTERSTATE INVESTMENT CORPORATION et al.*

Civ. Nos. 2744, 2770.

District Court of Appeal, Fourth District, California.
May 23, 1941.

Rehearing Denied June 21, 1941.

Hearing Granted July 21, 1941.

1. Frauds, statute of 🔑56(9)

A permit from city, similar to an oil lease and for a definite term of 20 years, was "personalty," rather than "realty," and hence a contract for the obtainment of such permit by several parties, and for sharing of profits realized thereunder, was not invalid because it was not in writing. Code Civ. Proc. § 1973.

See Words and Phrases, Permanent Edition, for all other definitions of "Personalty" and "Realty".

2. Mines and minerals 🔑73

An oil lease for an indefinite term, or for a term of years and as long thereafter as oil or gas may be found in the leased land, creates in lessee a "profit à prendre in gross," which in itself is "realty," a freehold interest in land, but a lease for a definite term of years is a "chattel real," and, while creating an interest in realty, is "personalty."

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Real" and "Profit À Prendre in Gross".

3. Frauds, statute of 🔑144

Where permit similar to oil lease was given corporation by city, and corporation's agent had agreed to reduce to writing oral contract with geologist for obtainment of permit and division of profits realized thereunder, corporation could not plead statute of frauds in geologist's suit for accounting. Civ.Code, § 1624.

4. Appeal and error 🔑1011(1)

In suit for accounting under contract for obtainment of permit to drill for oil from city and for sharing of profits realized thereunder, conflicting evidence as to whether contract was abandoned before it was consummated was for trial court.

5. Appeal and error 🔑994(3), 1012(1)

The credibility of witnesses and the weight to be given their testimony are matters for trial court, and will not be considered on appeal.

6. Mines and minerals 🔑101

Where geologist convinced oil scout that certain land was a valuable oil prospect, scout convinced corporation's agent, and corporation obtained permit from city to drill for oil on such land after its agent had agreed that geologist should have share in profits realized under permit, corporation could not defend geologist's suit for accounting on ground that geologist's methods, in determining whether land was oil bearing, were unscientific.

Appeals from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Suit for accounting by M. C. Dutton against the Interstate Investment Corporation and others. From a decree and judgment for plaintiff, named defendant appeals.

Affirmed.

Denio, Hart, Taubman & Simpson, of Long Beach, and Sherman & Sherman and W. B. Thomas, all of Los Angeles, for appellant.

Fogel & Beman, of Los Angeles, for respondent.

MARKS, Justice.

There are two appeals in this case which have been consolidated. The first appeal is from an interlocutory decree in which it was determined that plaintiff had an interest in the profits from an oil venture and an acounting was ordered. The second is from the final judgment after the accounting.

M. C. Dutton describes himself as a practical geologist. He testified that during and prior to 1935 he had spent much time in investigating the possibility that property belonging to the city of Los Angeles near Wilmington might be oil bearing; that after this investigation he formed the opinion that it was oil bearing.

Zack N. Neel was an oil scout who had known Dutton for several years and had performed services for the Interstate Investment Corporation and Emmet H. Jones, its president.

Dutton went to Neel and discussed the probability of the city property being oil bearing and of leasing it for oil development. Under its fixed policy, the city would not lease any of its property for oil development to a lessee who did not have a credit of at least $100,000. Neither Dutton nor Neel had any such credit.

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* Subsequent opinion 119 P.2d 138.

Neel took the matter to Jones who became interested in it. Jones saw Neel and Dutton on several occasions. Neel testified that in the course of these discussions, and in the presence of Dutton, he told Jones that they would take him (Jones) in on the "deal" and the three would divide any profits from the transaction equally. Jones consented to this arrangement. It was decided that the application for the lease would be made by the Interstate Investment Corporation because the three believed that it had the necessary financial responsibility to satisfy the requirements of the city; that Neel and Dutton would attempt to secure the lease and attend to all of the negotiations. Jones agreed to have the contract for the division of the profits reduced to writing. No question is raised as to the authority of Jones to represent and bind the Interstate Investment Corporation in the transaction.

Dutton and Neel asked Jones for the written contract on several occasions but Jones delayed producing it from time to time. He finally told them it would be signed after the lease was executed, and on one occasion gave as a reason for the delay that he did not want either Dutton or Neel to sell any interest in the lease and thus cloud the title of the lessee.

The negotiations for the lease were conducted chiefly by Neel. They resulted in a permit being given to the Interstate Investment Corporation to drill for, produce, store and take from the described property oil, gas, asphaltum and other hydrocarbons, and for purposes incidental thereto. The permit does not differ in legal effect from the ordinary form of an oil lease. It was dated November 13, 1935, and provided "that the term of this permit shall be for a period of five (5) years from and after the date this permit becomes effective, and as long thereafter as oil or other hydrocarbons are produced in commercial quantities, it being understood and agreed that the said permit shall automatically terminate at the end of the period twenty (20) years from the effective date hereof unless sooner terminated by agreement of the parties, breach of the conditions of this permit, or as otherwise provided herein".

A few days after November 13, 1935, Jones told Neel and Dutton that he would take care of Neel but did not regard Dutton in on the "deal" and would pay him nothing.

The foregoing summary is taken largely from the testimony of Neel and was corroborated by Dutton in many respects although there are some discrepancies in the testimony of the two men. Jones flatly contradicted this evidence in its important particulars. As the trial court found in accordance with the evidence we have outlined we do not deem it necessary to burden this opinion with conflicting evidence given by Jones. Conflicts in the evidence are addressed to the trial judge and are settled by him. On appeal we must disregard conflicts and accept as true the evidence supporting the findings and judgment.

About March 31, 1936, the Interstate Investment Corporation assigned the permit to the General Petroleum Corporation of California for a cash consideration of $20,000 and a percentage of the hydrocarbons to be produced from the property.

The Interstate Investment Corporation made a settlement with Neel for his services in securing the permit but has refused to make any settlement with Dutton or to recognize that he has any compensation coming to him or any interest in the profits from the transaction.

In the hearing on the accounting it appeared that the Interstate Investment Corporation did not have sufficient credit to enable it to satisfy the requirements of the city of Los Angeles. It was found that it "did secure Frank G. Butler and George P. Taubman, Jr., to make the necessary financial qualifications" and was required to convey to them a sixty per cent interest in the permit; that it paid them sixty per cent, or $12,000, of the $20,000 paid by the General Petroleum Corporation; that it had expended an additional $13,814.72 in connection with the permit and the leased property, leaving a deficit of $5,814.72 which it would be entitled to receive out of future profits from the leased property. It was further found that it would be required to pay Butler and Taubman sixty per cent of future profits, leaving a balance of forty per cent out of which it would be entitled to reimburse itself the $5,814.72, together with "a reasonable charge for office over head and expenses incurred in connection with" the permit. It was ordered that from the balance remaining from the forty per cent of the profits to be received from the General Petroleum Corporation one-third be promptly paid to plaintiff.

Appellant urges that the contract with plaintiff is void because it was not in writing and therefore violates various provisions of the statute of frauds.

It is first urged that under the contract, Dutton claimed "to have, own and receive a one-third interest, * * * in a lease of real property, which lease and the one-third interest therein was to extend and continue for a longer period than one year; * * *" and was invalid because it was not in writing. Sec. 1973, Code Civ.Proc.; Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871; Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822.

[1, 2] This argument is based on a false premise. The lease involved here was not for an indefinite period but, by its terms, terminated and ended at the expiration of twenty years. As was said in Payne v. Callahan, 37 Cal.App.2d 503, 99 P.2d 1050, 1052: "In Callahan v. Martin, supra, it was held for the first time that in California an oil lease for an indefinite term, that is, for a term of years and as long thereafter as oil or gas may be found in the leased land, created in the lessee a profit a prendre in gross which in itself is real property, a freehold interest in lands; that a lease for a definite term of years is a chattel real and while creating an interest in real property, is personal property."

This rule finds its origin and support in the California cases of Callahan v. Martin, supra, and Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal.2d 58, 69 P.2d 155, 167. There are numerous cases following them, many of which are cited in the Payne case. The cases cited and relied upon by appellant in this phase of its argument cannot be controlling here because those cases were treating with the estates created for an indefinite period which were real property and not with the interests which were to exist for a definite term, such as we have here, which are personal property.

[3] Appellant next argues that the failure to have the contract in writing violated the provisions of section 1624 of the Civil Code.

The case of Dougherty v. California Kettleman Oil Royalties, Inc., supra, is so factually similar to the instant case that it must be considered as controlling. It was there said: "The fact that the agreement between Dougherty and Ochsner rested in parol is of no legal significance in this case. This agreement was fully executed by Dougherty. Assuming the contract could not be performed within a year and therefore fell within the statute of frauds, the circumstances of this case, showing as they do complete performance by Dougherty, clearly create an estoppel to plead the statute. Dougherty's performance was clearly induced by Ochsner's representation that he would sign the contract. This creates an estoppel. Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. Another complete answer to this point is that under the facts of this case the moment the permit was issued a trust resulted in favor of Dougherty. As to that trust neither Ochsner nor his assignees with notice may successfully plead the statute. Byers v. Doheny, 105 Cal.App. 484, 287 P. 988; Hidden v. Jordan, 21 Cal. 92, 93."

[4] Appellant argues that the contract was abandoned by the parties before it was consummated. This contention is based on the testimony of Jones to the effect that several days before November 13, 1935, he told Dutton that he did not consider him in on the "deal" and would pay him nothing and that Dutton and Neel walked out of the office. Neel testified that this conversation occurred after the city officials had signed the permit. The trial court found in accordance with this evidence which effectively disposes of this contention.

[5] Appellant makes attacks on the evidentiary support of several findings. These arguments might properly be made to the trier of fact but cannot prevail on appeal as they are directed to the credibility of the witnesses and the weight to be given their testimony.

Particular attack is made on the finding to the effect that Dutton had devoted considerable time and much energy in satisfying himself that there was an excellent prospect of obtaining oil from the leased property. It is argued that Dutton was not a scientific geologist; that his investigations were made with an instrument of unknown and unestablished value which appellant denominates a "Doodlebug"; that the results of his work were a few lines and a few marks on a printed map prepared by others and were of no value.

[6] This argument lacks merit here. The methods which Dutton used to satisfy himself that the land was a valuable oil prospect are unimportant. He convinced himself of that fact and convinced Neel of it. Neel convinced Jones, and Jones so satisfied the General Petroleum Corporation of it that this company paid $20,000 for an assignment of the permit, agreed to drill wells on the property and to pay appellant thirty per cent of the net receipts from the leased property after the payment of all development costs. No matter how unscientific the methods of Dutton may have been, they set in motion a chain of circumstances that resulted in a contract of apparent value to appellant.

The judgments are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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45 Cal.App.2d 46

SONNICKSEN et al. v. SONNICKSEN et al.

Civ. 11679.

District Court of Appeal, First District,
Division 2, California.

May 27, 1941.

1. Appeal and error 🔑544(2)

Where appeal in equity case was taken on judgment roll alone without a bill of exceptions or transcript of evidence, primary question before reviewing court was whether finding and decree were within the equities.

2. Judgment 🔑252(5)

Under prayer for general relief in equity case, court may grant any relief conformable to case made by pleadings and evidence, although it may not be the relief asked by a special prayer.

3. Judgment 🔑204

A court of equity will endeavor to finally dispose of litigation so as to preclude further litigation between same parties upon same subject matter.

4. Equity 🔑39(1)
Judgment 🔑252(1)

Where party pleads facts in equity case entitling him to some equitable relief, court will assume jurisdiction of entire controversy, notwithstanding form of pleading, and will disregard specific prayers in order to grant relief which proof warrants as within equities of entire case.

5. Husband and wife 🔑278(1)

A separation agreement under which husband and wife agreed that, upon death oi one, all of property of either would go to survivor and upon death of survivor would go to their four children was a valid contract under the Civil Code. Civ.Code, § 159.

6. Contracts 🔑187(1)

A separation agreement under which husband and wife agreed that, upon death of one, all property of either would go to the survivor, and that upon death of survivor would go to their four children, was a contract made for benefit of surviving children who had the right to enforce it. Civ.Code, §§ 159, 1559.

7. Trusts 🔑30½(2)

Under separation agreement providing that, upon death of husband or wife, all of property of either would go to survivor and that upon death of survivor, property would go to their four children, the husband and wife each became a trustee one for the other, and both for the heirs named as beneficiaries in the agreement. Civ.Code, § 159; Code Civ.Proc. § 369.

8. Specific performance 🔑86

Where husband and wife agree to make mutual wills, agreement cannot be specifically enforced because of revocable nature of testamentary papers, but courts of equity will, under "quasi specific performance" theory, compel those on whom legal title has descended to convey to beneficiaries under agreement upon ground that they hold as trustees for the beneficiaries.

See Words and Phrases, Permanent Edition, for all other definitions of "Quasi Specific Performance".

9. Husband and wife 🔑279(4)

Where husband and wife entered into separation agreement providing that, upon death of one, all of property of either would go to survivor, and upon death of survivor would go to their four children, and husband, upon wife's death, took possession of all of property and denied wife's estate any interest therein, husband thereby became "estopped" from making any disposition of property other than that contemplated by agreement. Code Civ.Proc. § 369.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

10. Trusts 🔑168

Where surviving husband under separation agreement held property of husband and wife as trustee for their children, husband's second wife who entered into possession of property upon his death as executrix of estate took no greater interest than that of husband, and became a trustee for benefit of children. Civ.Code, § 159; Code Civ. Proc. § 369.

11. Specific performance 🔑86

Where husband and wife entered into separation agreement providing that, upon death of one, all of property of either would go to survivor, that upon death of survivor property would go to their children, and that they would make wills to carry out provisions of agreement, but husband after wife's death took possession of all of property, remarried and executed will in favor of second wife, children were entitled, under doctrine of "quasi specific performance", to enforce their rights to property against second wife who was executrix of husband's estate and who had contracted marriage with full knowledge of separation agreement. Civ.Code, §§ 159, 1559; Code Civ. Proc. § 369.

12. Appeal and error 🔑931(1)

On appeal in equity case, reviewing court was required to indulge in all assumptions in support of decree tending to sustain it.

13. Judgment 🔑715(1)

Where husband and wife entered into separation agreement providing that, upon death of one, all of property of either would go to survivor, and that upon death of survivor it would go to their children, former judgment quieting husband's title to the property as against executor of wife's estate did not, in absence of any showing as to what issues were tendered in prior case, preclude children from claiming property as against husband's second wife who was executrix of his estate, since it could not be said that there had been a former adjudication of issues involved adverse to children.

14. Husband and wife 🔑279(2)

Where husband and wife entered into separation agreement providing that, upon death of one, all of property of either would go to survivor, that upon survivor's death, property would go to children and that they would make wills to carry out provisions of agreement, fact that wife died leaving a will executed prior to separation agreement and inconsistent therewith did not constitute a "repudiation" of separation agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Repudiation".

15. Specific performance 🔑86

Where husband and wife entered into separation agreement providing that property would go to survivor and then to their children, but surviving husband remarried and executed will in favor of second wife, children seeking to enforce their right to property against second wife, who was executrix of husband's estate, were not required to maintain action for breach of agreement or to seek to impress trust upon property after it had been distributed to executrix, but were entitled to enforce right in suit to quiet title under prayer for a declaration of trust and for an order requiring executrix to convey to them. Civ.Code, §§ 159, 1559; Code Civ.Proc. § 369.

16. Judgment 🔑634

The doctrine of "res judicata" is based upon public policy and rests upon ground that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject matter should not be retried between same parties in any subsequent suit in any court.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

17. Judgment 🔑634

Prerequisites to the application of the doctrine of "res judicata" are identity of subject matter with that put in issue in former adjudication, identity of parties or their privies, and jurisdiction of the former tribunal to determine issue litigated.

18. Executors and administrators 🔑194(2)

Under provision of Probate Code authorizing probate court, upon petition, to select a homestead for use of surviving spouse and minor children, probate court acts under limited jurisdiction conferred, and is without power to try or determine any adverse claim of title to decedent's property. Probate Code, § 661.

19. Executors and administrators ⚷175
One of purposes of provision of Probate Code authorizing probate court to select, upon petition, a homestead for use of surviving spouse and minor children is to make provision for their maintenance during pendency of litigation involving adverse claims to decedent's estate. Probate Code, § 661.

20. Executors and administrators ⚷194(6)
It is duty of court to set apart homestead for use of decedent's surviving spouse and minor children, but proceedings operate only upon whatever right decedent had at time of his death, and do not affect question of title as between parties claiming thereto.

21. Executors and administrators ⚷194(6)
The decision of probate court setting aside a homestead to decedent's widow was not "res judicata" of question of title to decedent's property raised in subsequent suit by decedent's children who claimed title to property, notwithstanding that one of them had appeared in probate proceeding in opposition to widow's petition. Probate Code, § 661.

◆

Appeals from Superior Court, San Mateo County; A. R. Cotton, Judge.

Suit by Karsten Sonnicksen and others against Martha Sonnicksen, individually and as executrix, to quiet title to property. From a decree quieting title in the plaintiffs to a portion of the property, but excepting from its operation property which had been set apart to the defendant as a homestead in a probate proceeding, the plaintiffs and the defendant appeal.

Judgment affirmed on the defendant's appeal, and on the plaintiffs' appeal reversed, with directions.

Kenneth R. McDougall, of Palo Alto, and J. W. Coleberd, of South San Francisco, for plaintiffs.

Paul A. McCarthy, of San Francisco, and Lakin & Leve, of Palo Alto, for defendants.

NOURSE, Presiding Justice.

Two appeals are involved in the instant case, one being an appeal by the defendant from a decree quieting title in the plaintiffs to certain described property, the other being an appeal by the plaintiffs from a portion of the decree which excepted from its operation property which had been set aside to the defendant as a homestead in a probate proceeding. The complaint is framed as one to quiet title but in addition to the usual prayer in that respect it prays for a decree that the defendant holds all the described property in trust for plaintiffs; that she be required to convey the same to the plaintiffs; and for further relief. The decree quieted plaintiffs' title as prayed (except as to the homestead) and ordered plaintiffs put in possession as owners in fee simple. The appeal from the judgment is on the judgment roll alone.

The facts upon which the findings of fact and conclusions of law are based are not in substantial dispute. On March 31, 1930, Andrew and Else Sonnicksen, parents of the four plaintiffs, executed a written agreement of separation as husband and wife reciting that they would thereafter live apart, the wife having the right to occupy the family home and the husband the right to manage the property, which was therein declared to be community property of the parties, and which it was agreed should be held by him until certain portions of it could be sold at a reasonable price, but not without the consent of both parties. Paragraph nine of this agreement, which is the important provision in this litigation, read as follows: "Each of said parties hereby agrees that in consideration of the premises that upon the death of the first of them that all of the property of either or both of them will go to the survivor, and upon the death of such survivor will go to the four children of these parties, share and share alike, or in the event of the death of any of them prior to the death of such survivor, to the heirs at law of such deceased children, and both of said parties agree to make a will which will carry out the above provision and which shall provide that upon the death of the first of them all of the property of either or both of them will go to the survivor and that upon the death of such survivor will go to the four children of these parties share and share alike, or in the event of the death of any of them prior to the death of such survivor, to the heirs at law of such deceased children.

"This provision is irrevocable, except upon the written consent of both parties."

Here it should be noted that this contract to make mutual wills does not seem to have been complied with by either party. In the absence of the transcript of the proceeding, and in the absence of a bill of exceptions we may look only to the findings of fact and from these it appears that on October 16, 1932, Andrew executed a will devising to the defendant "such part of my estate as I may be legally or lawfully entitled to bequeath or devise to her" and expressly revoking his will of February 14, 1931. Also from the findings of fact it appears that Else executed a will on February 13, 1930, devising all her interest in the property to the plaintiffs herein.

Else died on December 31, 1930, and on January 1, 1931, Andrew entered into a written agreement with the defendant whereby he agreed if she would nurse him he would convey his home and the adjoining one half lot to her at the moment before his death. The will of Else executed before the property settlement agreement was admitted to probate on February 1, 1931, and Karsten Sonnicksen, one of the plaintiffs herein, qualified as executor. On June 17, 1931, Andrew was awarded a decree in a suit against the executor, the judgment decreeing that Andrew was the sole owner of the property described in the property settlement agreement, that Karsten as executor of Else's will had no title to the property as executor, or on behalf of himself or other heirs of the decedent. This judgment became final.

On June 23, 1932, Andrew married Martha Sullivan who is the defendant herein. This marriage was contracted by Martha with full knowledge of the property settlement agreement which had been made between Andrew and his former wife. Andrew died on May 7, 1935, and his will was admitted to probate. On May 28, 1935, the court ordered Martha a family allowance, which was later revoked, and on December 2, 1935, a probate homestead was awarded to her for her life. During the pendency of the probate proceeding Martha, as executrix of the estate of Andrew, commenced an action against the four plaintiffs herein presumably under section 850 of the Probate Code seeking an order directing a conveyance of the real property mentioned in the agreement of January 1, 1931, between herself and Andrew. After the probate court had denied her petition, Martha filed a claim against the estate based upon the written agreement and asking similar relief. Upon the rejection of this claim she then filed an action against the estate for the same purpose. From the order denying her petition for a conveyance and from the judgment denying her relief upon the rejected claim, she appealed and both the order and the judgment were affirmed by this court. Estate of Sonnicksen, 23 Cal.App.2d 475, 73 P.2d 643; Sonnicksen v. Estate of Sonnicksen, 23 Cal.App.2d 480, 73 P.2d 646.

On July 11, 1935, the plaintiffs commenced the instant action which we have heretofore said the parties treated as one to quiet title to the property covered in the settlement agreement. The action was instituted against Martha individually and in her capacity as an executrix of Andrew's estate. Findings of fact in accord with what we have heretofore stated were made and the court drew the conclusions of law that through the property settlement agreement Andrew and Else became joint tenants of life estates in the property; that, from the time of the execution of the contract, the plaintiffs became equitable remaindermen in the property contingent upon their survival of the contracting parties; and that upon the death of both Andrew and Else the plaintiffs became owners of vested equitable estates, subject to Martha's life interest in the probate homestead. On these findings and conclusions a decree was entered adjudging that the plaintiffs were owners of the personal property and owners in fee simple of the land, subject to the probate homestead, and that the defendant had no title or interest therein except as stated. All adverse claims of defendant were adjudged invalid and plaintiffs were ordered into possession.

[1-4] Counsel for the respective parties are far apart upon the issues involved in the appeal. The appellant attacks the conclusions of law made by the trial court that by and through the separation contract of March 31, 1930, the respondents became owners of equitable remainders in the property included in the contract contingent only upon their surviving their parents. She also attacks the conclusion that through the same contract the fee simple title of the parents was converted into a life estate for the benefit of the survivor. The respondents do not agree that these are the vital questions involved, but contend that the real question is whether the separation agreement created in them remainder estates which they were entitled to take on the death of Andrew. We do not deem it necessary to discuss any of these questions in the manner presented. It is sufficient to state that the case is in equity and that the appeal being taken on the judgment roll alone without a bill of exceptions and without a transcript of the evidence, the primary question before us on this appeal is whether the findings and the decree are within the equities. It is a cardinal rule of equity practice that under a prayer for general relief the court may grant any relief conformable to the case made by the pleadings and the evidence, although it may not be the relief asked by a special prayer. This rule is based upon the fundamental principle of chancery that a court of equity will endeavor to finally dispose of litigation so as to preclude further litigation between the same parties and upon the same subject matter. 19 Am.Juris. 281, 282. It is also an accepted rule that when a party comes into a court of equity pleading facts which entitle him to some equitable relief, the court will assume jurisdiction of the entire controversy, notwithstanding the form of the pleading, and will disregard the specific prayers in order to grant the relief which the proof warrants as within the equities of the entire case. Zellner v. Wassman, 184 Cal. 80, 193 P. 84.

[5-8] In view of these principles we may look at the equities of the case presented on this appeal. The separation agreement of March 31, 1930, was a valid contract specially authorized by section 159 of the Civil Code. It was in writing and made a complete disposition of the property interests of the husband and wife so far as they themselves were concerned. It was not rescinded, cancelled or modified and was in full force and effect at the time of the death of the wife on December 31, 1930. It was a contract made for the benefit of the surviving children of the contracting parties and thus one which they had the right to enforce. Sec. 1559, Civ.Code. Hence, both husband and wife each became a trustee one for the other and both for the heirs named as beneficiaries in the contract. Sec. 369, Code Civ.Proc. When Else died, Andrew took all the property named in the contract as survivor, but also as trustee for the beneficiaries named in the contract, and when Andrew died his legal representatives succeeded to the trusteeship. Now when a condition of this kind arises the usual procedure is a suit in equtiy to establish the trust, whether voluntary or involuntary, resulting or constructive, and to have it adjudged that the party holding as such trustee should deliver both title and possession to the beneficiaries, and should be foreclosed and enjoined from asserting any title adverse to the beneficiaries. When the contract as here is an agreement to make mutual wills which can not be specifically enforced, because in the lifetime of a party all testamentary papers are in their nature revocable and after his death it is no longer possible for him to make a will, courts of equity have adopted a remedy equivalent to a specific performance by compelling those on whom the legal title has descended to convey to the beneficiaries under the contract upon the ground that they hold as trustees for the beneficiaries. Burdine v. Burdine's Executor, 98 Va. 515, 36 S.E. 992, 993, 81 Am. St.Rep. 741. This practice has developed what is termed the "quasi-specific performance" theory. It was approved in Notten v. Mensing, 3 Cal.2d 469, 473, 45 P.2d 198, 200. That was a case in which husband and wife were alleged to have entered into an oral contract whereby each agreed to make mutual and respective wills providing that all their property should go to the survivor and upon the death of the survivor to certain designated relatives including the plaintiffs in that action. It was alleged that wills were executed in accordance with this agreement, that before they were revoked the husband died, that the wife accepted the full benefits of the husband's will, and that after the death of the husband she revoked her will and executed a new will omitting to provide for the plaintiffs. The case was one seeking to enforce a constructive trust on certain property devised to the defendants by the will of the wife contrary to the terms of the alleged oral agreement. The case came to the Supreme Court on an order sustaining a demurrer to the complaint. In holding that the complaint stated a good cause of action the Supreme Court used the following language (3 Cal.2d page 473, 45 P.2d page 200):

"It is clear that a will, even a mutual will, is ambulatory until death, and hence may be revoked, notwithstanding an agreement not to revoke. Section 23, Probate Code; Estate of Rolls, 193 Cal. 594, 226 P. 608.

However, even though such a mutual will may be revoked, where there is a valid agreement not to revoke, which agreement is fair and reasonable and adequately supported by consideration, equity will grant a sort of 'quasi-specific performance' by making the parties who receive the estate constructive trustees for the intended beneficiaries under the revoked mutual will, in accordance with the terms of the contract. Wolf v. Donahue, 206 Cal. 213, 273 P. 547; see notes, 13 Cal.L.Rev. 179; 28 Harvard L. Rev. 237, 241. This principle is recognized as the general rule in most jurisdictions. It is stated as follows in 69 Corpus Juris, page 1302, § 2725:

"'The rule is well settled that, on the death of one of the parties to an agreement for mutual wills, leaving a will in accordance with the agreement, the survivor becomes estopped from making any other or different disposition of his property than that contemplated in such agreement, and his obligations under the agreement become absolutely irrevocable, and enforceable against him, at least where he avails himself of provisions of decedent's will in his favor, or accepts any benefits thereunder, even though, it has been held, his will is revoked by operation of law, as by his subsequent marriage; and his heirs, after his death, have no rights better than, or superior to, his own.'"

The case came to this court on a second appeal after the trial court had found that the plaintiffs had failed to prove the oral contract on which their claim of a constructive trust was based. This judgment was affirmed (20 Cal.App.2d 694, 67 P.2d 734), but there has been no departure from the ruling on the first appeal adopting the "quasi-specific performance" doctrine.

Wolf v. Donahue, 206 Cal. 213, 220, 273 P. 547, 550, supports the general principle upon which this doctrine is based. It is there said: "The statutes of this state provide that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. Civ.Code, § 1624, subd. 7; Code Civ.Proc. § 1973, subd. 7. It is well settled in this state by numerous decisions that a court of equity will decree specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction. Owens v. McNally, 113 Cal. 444, 45 P. 710, 33 L.R.A. 369; Doolittle v. McConnell, 178 Cal. 697, 174 P. 305; Rogers v. Schlotterback, 167 Cal. 35, 138 P. 728; McCabe v. Healy, 138 Cal. 81, 70 P. 1008; Steinberger v. Young, 175 Cal. 81, 165 P. 432." In Estate of Rath, 10 Cal.2d 399, 404, 75 P.2d 509, 510, 115 A.L.R. 836, husband and wife entered into a written agreement whereby Mrs. Rath agreed to will described property to her husband in the event he survived her and Mr. Rath in turn agreed that he would make a will devising the same property "or such portion thereof as has not been used or consumed by him during his natural life" to beneficiaries named in the contract. Mrs. Rath died leaving a will in which she devised all property owned by her to her husband in fee simple absolute. In the litigation following the death of the husband the Supreme Court said: "But said estate was subject to the charge of the valid contract, enforceable in equity, that the husband should use and consume the estate only for 'his livelihood and support,' and that the unused portion should be devised by him to his wife's nephews. Had he either died intestate or devised the property to other persons, such persons would have held the property as constructive trustees for said nephews, and could have been compelled in an equitable action to turn over the property to the nephews. Estate of Rolls, 193 Cal. 594, 226 P. 608; McCabe v. Healy, 138 Cal. 81, 70 P. 1008; Owens v. McNally, 113 Cal. 444, 45 P. 710, 33 L.R.A. 369; 25 Cal.Jur. 152; 26 Cal.Jur. 834."

[9-11] From the foregoing it follows that the written agreement of March 31, 1930, was a valid contract for the disposition of the respective interests of the husband and wife in the property therein described, and that following the death of the wife, the husband having taken possession of all the property therein described, enjoyed all the benefits of the contract, and denied to the estate of the wife any claim or interest in the property adverse to him, he thereupon became estopped from making any other or different disposition of the property from that contemplated by the agreement. It follows as well that he could not avoid this estoppel either by a subsequent marriage or a will disregarding the terms of his contract since there was no rescission or cancellation of the contract during the life of the former wife. When, therefore, the appellant entered into possession of the property as executrix of his estate, she took no interest greater than that of the decedent. Under the rule of

the cases cited she then became a trustee for the benefit of the respondents. It would serve no purpose, therefore, to ascertain what estate was created in Andrew and Else or either of them or to determine what estate if any was created in the respondents by the terms of the agreement. The single issue as discussed in the cases cited is that since Andrew and Else executed a written contract which the law authorized them to make wherein they mutually agreed to provide for their four children and that, since this contract had been made for the benefit of these children, they have the right to demand its enforcement, and this right can not be denied solely because of the death of the parties against whom specific performance might be satisfied. All the equities support the judgment of the trial court upon this issue. There is no equity in the claim of the appellant. She entered into a contract with Andrew following the death of Else which was designed to aid Andrew in a repudiation of the contract with his former wife and this was done on her part with full knowledge of the former contract and of the rights of the respondents to the property in litigation. About a year later she and Andrew married, having been advised by counsel that such marriage would abrogate the contract and revoke the will which Andrew had made subject to its terms. Upon the issue of title and right of possession the equities are all with the respondents as found by the trial court.

[12, 13] Appellant argues that the respondents should be foreclosed from asserting any interest in the property because of the judgment of June 17, 1931, quieting Andrew's title as against Karsten as executor of the estate of Else. The record discloses nothing but a finding that such a judgment was entered on default, and a copy of such judgment. We have none of the pleadings, none of the evidence, and nothing showing what issues were tendered. In support of the decree which is the subject of this appeal we must indulge in all assumptions which would tend to sustain it. It is a fair assumption from the conclusions reached by the trial court that the former judgment was based upon the same recognition of the respective rights of the parties as is emphasized here. If on the former trial the separation contract was put in issue it is fair to assume that the court there determined that the estate of Else had no legal or equitable interest in the property, but that the title vested in Andrew as the sole survivor under that agreement. On the other hand, if the separation contract was not put in issue on the former trial, we cannot perceive how the judgment is any adjudication of respondents' interest in the property. By the terms of the contract the title rested in Andrew alone following the death of Else. It was by his will only that legal title would be transmitted to the respondents under the terms of the contract. Else therein undertook to waive all claim and interest in the event that she should predecease Andrew. If these were the issues determined on the former trial they are in full accord with the views herein expressed. If none of the issues raised here was raised in the former trial it must be apparent that that judgment could stand without a determination of these issues —as a holding that, as between Andrew and the estate of Else, there was no controversy over title, since all the property involved was acquired before 1923 and was property of the community. In either event the record here does not disclose a former adjudication of the issues now involved which was adverse to the position asserted by respondents.

[14] It is also argued that Else repudiated the separation contract by leaving a will inconsistent with it. This will was executed on February 13, 1930, the separation contract was executed on March 31, 1930. Repudiation is a question of fact and intent. The record discloses nothing more than that the will was executed on the date named and was "left" at the time of her death. We may not assume that the failure to revoke or destroy the will was a repudiation of the contract. It is more in accord with the record to assume that neither party executed a new will because they believed that the contract settled all their rights to the property, and that the survivor of either would in due course execute a will leaving the property to their children in accordance with the terms of the contract.

[15] Appellant finally argues that the respondents have sought the wrong remedy, that if they are entitled to any relief at all their remedy is exclusively one for damages for the breach, or to impress a trust upon the property after it has been distributed to her in the probate court. The respondents prayed for a declaration of trust and for an order re-

quiring appellant to convey to them. We have heretofore said that such proceedings are for a "quasi-specific performance" of the contract. A party is not always left to the doubtful remedy of an action at law for damages when specific performance can be enforced. In a case of this kind specific performance is effected by a declaration of trust and an order to convey. Such relief here would have been proper under the pleadings and findings. The estate is small and the litigation has been running for nearly ten years. It would serve no purpose to either party to continue it further when the only result would be a change in the "paper" title—a title in respondents resting upon a written conveyance executed under a court order after an adjudication of the trust, or a title in them resting upon the final judgment herein determining that their title is free from all adverse claims. No other arguments advanced on the main appeal require consideration.

[16, 17] On the second appeal both appellants and respondent devote a large part of their argument to a discussion of the application of the doctrine of res adjudicata (sic.) to the portion of the judgment appealed from. The doctrine of res judicata is based upon public policy; it rests upon the ground that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject matter shall not be retried between the same parties in any subsequent suit in any court. 30 Am.Jur., p. 910 et seq. Prerequisites to the application of the doctrine are: identity of the subject matter with that put in issue in the former adjudication, identity of the parties or their privies, and jurisdiction of the former tribunal to determine the issue litigated. Idem.

[18, 19] On this appeal we may concern ourselves solely with the latter element. The order designating a homestead to Martha Sonnicksen was made under the provisions of section 661 of the Probate Code, which declares that the probate court, upon the petition of the surviving spouse, or minor children, "must select * * * a homestead for the use of the surviving spouse and the minor children" out of the property of the decedent. In making the order the probate court acts under the limited jurisdiction conferred by the Probate Code and is without power or jurisdiction to try or determine any adverse claim of title to the property of the decedent. To the contrary, one of the purposes of the code section is to make provision for the maintenance of the surviving spouse and minor children during the pendency of any such litigation involving adverse claims to decedent's estate.

[20] The rule of decision in this state is in full harmony with these provisions of the Probate Code, and we find no departure from the statement of the rule in 11a Cal.Jur. p. 649 reading: "It is the duty of the court to set apart the homestead, and the performance of that duty does not change the property itself, nor affect the true title to it. The proceedings operate only upon whatever right the deceased had at the time of his death. In exercising its jurisdiction over the property and in making the order, the court deals with the property only as an asset of the estate. Being inventoried and appraised as such, it is subject to the jurisdiction of the court in the administration, but neither the inventory nor the withdrawal of a portion of it as a homestead affects or adjudicates the question of title as between parties claiming title thereto. Any question as to the validity of title must be tried and determined in another form, in some appropriate action brought for the purpose. In view of the foregoing, it is clear that if one's opposition to granting the order is overruled by the probate court that does not preclude him from establishing his title in an action brought for that purpose."

The first case found in support of the text is Rich v. Tubbs, 41 Cal. 34. An unbroken line of authorities down to Estate of Niccolls, 164 Cal. 368, 373, 129 P. 278, 280, is in full harmony with the rule. In the latter case the court, referring to the jurisdiction of the probate court upon a petition to set aside a homestead, adopted the following language from Estate of Burton, 64 Cal. 428, 1 P. 702: "It determines merely that the parcel named is selected from the estate of the deceased (whatever his interest therein may have been), and who are the persons entitled to the benefit of the homestead selection. * * * Title to real estate cannot be tried in such proceeding."

[21] From the foregoing it follows that the order in probate setting aside a homestead to the widow is not an adjudication of the title to the property, and that the appearance of one of the heirs in

opposition to the widow's petition does not foreclose him now, because the probate court was without jurisdiction in that proceeding to determine the issue of title.

On defendant's appeal the judgment is affirmed, on plaintiff's appeal the portion of the judgment appealed from is reversed, with directions to modify the judgment in accordance with the views herein expressed. The plaintiffs will have their costs on both appeals.

We concur: STURTEVANT, J.; SPENCE, J.

MILGATE et al. v. WRAITH.

Civ. 6499.

District Court of Appeal, Third District, California.

May 26, 1941.

Hearing Granted July 24, 1941.

1. Negligence 🔑90

In determining whether negligence of borrower of automobile is imputable to owner so as to preclude owner's recovery for damages to his automobile from the driver of other colliding automobile, based on driver's negligence, the borrower is neither an "agent" nor a "servant" of the owner. Vehicle Code, § 402, St.1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Servant".

2. Automobiles 🔑192(1)

The purpose of statute imposing liability on automobile owner for negligence of operator of the automobile, using it with owner's permission, was to create a remedy against the owner and in favor of party injured in person or property by negligent operation of the automobile while operated with owner's permission. Vehicle Code, § 402, St.1937, p. 2353.

3. Automobiles 🔑192(1)
Negligence 🔑89(1)

The statute imposing liability on owner for negligence of operator of owner's automobile using it with owner's permission, and providing that negligence of such an operator should be imputed to owner for all purposes of civil damages, does not change rights of owner in any respect other than to impute to him the negligence of the operator, and does not preclude the owner's recovery from third party for damage to the automobile resulting from third party's negligence, on ground of contributory negligence of the operator. Vehicle Code, § 402, St.1937, p. 2353.

4. Automobiles 🔑192(1)

The statute imposing liability on automobile owner for negligence of operator of the automobile using it with owner's permission is a "penal statute" and must be strictly construed. Vehicle Code, § 402, St.1937, p. 2353.

See Words and Phrases, Permanent Edition, for all other definitions of "Penal Statute".

5. Negligence 🔑89(1)

Where borrower of automobile, at time of collision, was using automobile for his own purposes, in absence of owner and not for owner's benefit nor in his business, contributory negligence of borrower was not imputed to owner under statute imposing liability on owner for negligence of operator of the owner's automobile using it with owner's permission, so as to preclude owner's recovery for damages to his automobile from driver of other automobile involved in the collision, based on such driver's negligence. Vehicle Code, § 402, St.1937, p. 2353.

Appeal from Superior Court, Yolo County; Dal M. Lemmon, Judge.

Action by Doris Milgate and others against Lawrence Wraith for damages resulting from an automobile collision. From a judgment denying recovery to plaintiff Frank E. Milgate for damage to his automobile which was involved in the collision, Frank E. Milgate appeals.

Reversed.

Ralph H. Lewis, of Sacramento, and A. G. Bailey, of Woodland, for appellants.

Huston, Huston & Huston, of Woodland, for respondent.

PULLEN, Presiding Justice.

This is an appeal by Frank E. Milgate, one of the plaintiffs, from a judgment in favor of defendant.

The complaint set out three causes of action, the first seeking damages for personal injuries to Doris Milgate, the minor daughter of appellant; the second, alleging Frank E. Milgate was the owner of the automobile which was at the time being driven by Hugh Cunningham and in which Doris Milgate was a passenger, sought to recover damages to the car, and the third cause was upon behalf of Cunningham, the driver, for personal injuries suffered by him. By an amendment to the complaint appellant claimed additional damages for the hospital and medical services rendered the daughter.

Factually it appears Frank E. Milgate, the father of Doris, loaned his automobile to Hugh Cunningham, who took Doris Milgate riding in the car. On this occasion the car collided with a car driven by Lawrence Wraith, the defendant, injuring Miss Doris Milgate and causing damage to the Milgate car.

Judgment was rendered in favor of Doris Milgate for personal injuries suffered by her, but relief was denied Frank E. Milgate and Hugh Cunningham.

As to the claim of Frank E. Milgate, the court found he was not entitled to recover a judgment against Wraith for damages to his car or for money expended for medical, surgical and hospital treatment of Doris Milgate, because of the contributory negligence of Hugh Cunningham, which was imputed to plaintiff Frank E. Milgate, and denied a judgment in favor of Cunningham because his negligence contributed to the accident.

The evidence justified the conclusion of the trial court that both drivers were negligent. It also appears that Cunningham, the driver of the Milgate car, was using the car for his private use in the absence of plaintiff Milgate, and not for the benefit of nor upon the business of Milgate.

The question as to whether the negligence of the permissive user of an automobile is imputed to the owner and precludes a recovery of damages by such owner arises by virtue of section 402 of the Vehicle Code as amended in 1937, St.1937, p. 2353.

The trial court held that the negligence referred to in this section should be construed to include contributory negligence and should bar all recovery by the owner of the car, basing that conclusion upon the clause of that section "and the negligence of such person shall be imputed to the owner for all purposes of civil damage".

Subdivision (a) of section 402 of the Vehicle Code, in full, provides: "402. Liability of Private Owners. (a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

The situation here presented is similar in many respects to that in Mills v. Gabriel, 259 App.Div. 60, 18 N.Y.S.2d 78, and affirmed in 284 N.Y. 755, 31 N.E.2d 512, determined after the trial of the case at bar, and which disapproved the rule laid down in Darrohn v. Russell, 154 Misc. 753, 277 N.Y.S. 783, and Renza v. Brennan, 165 Misc. 96, 300 N.Y.S. 221, upon which the able trial judge in the instant case relied in part for his conclusions. The court in the Mills case, supra, pointed out that under the common law the owner, under such circumstances, was not liable for damages arising from the negligent act of the operator of his car, nor under the common law was the negligence of the driver imputable to the owner when the car was being operated with his consent, but in his absence and not on his business.

However, by section 59 of the Vehicle and Traffic Law of the State of New York, the common law was changed by the following section: "§ 59. Negligence of operator other than owner attributable to owner. Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner. * * *"

By this provision the owner was made liable for the negligence of a person legally operating the car with the permission, express or implied, of the owner, but in the Mills case, supra, it was held the statute did not change the common law rule respecting the owner's right to recover from third persons under such circumstances, "nor", the court further said [259 App.Div. 60, 18 N.Y.S.2d 80], "may it be invoked for the purpose of imputing the operator's negligence to the owner. It is applicable for that purpose only in actions brought by third persons against the owner. * * * Gochee v. Wagner [257 N.Y. 344, 178 N.E. 553.] While we recognize there are a number of cases to the contrary, we do not approve them. It is suggested that if the statute does not apply, then the owner of each vehicle may recover against the other for property damage if both operators were bailees at the time of the accident, even though both were negligent. This was always the rule at common-law. If the statute operates illogically or unjustly, it is for the legislature and not the courts to extend its scope."

In the earlier New York case of Nannes v. Ideal Garage et al., 150 Misc. 522, 269 N.Y.S. 777, 781, the car of plaintiff while being driven by another with his permission but in his absence, was involved in a collision with the car of defendant. There, as also pointed out, prior to the enactment of section 59 of the Vehicle and Traffic Law of New York, the owner of a vehicle was not liable for negligent injury caused by its operation by another, unless at the time it was being used on his business. Since the enactment of that statute, the court said liability was not dependent upon use or operation by a servant in the business of a master, but depended only upon legal use with the permission or consent of the owner. Due to the fact that the driver to whom the owner had entrusted his car was often financially unable to respond in damages, the innocent party was too frequently without redress, so this statute was enacted to protect such third party. It was intended to broaden the liability of the owner who had entrusted the use of his car to another, but was not intended to restrict the liability of an owner whose motor car may have caused the injury. By its terms the statute was limited to the liability and responsibility of an owner for injuries resulting from the negligent operation of his car. It imposed a new rule of liability for injury by the owner's car; it did not purport to lay down any new rule for damage to the owner's car.

[1] A borrower of a car is neither an agent nor a servant of the owner. As the court in Nannes v. Ideal Garage, supra, said, quoting from Gochee v. Wagner, 232 App.Div. 401, 250 N.Y.S. 102 (which case was, in 257 N.Y. 344, 178 N.E. 553, reversed upon other grounds), "while the statute is remedial, it is remedial solely in favor of an injured third person. It is not to be wrenched out of its intended purpose and its language distorted in order to conform it to the conventional pattern of common-law agency. The driver is not in fact the agent of the owner and the statute does not make him such. No intention can be found in this statute to broaden the scope of the doctrine of contributory negligence."

Iowa, in Secured Finance Co v. Chicago Ry. Co., 207 Iowa 1105, 224 N.W. 88, has, under a similar statute, reached a different conclusion from that held by the Court of Appeal of New York in Mills v. Gabriel, supra, and seems to be based largely upon the theory, also found in earlier New York cases, subsequently overruled, that the statute in effect made one who used an automobile with the consent of the owner, the agent of the latter. This relationship, we have seen, is denied by the more recent New York holding in Mills v. Gabriel, supra, which latter case appears to us to declare the better rule.

Originally the law in this state was that the owner was not liable for personal injuries inflicted unless there existed the relationship of principal and agent between the owner and the operator (Lemka v. Nauman, 103 Cal.App. 757, 284 P. 1062), but in order to protect third parties and to make the owner liable for the permissive operation of his car the legislature first enacted in 1929, section 1714¼ of the Civil Code, which is now section 402 of the Vehicle Code.

[2-4] The purpose of this section was to create a remedy against the owner and in favor of one who was injured either in person or property by the negligent operation of a car while operated by one with the owner's permission. No attempt is made in this section to change any other rights which the owner had, except to impute to him the negligence of the bailee. It imposes no other liability, and being penal in its nature, must be strictly construed. Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407; Lucas v. City of Los Angeles, 10 Cal.2d 476, 75 P.2d 599; Swing v. Lingo, 129 Cal.App. 518, 19 P.2d 56.

[5] The language of section 402(a) of the Vehicle Code—"and the negligence of such person shall be imputed to the owner for all purposes of civil damages"—is not an attempt to enlarge generally the scope of damage actions but refers only to actions for civil damages rising out of the

particular section under examination. If this language should be held to declare a new rule of contributory negligence it would be ambiguous and contrary to the strict construction under which the section must be interpreted.

Appellant also points out that the title to the act is not sufficiently comprehensive if the contention of respondent herein should be adopted. The title is "An act to amend sections 402 * * * of the Vehicle Code, and to add thereto sections 410.5, 415.5, 417 and 418, relating to civil liability and financial responsibility of owners and operators of vehicles." Appellant calls attention to the fact that the title does not include any reference to the liability of third persons to the owners, but relates only to the civil liability and financial responsibility of owners and operators, and a situation relating to the liability of a third person to the owner is not referred to in the title. In view of our conclusions we need not consider this point. The judgment is reversed.

We concur: THOMPSON, J.; TUTTLE, J.

18 Cal.2d 92

SONTAG CHAIN STORES CO., Ltd., v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

L. A. 17770.

Supreme Court of California.

May 29, 1941.

1. Judgment 🔑**501**

Generally, final judgment of a court of competent jurisdiction may not be impeached collaterally for mere error or irregularity committed by court in exercise of its jurisdiction or in the course of the proceedings, even though the error is one of law and appears on face of record.

2. Judgment 🔑**355**

Generally, a judicial decree will not be set aside by reason of change of law resulting from subsequent decision by a higher court reaching a contrary conclusion.

3. Injunction 🔑**210**

A Superior Court decree enjoining picketing, intimidation, and other interference with business, although purporting on its face to be permanent, was "executory" or "continuing", and Superior Court had inherent power to modify or dissolve it in the light of subsequent contrary Supreme Court decision.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Decree" and "Executory Decree".

4. Injunction 🔑**210**

Where Superior Court decree enjoining picketing, intimidation, and other interference with business was erroneous, under subsequent Supreme Court decision, motion to vacate decree was proper remedy, and was not barred by availability of remedies of defense of contempt proceeding, or certiorari or habeas corpus to secure relief from contempt commitment, or independent action in equity.

5. Prohibition 🔑**27**

In prohibition to determine power of Superior Court to vacate or modify final decree which was erroneous under subsequent Supreme Court decision, it would be assumed that Superior Court, in exercising power to vacate or modify decree, would not abuse its discretion, but would re-examine decree in the light of recent Supreme Court decision and grant any relief to which defendants enjoined might be entitled.

In Bank.

Prohibition by the Sontag Chain Stores Company, Limited, against the Superior Court of the State of California in and for the County of Los Angeles.

Decision for respondent.

Loeb & Loeb, of Los Angeles, for petitioner.

J. H. Connor, Co. Counsel, and Rosecrans & Emme, all of Los Angeles, for respondent.

EDMONDS, Justice.

Some months after a decree enjoining picketing of the petitioner's place of business had become final, the labor unions, who were the defendants in that action, moved the Superior Court to vacate or set it aside. When the court indicated its intention to entertain the motion and act upon it, the petitioner filed the present proceeding in prohibition, asserting that the decree is a final judgment which may not now be vacated or modified. An alternative writ issued, and the question for decision concerns the jurisdiction of the Superior Court to hear and determine the motion pending before it.

The decree followed a labor controversy which included attempts by picketing and other means to compel the unionization of petitioner's places of business. It permanently enjoined the defendant labor unions from picketing or creating any disturbance in the vicinity of petitioner's stores; from threatening, intimidating or coercing petitioner's employees; from representing that a labor dispute existed between petitioner and the employees; and from otherwise interfering or inducing others to interfere with petitioner's conduct of its business. The motion to vacate it was made upon the ground that subsequent to its entry, this court declared labor unions have a right to peacefully picket in an effort to obtain a contract for a closed shop (C. S. Smith Metropolitan Market Co., Ltd., v. Lyons et al., 16 Cal.2d 389, 106 P.2d 414); therefore the decree, which restrained all picketing, is in excess of the jurisdiction of the court and is void.

Upon the points and authorities submitted in support of its demurrer to the petition for a writ of prohibition, the respondent court takes the position that if the entire judgment should not be vacated, any writ issued by this court could prohibit the vacation of any provisions of it "except paragraphs (a), (b) and (c) thereby leaving stand that part * * * restraining intimidation * * * but permitting peaceful picketing * * *". In answer to this proposition, the petitioner contends that unless the power so to do is reserved in the decree, an injunction which has become final is not subject to later modification or vacation, as the Superior Court has no jurisdiction to modify, revoke or disturb its judgments except in accordance with the prescribed statutory procedure. It also asserts that the decree in controversy cannot be set aside for mere judicial error, error of law, or change of decision. Such types of error in the rendition of a judgment, petitioner contends, represent only instances of the erroneous exercise of jurisdiction, and not that entire absence or loss of jurisdiction which will make a judgment void.

The issue is therefore one of law only. No change of conditions was alleged as grounds for the motion; in fact it was conceded on oral argument before this court that the labor unions rely entirely upon the ground that the trial court did not correctly apply the law to the facts then before it, or if the decision in C. S. Smith Metropolitan Market Co., Ltd., v. Lyons et al., supra, be construed as changing the law, that this change justifies the granting of the motion.

[1, 2] As a declaration of the general rule, petitioner's statement is correct. It is well settled that a final judgment of a court of competent jurisdiction may not be impeached collaterally for mere errors or irregularities committed by the court in the exercise of its jurisdiction or in the course of the proceedings, even though the error is one of law, and appears on the face of the record (31 Am.Jur., § 583, pp. 181, et seq.), and it has frequently been declared that a judicial decree will not be set aside by reason of a change of law resulting from a subsequent decision by a higher court reaching a contrary conclusion. 95 A.L.R., note pp. 708, et seq. The reason for the rule is that there must be an end to litigation, and hence it is the long established policy of the law to, so far as possible, prohibit the further contest of an issue once judicially decided and to accord finality to judgments.

[3] But the reason for the rule ceases and the rule fails to apply in the case of a preventive injunction of the type here under review. This is so because the decree, although purporting on its face to be permanent, is in essence of an executory or continuing nature, creating no right but merely assuming to protect a right from unlawful and injurious interference. Such a decree, it has uniformly been held, is always subject, upon a proper showing, to modification or dissolution by the court which rendered it. The court's power in this respect is an inherent one. Its action is determined by the facts and circumstances of each particular case, with a view to administering justice between the litigants, and it has the power to modify or vacate its decree when the ends of justice will be thereby served.

Two leading cases on the subject, which note clearly the distinction between "restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative" are United States v. Swift & Co., 286 U.S. 106, 52 S.Ct. 460, 462, 76 L.Ed. 999, and Ladner v. Siegel, 298 Pa. 487, 148 A. 699, 68 A.L.R. 1172. In the Ladner case, the court, speaking of decrees within the exception to the general rule, held that such an injunction is executory and continuing as to the purpose or object to be attained, and that a court granting it has the inherent power to vacate or modify it when the circumstances and situation of the parties have so changed as to render such action just and equitable. This inherent power, said the court, may be exercised either where there has been a change in the controlling facts upon which the injunction rested, or the law has been changed, modified or extended, or where there the ends of justice would be served by modification. See, also, Washington Water Power Co. v. City of Coeur D'Alene, D.C., 24 F.Supp. 790, 793; Kelley v. Earle, 325 Pa. 337, 190 A. 140; 28 Am.Jur., sec. 314, 315, pp. 485, 487; § 323, pp. 494, 495.

In California cases cited by petitioner, language may be found which is at variance with the views above expressed. See, for example, Ots v. Superior Court, 10 Cal.App. 168, 101 P. 431; Jellen v. O'Brien, 89 Cal. App. 505, 264 P. 1115; Golden v. Superior Court, 31 Cal.App. 734, 161 P. 758; People v. Bank of Mendocino County, 133 Cal. 107, 65 P. 124; United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, Ann.Cas. 1916E, 199. But a review of these authorities reveals that, in many instances, the decree under consideration was not of the nature or classification of the one here in question, and also that earlier pronouncements have been modified or distinguished by later rulings. Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 242 P. 725; Wheeler v. Superior Court, 82 Cal.App. 202, 255 P. 275. For present purposes it is sufficient to state that no California case is cited which touches the precise point here under discussion, or which is here controlling. The continuing and ambulatory nature of the labor injunction is well described by the United States Supreme Court, in the very recent case of Milk Wagon, etc., v. Meadowmoor Dairies, Inc., 61 S.Ct. 552, 557, 85 L.Ed. 836, 132 A.L.R. 1232, decided February 10, 1941, as follows: "The injunction which we sustain is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted."

[4, 5] Petitioner does not dispute the fact that under the doctrine of C. S. Smith Metropolitan Market Co., Ltd., v. Lyons, supra, and associated cases, the present decree of injunction is erroneous. To compel defendant labor unions to seek redress by the indirect method of violation of the terms of the injunction and defense of a contempt proceeding, or certiorari or habeas corpus to secure relief from a contempt commitment, would be to relegate them to a remedy which is indeed circuitous. See general discussion in 47 Yale Law Journal, pp. 1136, et seq. An independent action in equity would be almost as dilatory and cumbersome. Under such circumstances, a motion to vacate the decree is a proper procedure and the labor unions are entitled to a determination of it in accordance with the principles which have been stated. Whether a complete dissolution of the injunction would be warranted, or merely a modification, is a matter of no concern in this proceeding. The respondent court has properly entertained the motion and may, in the exercise of its discretion, grant such relief as it deems expedient. It is to be assumed that it will not abuse its discretion in this respect, but rather that it will reexamine the decree in the light of recent decisions of this court and grant any relief to which the defendants enjoined may be entitled.

The demurrer of respondent is sustained, the alternative writ of prohibition is discharged, and the petition for a peremptory writ is denied.

We concur: GIBSON, C. J.; TRAYNOR, J.; CARTER, J.

45 Cal.App.2d 74

HURWIT v. PRUDENTIAL INS. CO. OF AMERICA.

Civ. 12825.

District Court of Appeal, Second District, Division 2, California.

May 28, 1941.

Rehearing Denied June 23, 1941.

Hearing Denied July 24, 1941.

1. Insurance 🔑516

In action for total and permanent disability payments under life policy authorizing such payments if insured was rendered unable to engage in any occupation or perform any work for any kind of compensation of financial value, court properly instructed that expressions "any occupation" and "any work" meant ordinary employment of insured or such other employment, if any, approximating the same livelihood as insured might fairly be expected to follow in view of his station, circumstances and physical and mental capabilities.

See Words and Phrases, Permanent Edition, for all other definitions of "Any Occupation" and "Any Work".

2. Insurance 🔑516

"Total disability" preventing an insured from engaging in any occupation or performing any work for compensation is disability which prevents his working with reasonable continuity in his customary occupation, or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity.

See Words and Phrases, Permanent Edition, for all other definitions of "Total disability".

3. Evidence 🔑472(1), 506

The scope of opinion testimony is limited by general rule that ultimate question for determination of jury should be passed upon by jurors and not by the witnesses.

4. Appeal and error ⚿1050(1)

In action for total and permanent disability payments under life policy, error, if any, in permitting expert witnesses to give opinions on question of whether plaintiff was totally disabled was not prejudicial, where witnesses were given opportunity to give reasons for opinions expressed, other witnesses were allowed to give testimony of same nature without objection and court instructed that an opinion might be rejected if reasons given for it were unsound.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by James S. Hurwit, etc., against the Prudential Insurance Company of America, to recover for total and permanent disability payments under a policy of life insurance. Judgment for plaintiff, and the defendant appeals.

Judgment affirmed.

Rehearing denied; McCOMB, J., dissenting.

Walker, Adams, Duque & Smith, of Los Angeles (Henry Duque and Mark E. True, both of Los Angeles, of counsel), for appellant.

Pacht, Pelton, Warne & Black, of Los Angeles, for respondent.

WOOD, Justice.

Plaintiff commenced this action to recover for total and permanent disability payments under a policy of life insurance issued to him by defendant. The jury returned a verdict in favor of plaintiff and the appeal is taken by defendant from the resulting judgment.

Plaintiff was 58 years of age at the time of the trial. As a youth in the city of New York he had studied at night and in this way had gained the equivalent of a high school education. He also studied accounting for "a couple of months" in a business college. Before going into business for himself plaintiff worked for others for a period of eight years as a salesman in the hardware business. From 1910 or 1911 until October, 1929, plaintiff personally operated a hardware and paint store on Long Island, New York. In his business plaintiff was the chief salesman, waited on customers, helped load the delivery truck, checked bills and went outside to make collections. His only employees were a clerk, a man who delivered orders and his wife. He has never done any other kind of work.

Defendant sold plaintiff a policy of life insurance on March 14, 1923. In consideration of the immediate payment of an extra premium of $52.50, and of the payment of extra annual premiums in the same amount, the policy was on March 14, 1927, amended to provide for permanent and total disability payments as follows:

"If the insured shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he * * * is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his * * * lifetime, * * * the Company * * * will grant the following benefits * * *"

On the same date, in consideration of the payment of another additional premium of $45.25, and thereafter of the payment of additional extra annual premiums in the same amount, the policy was also amended to provide as follows:

"* * * The following provisions are hereby made a part of the clause headed 'Provisions as to Total and Permanent Disability', contained in this policy: If * * * the Insured shall furnish due proof that he has been totally disabled, either physically or mentally, from any cause whatsoever, to such an extent that he was rendered wholly and continuously unable to engage in any occupation or perform any work for any kind of compensation of financial value during a period of ninety consecutive days * * * such disability shall be presumed to be permanent and the Company will upon receipt of such proof grant the disability benefits provided, subject to all other provisions of said clause including those relating to proofs of continuance of disability."

The provision relating to proof of continuance of disability reads as follows:

"* * * The Insured, upon demand by the Company from time to time, but not oftener than once a year after such disability has continued for two full years, for the purpose of verifying that such disability is actually permanent and not temporary, shall furnish due proof that he * * * actually continues in the state of disability defined above. * * *"

Plaintiff was taken ill with asthma in October, 1929, and ceased all work. Under directions of physicians he went to Florida and California and thereafter returned to New York. He had several nasal operations but continued to be ill.

An application for total and permanent disability benefits was made by plaintiff on June 7, 1930. The claim was approved by defendant and payments were made, including back payments to October 17, 1929. These payments were continued until November 18, 1931. Then followed about ten or eleven months of correspondence between plaintiff and defendant on the question whether plaintiff ceased to be entitled to disability benefits. The controversy was terminated by a letter from defendant to plaintiff dated July 28, 1932, in which defendant stated that it was "satisfied at this time that you are totally disabled". The letter suggested that plaintiff go to Arizona to improve his condition. Defendant thereafter paid to plaintiff all payments due, until October 17, 1938. Plaintiff went to Arizona on September 1, 1932, where he continued to suffer. In 1935 he came to Los Angeles.

There is a decided conflict in the testimony of the parties concerning the condition of plaintiff's health. Witnesses for the plaintiff, including experts, testified that he is unable to engage in any occupation. A number of expert witnesses for defendant testified that plaintiff is able to engage in a sedentary occupation such as bookkeeping, or as an executive, or in an advisory capacity to a hardware company.

[1] The principal contention of defendant is that the trial court erred in its instructions to the jury on the subject of what constitutes "any occupation" and "any work". The instructions at which criticism is aimed are as follows:

"Plaintiff's Instruction No. 8

"The words in the policy of insurance in evidence in this case which deal with the right of the assured to receive disability benefits if he is totally and permanently disabled read as follows:

"'If the insured shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime. * * *'

"I charge you that the law is and the disability clause which I have quoted to you means that the insured is entitled to the disability benefits when his disability is such that he is unable to perform the substantial and material acts of his business or occupation in the usual and customary way and when such disability is presumably permanent.

"The expressions in the policy 'any occupation' and 'any work' mean the ordinary employment of the insured or such other employment, if any, approximately [approximating] the same livelihood as the insured might fairly be expected to follow, in view of his station, circumstances and physical and mental capabilities. If the insured is so incapacitated that substantially all of the material activities of any such employment are reasonably closed to him, he is totally disabled within the meaning of the policy.

"Plaintiff's Instruction No. 5

"I instruct you that the provisions of the insurance contract in this case, relating to the disability benefits, do not require that the disease or diseases from which the plaintiff may be suffering shall render him absolutely helpless, but such provisions are construed in law as meaning such a disability as renders him unable to perform the substantial and material acts of his business or occupation in the usual and customary way. The fact that the insured may have done some work or engaged in some activities of pleasure, or transacted some business duties during the time for which he claims payment for total disability, is not conclusive evidence that his disability is not total and permanent within the meaning of the policy. The test of disability is not what the plaintiff has actually done in an effort to perform the duties of his occupation, but what in the exercise of due prudence he was reasonably able to do. This is a question of fact which you should determine under all the evidence in the case and under all of the instructions of the court on the law of the case, and if you find from a preponderance of the evidence and under these instructions that the plaintiff has been so totally and permanently disabled, your verdict will be for the plaintiff and against the defendant.

"Plaintiff's Instruction No. 6

"The defendant in this case admits that the plaintiff is, and for many years has been, suffering from the disease known as chronic asthma, but claims that this does not prevent the plaintiff from following some sedentary occupation, and therefore, that under the terms and provisions of the contract of insurance he is not totally and permanently disabled. I instruct you that it is for you to determine as a fact under all the evidence in the case and the instructions of the court whether or not the plaintiff is totally and permanently disabled. In that connection I charge and instruct you that if the plaintiff's condition, as a result of the disease, is such that common care and prudence required that he desist from the transacting of business or working, and his condition is presumably permanent and continuous, he is permanently and totally disabled, within the meaning of the contract, though he may not be physically disabled to perform occasional acts of pleasure or acts connected with his business, profession or occupation."

It will be noted that in plaintiff's instruction No. 8, after quoting the essential provisions in the policy, the court informed the jury that plaintiff would be entitled to disability benefits if his disability be shown to be such as to render him unable to perform the substantial and material acts of his business or occupation in the usual way. This instruction is followed immediately by an explanation of the meaning of the words "any occupation" and "any work". The jury was told that they refer to the ordinary employment of the insured or such other employment, if any, approximating the same livelihood as the insured might fairly be expected to follow in view of his station, circumstances and physical and mental capabilities. In instruction No. 5 reference is made to "his experience" and "his occupation". This instruction dealt with the proposition that it was not necessary that plaintiff be absolutely helpless. The jury, however, had just been given an explanation of the meaning of the terms "any occupation" and "any work". They unquestionably considered all of the instructions together and were not misled by the failure of the court to again explain those terms in instruction No. 5. The same observation is applicable to plaintiff's instruction No. 6, in which the court called attention to defendant's claim that plaintiff's disease did not prevent his following some sedentary occupation and in which the jury was told that it was for them to determine whether plaintiff was totally and permanently disabled.

A similar situation was present in Hill v. New York Life Insurance Co., 38 Cal. App.2d 627, 101 P.2d 752, 756, where the court in one of its instructions used the expression "his business or occupation". It was held that when considered alone the instruction was erroneous but when considered with the other instructions it was not confusing to the jury. Immediately after discussing the criticised instruction the court gave a definition of the expressions "any occupation" and "any work" in the language of Prudential Insurance Co. v. South, 179 Ga. 653, 177 S.E. 499, 502, 98 A.L.R. 781. This definition corresponds to the definition of the same expressions which appears in plaintiff's instruction No. 8 herein. In the Hill case the court pointed out that there was no evidence that the plaintiff could indulge in any occupation other than the one which he followed at the time of the issuance of the policy. So in the case before us there is no evidence that plaintiff could follow any other occupation, if we are to be guided by the definition in the Hill case and as set forth in plaintiff's instruction No. 8. It is true that certain experts testified that plaintiff could act as executive, as advisor to a hardware company or as a bookkeeper, the conditions being that the occupation be sedentary and that physical exertion be not required. Fantastic indeed is the contention that one who has been compelled for years by chronic asthma to desist from the operation of his hardware store, the only business he knew, could achieve success as an executive in the employ of others or as an advisor to a hardware company; and fanciful is the contention that in view of present day standards and competition one in plaintiff's situation could reasonably hope to obtain or retain a position as bookkeeper, his limited knowledge of the subject having been gained while studying for two months in a business college during his youth. We agree with the conclusion reached by the Georgia court in the case above cited that it was not within the contemplation of the parties that the insured would be unable to recover if he "might embark in the peanut trade or follow the business of selling shoe strings or lead pencils, or follow some similar calling".

[2] The authorities are by no means in accord concerning the construction to be placed upon a general disability clause such as that contained in the policy sued upon. They may, however, be divided into three groups, representing the two extreme and the intermediate views. In the jurisdictions which apply the strict or literal rule

of construction the insured is permitted to recover only when there is proof that he has as a result of his disability become totally unable to engage in any occupation or employment for wage or profit. Garms v. Travelers' Ins. Co., 242 App.Div. 230, 273 N.Y.S. 39; Metropolitan Life Ins. Co. v. Guinn, 199 Ark. 994, 136 S.W.2d 681; Cooper v. Metropolitan Life Ins. Co., 317 Pa. 405, 177 A. 43. On the other extreme is the liberal rule of construction, under which the disability provision of a policy is construed as if it were occupational rather than general. These authorities permit a recovery upon mere proof that the insured is by reason of his disability unable to follow his customary business or occupation or is unable to perform substantially all of the material acts necessary to its prosecution. Equitable Life Assurance Soc. v. McDonald, 280 Ky. 825, 134 S.W.2d 953; Ætna Life Ins. Co. v. Person, 188 Ark. 864, 67 S.W.2d 1007. The third or intermediate view is the most reasonable. It is the one which we have followed and which was favored in Hill v. New York Life Ins. Co., supra, and in Wright v. Prudential Ins. Co., 27 Cal.App.2d 195, 80 P. 2d 752. The authorities supporting this rule define total disability which prevents the insured from engaging in any occupation or performing any work for compensation as a disability which prevents his working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity. Misskelley v. Home L. Ins. Co., 205 N.C. 496, 171 S.E. 862; Equitable Life Assurance Soc. v. Wiggins, 115 Fla. 136, 155 So. 327; Ursaner v. Metropolitan Life Ins. Co., 146 Misc. 121, 262 N.Y.S. 462; Kane v. Metropolitan Life Ins. Co., 228 Mo.App. 649, 73 S.W.2d 826; Nickolopulos v. Equitable Life Assurance Soc., 113 N.J.L. 450, 174 A. 759; Prudential Ins. Co. v. South, supra. The authorities cited in support of the three views are not intended to be exhaustive. For additional citations see 24 A.L.R. 203; 37 A.L.R. 151; 41 A.L.R. 1376; 51 A.L.R. 1048; 79 A.L.R. 857; and 98 A.L.R. 788.

[3, 4] Defendant contends that the trial court erred in permitting expert witnesses for plaintiff to give opinions on the question whether plaintiff was totally disabled, claiming that such witnesses invaded the province of the jury. As a general rule the ultimate question for the determination of the jury should be passed upon by the jurors and not by the witnesses. It is not argued that the physicians could not give their opinions as to whether plaintiff could follow a sedentary occupation. It is extremely difficult to draw a clear line of demarcation between the field in which the experts may give their opinions and the field which is reserved exclusively for the jury. If it be conceded that some of plaintiff's witnesses were allowed too much latitude, it is apparent from all of the evidence that no prejudice resulted, for they were allowed to testify exhaustively on the subject with opportunity to give reasons for the opinions expressed. A clear answer to defendant's criticism appears, however, in the fact that other witnesses for plaintiff were allowed to give testimony of the same nature without objection from defendant. Holahan v. McGrew, 111 Cal. App. 430, 439, 295 P. 1054. Moreover it appears that defendant's expert witnesses were permitted to answer questions of the same tenor as those which were propounded by plaintiff to his expert witnesses. That neither party was prejudiced by the ruling permitting the experts to give their opinions on the subject of total disability becomes apparent when it is brought to mind that the court instructed the jury concerning the opinion of an expert as follows: "Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject any such opinion if in your judgment the reasons given for it are unsound."

The judgment is affirmed.

I concur: MOORE, P. J.

McCOMB, Justice (dissenting).

I dissent. From a judgment in favor of plaintiff after trial before a jury in an action to enforce an insurance policy providing for payments to plaintiff if he be continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value, defendant appeals.

The essential facts are:

Defendant issued a policy of insurance to plaintiff containing among others the following provisions:

"If the Insured shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime, and if such disability shall occur at any time after the date hereof, while this Policy is in full force and effect, and while the Insured is less than sixty years of age, and before any non-forfeiture provision shall become operative, the Company, upon receipt of due proof of such disability, will grant the following benefits: * * *."

After the policy was issued plaintiff, who was engaged in the hardware business, became physically unable to continue in his business and, upon his making proper proof, defendant made disability payments to him from October 14, 1929, to October 17, 1938. October 21, 1938, defendant advised plaintiff that he was no longer entitled to disability benefits and declined to make further payments. A number of doctors testified at the trial that in their opinion plaintiff's health would permit him to engage in some occupation not involving physical exercise but of financial value.

Defendant relies for reversal of the judgment on the proposition *that it was error for the trial court to instruct the jury that the clause in the life insurance policy above quoted meant that plaintiff was entitled to disability benefits thereunder if he was unable to perform the substantial and material acts of "his" business, and that in place of such instruction the jury should have been instructed that such clause meant that plaintiff was entitled to disability benefits only when his disability was such that he would be unable to perform the substantial and material acts connected with "any" business.*

This proposition is tenable. It is to be noted that:

(1) The policy which is the basis of the present suit is a total disability policy as distinguished from an occupational policy. By an occupational policy the insured may recover upon a showing that he is substantially unable to perform the acts required by his business or profession, while under a total disability policy he must prove his disability is such as to prevent him from engaging in any occupation or performing work for compensation of financial value. Most of the cases cited by plaintiff arise under provisions of occupational policies and are, therefore, inapplicable to the facts of the instant case.

(2) Defendants concede that a liberal construction is to be placed upon clauses of an insurance policy (Wright v. Prudential Ins. Co., etc., 27 Cal.App.2d 195, 205, 80 P.2d 752; Hill v. New York Life Ins. Co., 38 Cal.App.2d 627, 632, 101 P.2d 752). In the instant case the trial court instructed the jury at plaintiff's request as follows:

"Plaintiff's Instruction No. 8.

"The words in the policy of insurance in evidence in this case which deal with the right of the assured to receive disability benefits if he is totally and permanently disabled read as follows:

" 'If the insured shall become totally and permanently disabled, either physically or mentally, from any cause whatsoever, to such an extent that he (or she) is rendered wholly, continuously and permanently unable to engage in any occupation or perform any work for any kind of compensation of financial value during the remainder of his (or her) lifetime * * *,'

"I charge you that the law is and the disability clause which I have quoted to you means that the insured is entitled to the disability benefits when his disability is such that he is unable to perform the substantial and material acts of his business or occupation in the usual customary way and when such disability is presumably permanent.

"The expressions in the policy 'any occupation' and 'any work' mean the ordinary employment of the insured or such other employment, if any approximately *(sic)* the same livelihood, as the insured might fairly be expected to follow, in view of his station, circumstances, and the physical and mental capabilities. If the insured is so incapacitated that substantially all of the material activities of any such employment are reasonably closed to him, he is totally disabled within the meaning of the policy."

"Plaintiff's Instruction No. 5.

"I instruct you that the provisions of the insurance contract in this case, relating to the disability benefits, do not require that the disease or diseases from which the plaintiff may be suffering, shall render him absolutely helpless, but such provisions are construed in law as meaning such a disability as renders him unable to perform the substantial and material acts of his business or occupation in the usual and customary way. The fact that the insured may have done some work or engaged in some activities of pleasure, or transacted some business duties during the time for which he claims payment for total disability, is not conclusive evidence that his disability is not total and permanent within the meaning of the policy. The test of disability is not what the plaintiff has actually done in an effort to perform the duties of his occupation, but what in the exercise of due prudence he was reasonably able to do. This is a question of fact which you should determine under all the evidence in the case and under all of the instructions of the Court on the law of the case, and if you find from a preponderance of the evidence and under these instructions that the plaintiff has been so totally and permanently disabled, your verdict will be for the plaintiff and against the defendant."

"Plaintiff's Instruction No. 6.

"The defendant in this case admits that the plaintiff is, and for many years has been, suffering from the disease known as chronic asthma but claims that this does not prevent the plaintiff from following some sedentary occupation, and therefore, that under the terms and provisions of the contract of insurance he is not totally and permanently disabled. I instruct you that it is for you to determine as a fact under all the evidence in the case and the instructions of the Court, whether or not the plaintiff is totally and permanently disabled. In that connection I charge and instruct you that if the plaintiff's condition, as a result of the disease, is such that common care and prudence required that he desist from the transacting of business or working, and his condition is presumably permanent and continuous, he is permanently and totally disabled, within the meaning of the contract, though he may not be physically disabled to perform occasional acts of pleasure or acts connected with his business, profession or occupation."

It is the law that under a clause in an insurance policy such as that involved in the present case, defendant is not liable unless plaintiff be wholly disabled from engaging in *"any"* occupation or employment for profit. It is not sufficient that the evidence disclose that he is disabled from engaging in *"his"* occupation. In referring to a clause similar to the one here involved, the Supreme Court of New York, Appellate Division (Garms v. Travelers' Ins. Co., 242 App.Div. 230, 273 N.Y.S. 39, 41), speaking through Mr. Justice Martin thus accurately states the rule:

"* * * The Insurance Company is not liable unless there be proof that the insured had been 'wholly disabled by bodily injuries or disease and will be continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit.' The trial court sent this question to the jury, and a verdict was rendered for plaintiff. To prove the second cause of action it was necessary for plaintiff to show that he had sustained bodily injuries as a result of which he would thereafter be prevented, for life, from engaging in any occupation or employment for wage or profit."

In accord with this rule are the following cases: Metropolitan Life Ins. Co. v. Guinn, 199 Ark. 994, 136 S.W.2d 681, 684; Cooper v. Metropolitan Life Ins. Co., 317 Pa. 405, 177 A. 43, 44; Thigpen v. Jefferson Standard Life Ins. Co., 204 N.C. 551, 168 S.E. 845, 847; Jones v. Connecticut General Life Ins. Co., 114 W.Va. 651, 173 S.E. 259, 262; Wyckoff v. Metropolitan Life Ins. Co., 302 Ill.App. 241, 23 N.E.2d 802, 804; Kaneb v. Equitable Life Assur. Soc., 304 Mass. 309, 23 N.E.2d 889, 890; Shabotzky v. Equitable Life Assur. Soc., 257 App.Div. 257, 12 N.Y.S.2d 848, 852; Hill v. New York Life Ins. Co., 38 Cal.App.2d 627, 636, 101 P.2d 752.

Applying the foregoing rule to the present case, it is apparent that the instructions given by the trial court were erroneous in stating that defendant was liable to plaintiff if the jury should find that plaintiff was disabled from following "his" occupation, nor was this error cured by the fact that the trial court gave other instructions which correctly stated the law. Such instructions simply were contradictory of the instructions stated above and thus tended to confuse the jury. (Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 280, 201 P. 599.) Incorrect instructions on a material issue will not be cured by a correct statement of the law in another instruction, for it is impossible to determine which instruction the jury has followed (Gaster v. Hinkley, 85 Cal.App. 55, 62, 258 P. 988.) Article VI, section 4½ of the Constitution of the State of California is inapplicable to the facts of the instant case, for the reason that it is not possible to determine whether the jury would have returned the same verdict had they been correctly instructed, since the record in the present case discloses that plaintiff had the equivalent of a high school education, had studied accounting and bookkeeping, and had engaged in business as a salesman over a long period of years. In the opinion of a number of the doctors, who testified at the trial, plaintiff at the time of the trial was able to engage in some gainful occupation.

For the foregoing reasons the judgment in my opinion should be reversed.

45 Cal.App.2d 161

LONG v. THOMPSON et al.

Civ. 13010.

District Court of Appeal, Second District Division 2, California.

June 3, 1941.

Rehearing Denied June 26, 1941.

Hearing Denied July 30, 1941.

1. Judgment 🔑795(1)

Under Washington law, a judgment ceases to be a charge against person or estate of judgment debtor six years after entry of judgment, and no new judgment can extend period of duration of old judgment beyond six years. Rem.Rev.Stat.Wash. §§ 459, 460.

2. Judgment 🔑910(1)

An action upon a Washington judgment expires with lapse of six years from the entry in the Washington court. Rem.Rev. Stat.Wash. §§ 459, 460.

3. Contracts 🔑7

A subsisting valid judgment entered in the state of Washington was a proper subject for a valid contract to pay judgment at a subsequent date in return for a present forbearance.

4. Limitation of actions 🔑154(4)

An action on contract entered into on October 8, 1936, under which judgment creditor agreed to refrain from attempting to enforce judgment for a year, would not be barred by limitations until October 8, 1941. Code Civ.Proc. § 337.

5. Contracts 🔑73

A promise not to attempt to enforce immediate payment of a judgment is a sufficient, lawful, and valid consideration for a contract. Civ.Code, §§ 1605, 1614.

6. Limitation of actions 🔑145(5), 151(2), 169

Where judgment creditor and judgment debtors entered into contract in California containing judgment debtors' promise to pay Washington judgment in return for judgment creditor's promise to refrain for a year from attempting to enforce judgment, the judgment debtors' promise was supported by consideration and their old obligation was thereby renewed and became enforceable in California and justiciable under its laws, regardless of duration of judgment under Washington laws. Rem.Rev.Stat.Wash. §§ 459, 460; Code Civ.Proc. § 337, and § 1875, subd. 3; Civ.Code, §§ 1605, 1614, 1646.

7. Limitation of actions 🔑151(2)

Where an additional promise is made with reference to a right of action which has become barred, a new promise to pay barred debt must form basis of the creditor's action, and not the original obligation.

8. Limitation of actions 🔑151(2)

Where a new promise coupled with a condition is made with reference to a debt which is still legally enforceable, a subsequent action instituted after original obligation has become barred is founded upon the substituted conditional promise.

9. Judgment 🔑910(4)

Under Washington law, the running of statute of limitations against right of action on Washington judgment was suspended during time judgment debtors were absent from Washington. Rem.Rev.Stat.Wash. §§ 157, 168.

10. Contracts 🔑332(2)

In action on a contract under which judgment debtors agreed to pay a foreign judgment at a subsequent date in return for a present forbearance by judgment creditor, a count alleging the contract, its breach, and resultant damages stated a cause of action.

11. Fraud 🔑43, 47

A count alleging that judgment debtors stated that they would be compelled to forfeit lucrative construction contracts if judgment creditor attempted to collect judgment, that debtors promised to pay judgment if creditor would forbear in efforts to collect judgment, that creditor did forbear, but that defendants had made promises without any intention of performance, and with intent that judgment would be outlawed, sufficiently alleged successful perpetration of a fraud and resulting damages.

12. Liens ⟹22

A count, alleging that judgment debtors, in order to induce judgment creditor to execute agreement to refrain from attempting to enforce judgment, promised that award which judgment debtors expected to obtain in United States Court of Claims would constitute security for payment of debtors' obligation and that an equitable lien upon award should be impressed to extent of judgment creditor's claim, sufficiently alleged creditor's right to a lien.

13. Liens ⟹7

Where judgment debtors agreed with judgment creditor that award which they expected to obtain in United States Court of Claims would be security for payment of their obligation, which they had agreed to pay at a subsequent date in return for judgment creditor's present forbearance, an equitable lien was created in favor of the judgment creditor upon moneys about to be awarded by Court of Claims to the judgment debtors.

14. Estoppel ⟹78(6)

Where judgment creditor and judgment debtors entered into agreement under which judgment creditor was to refrain from attempting to enforce judgment for a year and judgment debtors promised to make payments from profits to be received from construction contracts and to pay judgment in full from award which judgment debtors expected to obtain in United States Court of Claims, judgment debtors, who paid none of proceeds from construction contracts to judgment creditor and who assigned Court of Claims award to a bank, were "estopped" to deny damage suffered by judgment creditor as result of his reliance upon their promises.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

15. Judgment ⟹910(1)

Where a creditor by virtue of debtor's wrongful act is prevented from enforcing his judgment during statutory period which conserves its vitality, debtor is "estopped" from taking advantage of the creditor's act or omission.

16. United States ⟹111

An assignment to judgment creditor of moneys which judgment debtors expected to receive from award in United States Court of Claims was not invalid because of alleged failure to observe certain formalities in drafting of assignment, where, under circumstances, substantial justice would be served by decreeing that an equitable lien had been created.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Charles W. Long against Charles A. Thompson, George K. Thompson, and others, to recover upon a contract to pay a foreign judgment. From a judgment entered in favor of the defendants after a demurrer to the plaintiff's complaint had been sustained without leave to amend, the plaintiff appeals.

Judgment reversed with directions.

Wilbert C. Hamilton, Edwin H. Casey, and Zuckerman & Stein, all of Los Angeles, for appellant.

John M. Martin and Frank L. Martin, Jr., all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Plaintiff appeals from an unfavorable judgment after an order was entered sustaining a demurrer without leave to amend his complaint under a contract to pay a foreign judgment at a subsequent date in return for a present forbearance.

February 21, 1933, a final judgment was entered in favor of plaintiff against defendants Charles A. and George K. Thompson by the superior court of the state of Washington in the sum of $10,000 with interest and costs. On April 16, 1936, plaintiff filed an action upon the Washington judgment in the superior court of Los Angeles county. It is identified as action No. 301002 on the records of that court. Plaintiff caused summons to be issued and served upon defendants. Further details of the story are succinctly told by the pleadings before us:

"VI. That on or about the 8th day of October, 1936, in the City of Los Angeles, County of Los Angeles, State of California, the plaintiff by and through his duly authorized agent and attorney, Wilbert C. Hamilton, entered into an express written contract with the defendant, George K. Thompson, by the terms of which plaintiff promised and agreed to forbear, for a period of one (1) year thereafter, the further prosecution of the action aforesaid and to forbear and cease, during said year, all efforts on his part to effect a satisfaction of the judgment aforesaid, and said defendant promised and agreed to pay to plaintiff ten per cent (10 per cent) of any and all profits thereafter received by said defendant as a result of any and all construction contracts which said defendant should thereafter enter into, the said amounts so paid to plaintiff to be applied on account of the judgment aforesaid, and said defendant promised and agreed to keep plaintiff informed at all times of any and all construction contracts which he should enter into subsequent to said October 8, 1936, and further said defendant promised and agreed to pay to plaintiff the aforesaid judgment in full as soon as the action then being maintained by said defendants in the United States Court of Claims entitled Charles Thompson and George K. Thompson, Copartners, v. The United States, Number 42963, was settled and the money therein awarded was received by said defendant.

"VII. That on the 8th day of October, 1936, and at all times herein mentioned, the judgment of the Superior Court of the State of Washington, aforesaid, was and now is a final judgment owed by defendants, and each of them, to plaintiff.

"VIII. That plaintiff is informed and believes, and basing his allegations on said information and belief, alleges that from and after October 8, 1936, to date hereof, the defendants and each of them, have entered into many construction contracts and have received therefor and therefrom many thousands of dollars in profits, the exact amount of which is unknown to plaintiff at this time. That when plaintiff has ascertained the true amount of said profits, he will ask leave of Court to amend this complaint accordingly.

"That plaintiff is informed and believes, and basing his allegations on said information and belief, alleges that on or about May 6, 1940, the United States Court of Claims, in action Number 42963, aforesaid, rendered its opinion, awarding to the defendants, and each of them, the sum of Ninety-two thousand two hundred two and 06/100 Dollars ($92,202.06), no part of which has to date hereof been paid; that said award is a final judgment of record in the Court aforesaid."

The pleading then alleges that the Thompsons have assigned to defendant bank all of their interest in the award of the court of claims "and that as a result thereof, said defendants and each of them have prevented and made impossible the performance of" a contract of October 8, 1936; that the assignments were made by defendants with intent and for the purpose of delaying and defeating plaintiff's right to the payment of the judgment. Since plaintiff performed all of the obligations imposed on him by the contract of October 8, 1936, and since the Thompsons have violated all of the promises thereby made for them to perform, plaintiff alleges that the entirety of his claim "remains due, owing and unpaid."

It is alleged in count two that the Thompsons stated on numerous occasions subsequent to October 8, 1936, that they were engaged in the performance of several lucrative construction contracts and that in the event plaintiff should attempt to enforce the collection of the judgment they would be compelled to forfeit such contracts and that "if plaintiff would forbear in his efforts to collect the judgment" then defendants and each of them would pay plaintiff in full the amount thereof. That in reliance upon such promises, plaintiff did forbear; that such promises of the Thompsons were made with the intent that plaintiff would act thereon "to the end that eventually and before further judicial action should be taken by plaintiff, the judgment would be declared barred by the lapse of time and the statutes and the laws relating thereto"; that each promise of the Thompsons was made without any intention of performance; that defendant George K. Thompson filed an answer in action No. 401002 on June 21, 1940, whereby he invokes the statutes of Washington which prescribed the rules with reference to judgments and the lapse of time.

In the third count, plaintiff alleges that George K. Thompson, in order to induce plaintiff to execute the writing of October 8, 1936, promised "that if the payment of the money therein agreed to be paid was not made to plaintiff prior to the United States Court of Claims' award, that said award was to be and was by said promises and agreement made a security for the payment of defendants' obligation aforesaid"; that therefore it is necessary that an equitable lien upon such award be impressed by a judgment in this action to the extent of plaintiff's claim and that defendants should be required to execute such writing as may be necessary to effect a lien and be enjoined from collecting the award until after plaintiff's claim shall have been satisfied. The prayer is for judgment in the amount of the Washington judgment with interest, for an equitable lien upon the moneys in possession of the United States, that defendants be ordered to deliver to plaintiff such legal instruments as may be necessary to effect the purpose of said equitable lien, that defendants be enjoined from collecting the award and for general relief.

Remington Revised Statutes of the State of Washington provides as follows:

"§ 459. Judgment lien expires when. After the expiration of six years from the date of the entry of any judgment heretofore or hereafter rendered in this state, it shall cease to be a lien or charge against the estate or person of the judgment debtor."

"460. Proceedings for extension denied. No suit, action or other proceeding shall ever be had on any judgment rendered in this state by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment, except as in the next section of this act provided."

[1, 2] Respondents correctly declare the law to be that by virtue of such provisions the judgment of the Washington court ceases to be a charge against the person or estate of the judgment debtor six years after entry of the judgment and that no new judgment can extend the period of the duration of the old judgment beyond the six years. Roche v. McDonald, 136 Wash. 322, 239 P. 1015, 44 A.L.R. 444. Moreover, an action upon a Washington judgment expires with the lapse of six years from the entry in the Washington court. Burman v. Douglas, 78 Wash. 394, 139 P. 41; Ball v. Bussell, 119 Wash. 206, 205 P. 423. But, while on the one hand, they are accurate in espousing the law, on the other they vainly contend that since plaintiff's rights were created under the laws of Washington, they were destroyed by that same law; that California cannot grant a remedy where no right exists; that under the rule of comity, the law of Washington must prevail and that thereby the judgment, which was the subject of the contract of October 8, 1936, vanishes into thin air upon the expiration of six years after its entry in Washington, leaving plaintiff bereft of all enforceable rights. (Citing sec. 1875, subd. 3, Code Civ.Proc.; Interstate Lumber Co. v. Tweedy, 28 Cal.App.2d 208, 82 P.2d 208; Anchors v. Anchors, 41 Cal.App.2d 988, 107 P.2d 973. Such claims are based upon a misconception of the law and of the facts of this case.

[3, 4] Before us is a written contract executed in California where it is to be performed. It was executed on October 8, 1936. At that time the Washington judgment was a subsisting, valid judgment and had at least two years and two months of life under the Washington statutes. Since it was such a judgment it was a proper subject for a valid contract. That contract is not barred. If it had been barred at the expiration of four years (Code Civ. Proc. § 337) from its date, it would have been outlawed after October 8, 1940. But inasmuch as it clearly provides for a forbearance to enforce the collection of the judgment for a year, no rule of limitation could be successfully invoked against it until after October 8, 1941. There was a promise to forbear and forbearance prevailed during the term of the contract.

[5, 6] The promise not to attempt to enforce immediate payment of a judgment is a sufficient consideration for a contract. Estate of Thomson, 165 Cal. 290, 131 P. 1045; Santa Ana Sugar Co. v. Smith, 116 Cal.App. 422, 2 P.2d 866; Parrino v. Rallis, 116 Cal.App. 364, 2 P.2d 515; Lincoln Holding Corporation v. Levering, 219 Cal. 427, 27 P.2d 74; California Civ.Code, secs. 1605, 1614. Also it is a lawful, valid consideration. Since defendants gave a new promise to be performed in California to pay the Washington judgment in return for a valuable consideration, they thereby renewed the old obligation enforceable in California and justiciable under its laws. Fenton v. Edwards & Johnson, 126 Cal. 43, 47, 58 P. 320, 46 L.R.A. 832, 77 Am.St.Rep. 141; California Civ.Code, sec. 1646. By their contract with plaintiff on October 8, 1936, defendants placed themselves in a position comparable to that of a debtor who gives a new note as evidence of an old debt. Where an endorser wrote a letter acknowledging his liability on his endorsement and promise to pay the note in anticipation of a forbearance for more than six months, it constituted an independent contract supported by a valid consideration. Dittmar v. Frye, 200 Wash. 451, 93 P.2d 709, 715, 124 A.L.R. 708.

[7, 8] Although the obligation to pay the Washington judgment was in all re-

spects lawful, regular and fair, its only function disclosed by the complaint was to serve as a consideration for the contract sued upon. Where an additional promise is made with reference to a right of action which has become barred, a new promise to pay the barred debt must form the basis of the creditor's action, not the original obligation. Rodgers v. Byers, 127 Cal. 528, 60 P. 42. But if the new promise was made while the old debt was legally enforceable and is coupled with a condition, the action is founded upon the substituted conditional promise if instituted after the original obligation has become barred. Ibidem.

[9] We are, therefore, not concerned with the right of the judgment creditor to renew the Washington judgment. Plaintiff might have proceeded to do so in harmony with section 157 of Remington's Revised Statutes of Washington and section 336 of our Code of Civil Procedure. Section 168 of the Washington statutes provides for the suspension of operation of section 157 while the judgment debtor resides outside of Washington. Defendants were absent from Washington for more than three years following the entry of the judgment. The statute of limitations was suspended during that time. Dignam v. Shaff, 51 Wash. 412, 98 P. 1113, 22 L.R.A., N.S., 996. But under our view of the pleading, the paramount question here is the right of plaintiff to sue upon the substituted contract which was executed in California. Clearly he has that right.

[10-13] No count of the complaint lacks an essential to constitute a valid cause of action. The first count alleges a contract and its breach and the resultant damages. Barber v. Cazalis, 30 Cal. 92; 6 Cal. Jur. 479, 484. The second count alleges the successful perpetration of a fraud and the damages certain to flow therefrom. Cohen v. Metropolitan Life Ins. Co., 32 Cal.App. 2d 337, 89 P.2d 732; Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am.St.Rep. 29; Maynes v. Angeles Mesa Land Company, 10 Cal.2d 587, 76 P.2d 109; 12 Cal.Jur. 806. The third count contains a statement of facts which in effect pledged the moneys owed defendants by the United States. Such pledge created an equitable lien in favor of plaintiff upon the moneys about to be awarded by the court of claims to defendants. Higgins v. Manson, 126 Cal. 467, 58 P. 907, 77 Am.St.Rep. 192.

[14] But conceding for the moment the soundness of the theories and defenses of respondents, they are estopped to deny the damage suffered by plaintiff by reason of his reliance upon the statements and promises of the Thompsons. They made the new promises to pay the Washington judgment and upon those promises and solely by reason thereof, plaintiff acted when he agreed to desist from his efforts to collect his money. According to the allegations of the complaint, while plaintiff kept the faith, defendants spurned their own plighted word; they made construction contracts and collected money but paid none to plaintiff; they received an award from the court of claims out of which they had promised to pay the judgment; but they promptly assigned the award to defendant bank to fortify their credit in the new arena, contrary to a specific promise and to the detriment of plaintiff who in other fields had financed their business operations.

[15] Where a creditor by virtue of the wrongful act of the debtor is prevented from enforcing his judgment during the statutory period which conserves its vitality, his debtor is estopped from taking advantage of the act or omission of the creditor. Calistoga National Bank v. Calistoga Vineyard Co., 7 Cal.App.2d 65, 72, 46 P.2d 246.

[16] The contention of respondents that the assignment of the moneys due the Thompsons from the United States is invalid because of a failure to observe certain formalities in the drafting of the assignment is not well founded. A strict compliance with the statute is not necessary where the conduct of the parties is such that substantial justice would be served by decreeing that an equitable lien has been created. Martin v. National Surety Company, 300 U.S. 588, 57 S.Ct. 531, 81 L.Ed. 822. The case of Morrison v. Havens, 24 Cal.App.2d 504, 75 P.2d 515 does not apply. The writing sued upon in that case was the mere personal promise of its author (since deceased) to pay a debt out of a particular fund. The fund was not created and the holder of the writing did not present a claim against the estate.

The judgment is reversed. The trial court is directed to overrule the demurrer and to allow defendants to answer if they be so advised.

We concur: WOOD, J.; McCOMB, J.

RICHARDS v. METROPOLITAN LIFE INS. CO. et al.[*]

Civ. 12870.

District Court of Appeal, Second District, Division 2, California.

June 3, 1941.

Hearing Granted July 30, 1941.

1. Master and servant 🔑302(1)

The test of whether employee is acting within "scope of employment" at a particular time is whether act of employee was done in prosecution of business which employee was employed to do.

See Words and Phrases, Permanent Edition, for all other definitions of "Scope of Employment".

2. Automobiles 🔑197(7)

That employee travels by his own automobile instead of by street car to employer's place of business does not establish that employee is within "course of employment" the moment employee leaves home.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

3. Automobiles 🔑197(7)

An insurance agent, driving his automobile in the morning to insurance company's office to report and to attend a meeting of agents and to deliver premiums collected during preceding two days, was not within "scope of his employment", and hence insurance company was not liable for death of guest in another automobile with which agent's automobile collided.

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Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action for wrongful death in automobile accident, by Addie B. Richards against the Metropolitan Life Insurance Company and another. From a judgment of nonsuit granted to the named defendant, the plaintiff appeals.

Affirmed.

Rodney F. Williams, of Los Angeles, for appellant.

Chase, Barnes & Chase and Laurence A. Peters, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff appeals from a judgment of nonsuit granted the Metropolitan Life Insurance Company on the ground that the evidence was insufficient to establish the employer-employee relationship between the corporation and one Lehman, its collector and solicitor.

On March 17, 1937, defendant Lehman was, and had been for one and one-half years, in the employ of the Metropolitan Life Insurance Company; he solicited insurance and collected insurance premiums upon insurance policies and delivered said premiums to the company at its office in the city of Los Angeles. On the date mentioned plaintiff's daughter, Altier Richards, while riding as a guest in another automobile, was injured in a collision when the car driven by Lehman collided with the automobile in which she was riding. The injuries she received later caused her death.

On the morning in question Lehman was accompanied by Rose Starr, a young woman who lived at the same address as that of Lehman. He had conveyed her to the city daily for some five weeks prior to the date mentioned. She worked on Venice boulevard, about fifteen blocks south of the office of defendant company at 315 South Broadway. It was her habit usually to leave Lehman's car at Third and Hill street, which is about one block from the Broadway address. It was their mutual intention that she should do so on the day of the accident.

On that day Lehman had made no calls in the service of the company. Prior to the accident he had neither sought nor acquired any applications for policies nor had he collected any money due the company. His immediate destination was the company's office to report, attend a daily meeting of the agents and deliver premiums collected during the two preceding days. He used his own car in making collections for the company and in going to the office of the company. His contract required him to make a daily report and payment of all collections. Ordinarily he deposited his collections the morning after they were made but occasionally he carried some of the company's money around for a day or so along with applications for policies. His duties required him to attend daily meetings at the office in the morning.

Upon the foregoing facts, the court granted the company's motion for a nonsuit.

Plaintiff contends that there was substantial evidence that Lehman as an employee was acting within the scope of his employment at the time of the accident; that at that very time he was on his way to deliver the premiums which he had collected and to attend a meeting of the employees; that he was in the continuous employ of the company by the terms of his employment; and that he was required to attend daily meetings of employees to receive his instructions; that he was guaranteed a minimum salary.

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[*] Subsequent opinion 120 P.2d 650.

In support of this contention, plaintiff recited certain provisions of the book of instructions governing such employee's conduct which provisions required the prompt collection of premiums and the prompt payment of moneys collected and which also required daily reports of such collections. It appears from Lehman's testimony that as an agent for the company, he was given a certain territory within the city of Los Angeles within which he made collections, but such labors took him into various sections of the city.

On the morning of the accident, he had with him all of the premiums which he had collected for a day or two prior to the accident and he was on his way to turn it over to the company. It was customary for him to use his automobile in all of his work for the company.

[1-3] It has been declared that the test of whether an employee is acting within the scope of his employment at a particular time is whether the act was done in the prosecution of the business which he was employed to do. Chamberlain v. Southern Cal. Edison Co., 167 Cal. 500, 140 P. 25. Measured strictly by the language of that test, it may be said that any act of the employee which contributes ultimately, in the slightest degree to the advancement of the employer's business may be considered as an act done in the prosecution of the business. This is true even of the employee's diet, and of his time and place of eating; of his social relations, and of the hours of his vespers and orisons. But we are not bound by such strict rule of construction. The fact that an employee travels by his own motor car instead of by a street car to the employer's place of business does not establish that he is within the course of his employment the moment he leaves his home. The line of distinction appears to be finely drawn between those cases where an employee acts within the scope of his employment and where he was beyond that scope. A study of the authorities and a close inspection of the nature of Lehman's services force upon us the conclusion that at the time of his accident he was acting outside the scope of his employment.

Where an employee used his employer's automobile in selling labels and took the machine from the garage to his work, his employer was not liable for injuries caused by the act of the employee while driving such automobile on his way to the employer's office. Nussbaum v. Traung Label Co., 46 Cal.App. 561, 189 P. 728. Where the operator of a service station suffered an automobile collision while driving from the bank with the moneys he delivered to the branch office of the corporation, the company was not liable merely because of the employee's possession of the money. He had deviated from his course between the bank and the district office to serve a friend. Gordoy v. Flaherty, 9 Cal.2d 716, 72 P.2d 538. Where an employee of a store was required to make a daily report by depositing it in the mail near his branch store, addressed to the district office, and, instead of posting the report at the close of the day, left his home early the next morning and stopped to leave it at the main store, his employer was not liable for injuries caused by the employee after leaving the main store and before he reached his destination. He was not acting within the scope of his employment at the time. Humphry v. Safeway Stores, Inc., 4 Cal.App.2d 589, 41 P.2d 208. After a collecting and soliciting agent had been engaged during the morning on business of the company to within a few minutes of the accident, and collided with another car on his way home to lunch, the employer was not liable because the agent was not, at the time of the collision, performing a service for the employer. Martinelli v. Stabnau, 11 Cal.App.2d 38, 52 P.2d 956.

Where two employees used the automobile of their employer in installing signs and had no fixed hours or place of employment their employer was not liable for injuries which they caused plaintiff, while driving from their home to the city to get their evening meal, which was paid for by the employer. Kish v. California State Auto. Ass'n, 190 Cal. 246, 212 P. 27. Where a motorcycle messenger furnished, fueled and operated his own machine and kept it at his own home and rendered services from 8 a. m. to 6 p. m. and at the time of his accident was on his way from his home to the office and was traveling under no restrictions as to the mode or direction of travel, the employer was not liable for plaintiff's injuries suffered in a collision with such motorcycle. Postal Tel. Cable Co. v. Industrial Acc. Comm., 1 Cal.2d 730, 37 P.2d 441, 96 A.L.R. 460. Where a delivery boy on his way to work used a sidecar motorcycle in making his deliveries but furnished his own gasoline and maintained his motorcycle and chose any route he pleased from the time he left his employer's premises until the following morning, his employer was not liable although the boy had delivered some merchandise to a friend on the way to work. Holopoff v. Industrial Acc. Comm., 131 Cal.App. 554, 21 P.2d 649. Where a collector, whose hours were from 8 a.m. to 5 p. m. used his own automobile to make collections, and was not required to report at the office of his employer at the close of the day but might report his collections on the following morning, his employer was not liable for plaintiff's injuries caused by a collision with the collector's car while driving on his way to work with money collected the day before in his possession. That collector was proceeding to his employer's place of business, first to return the collection slip of the preceding day, to report and deposit his collections and to secure new slips for the work ahead of him. Nagy v. Kangesser, 32 Ohio App. 527, 168 N.E. 517.

Appellant cites two authorities which have persuasive elements but which may be distinguished. In the case of Dillon v. Prudential Insurance Company of America, 75 Cal.App. 266, 242 P. 736, the agent McDonald worked from 8 a. m. until 4 p. m. in making collections under a contract of employment similar to that between Lehman and defendant company. But he had gone from his home to the district within which he performed his work—comprised of 200 square miles, and while he was in the midst of his clientele, it became necessary for him to leave the "area" of his operations in order to drive to the office of the company to attend a meeting at 9:30 o'clock in the morning. At the time of his accident, McDonald had in his possession policies aggregating $40,000 worth of insurance to be delivered to policyholders. His attempt to leave his district to attend a meeting at the company's office places him definitely in the class of an employee performing a service at the time of his collision. The case of Cain v. Marquez, 31 Cal.App.2d 430, 88 P.2d 200, 204, is likewise distinguishable. In that case the employee who acted in the general capacity of mechanic, bookkeeper, collector and solicitor, was on his way to his employer's shop to obtain a micrometer and other tools to be used by the employee at the shop on the same evening. There was no purpose or intention on his part to cease the pursuit of his master's business. It is there said: "If, at the time of his trip, the servant combines some purpose of serving the master with the trip to obtain food, it would be an invasion of the province of the jury to hold as a matter of law that the scope of his employment is broken." It was further held that in order to exonerate the master, it is essential that the deviation from his mission to serve his master must be for purposes entirely personal to the servant and that a deviation would be required as a matter of law if the servant combined "his own business with that of the master or attends to both at substantially the same time," citing Kruse v. White Bros., 81 Cal. App. 86, 253 P. 178; Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 191 P. 894. The case of Fenton v. Ind. Acc. Comm., 44 Cal.App.2d 379, 112 P.2d 763, 765, is not in point, an employee of the California State Relief Administration had been assigned on Saturday to investigate several cases before returning to the office the following Monday. He was killed Monday morning while en route to the first home on which he was to call. It was there held that an "employee should be regarded as having been injured in the course of his employment * * * when the accident occurs while he is going to or coming from his work, either on his own time or on that of his employer, if he is then engaged in some substantial mission, growing out of his employment, which has been assigned to him by the employer."

From the evidence before us, it appears that Lehman had not resumed that portion of his labors whereby he would have been in the service of defendant. He was still moving within the orbit of his own personal freedom, serving himself by traveling the mode and route of his choice and in a manner to suit his own convenience. He was not in the performance of an act for the benefit of the defendant company. The mere possession of moneys collected by him on previous days was an incident remote from the performance of the tasks which would later have made his acts a part of his duty to the company. The possession of the money on that day was incidental only to the main purpose of reaching the office of the company in order to begin the work of the day.

The judgment is affirmed.

We concur: WOOD, J.; McCOMB, J.

45 Cal.App.2d 128

PEOPLE v. THOMAS.

Cr. 2175.

District Court of Appeal, First District,
Division 1, California.
May 29, 1941.

1. Criminal law 🔑1159(3)

In robbery prosecution where on vital points testimony was conflicting, verdict of jury was controlling on appeal.

2. Robbery 🔑24(1)

Evidence sustained conviction for robbery.

3. Criminal law 🔑1159(3)

In robbery prosecution where testimony given on behalf of defendant did no more than create a conflict with the testimony given on behalf of state, the conclusion reached by the jury upon issue of whether there was a robbery was conclusive on appeal.

4. Criminal law 🔑742(1)

The jury is the sole judge of credibility of witnesses.

5. Criminal law 🔑741(1)

The jury is the sole judge of the weight to be given testimony.

6. Robbery 🔑4

Robbery does not depend upon the value of the property taken, and, the other elements being present, the crime is made out even though the property taken is of slight value.

7. Robbery 🔑24(1)

Evidence justifying conclusion that victim was robbed of small amount of money he had in his pocket, his wallet, and his valise, established a case of robbery.

8. Robbery 🔑24(1)

Proof of motive or conspiracy to commit robbery is not essential to conviction for robbery.

9. Robbery 🔑1

Neither deliberation nor premeditation is an element of crime of robbery.

10. Indictment and Information 🔑137(5)

Denial of defendant's motion to set aside the information on ground that he had not been legally committed by the magistrate was not error where the motion was not supported by evidence.

11. Indictment and Information 🔑137(5)

An information is not based on the complaint filed with the magistrate, but upon order of commitment made by him, and the fact that order is not indorsed on the complaint itself does not serve as grounds for setting aside the information.

12. Criminal law 🔑226

Where, at time defendant's preliminary examination was held, complaint theretofore issued before magistrate accusing defendant and two others jointly of robbery was on file in office of county clerk because order previously made by magistrate holding the two others to answer had been indorsed on the original complaint and the complaint had been forwarded to county clerk for filing, the magistrate did not lose jurisdiction to hold defendant's preliminary examination when the original complaint was forwarded and filed with the county clerk. Pen.Code, § 872.

13. Indictment and Information 🔑137(5)

Where a legal complaint has been duly and regularly filed charging a public offense and the magistrate hears the evidence, holds the defendant to answer for trial, and a valid commitment is issued, the accused is "legally committed by a magistrate" within meaning of statute requiring information to be set aside if before filing thereof defendant had not been legally committed by a magistrate. Pen.Code, § 995.

See Words and Phrases, Permanent Edition, for all other definitions of "Legally Committed by a Magistrate".

14. Indictment and Information 🔑137(5)

Any irregularity in conducting a preliminary examination of a defendant which does not affect his substantial right in the premises furnishes no ground for setting aside an information.

15. Indictment and Information ⚷137(5)

Where a complaint was filed before magistrate accusing defendant and two others jointly of robbery, and prior to time of defendant's preliminary examination order made by magistrate holding the two others to answer had been indorsed on original complaint and the complaint had been forwarded to county clerk for filing, and therefore order of commitment made by magistrate holding defendant to answer was attached to a true copy of the complaint rather than being indorsed on the original complaint, the absence of the original complaint at time of the preliminary examination was at most an irregularity which did not affect any of defendant's substantial rights and therefore was not ground for setting aside the information. Pen.Code, §§ 872, 995.

16. Criminal law ⚷620(2)

The consolidation of separate informations against different defendants, even though the charges therein relate to the same circumstances, is not authorized. Pen. Code, § 954.

17. Criminal law ⚷1166(6)

An error in the consolidation of separate informations against different defendants is not jurisdictional, but is one of procedure, and therefore, before it becomes a ground for reversal, it must appear that the consolidation has resulted in prejudice to some substantial rights of the accused. Pen.Code, § 954.

18. Criminal law ⚷1166(6)

The consolidation of informations charging robbery based on same circumstances did not operate to prejudice accused and therefore did not require reversal of conviction. Pen.Code, § 954.

19. Criminal law ⚷261(2)

Where court ordered consolidation of robbery informations against the defendant and another and on day of trial expressed opinion that in consummation of order of consolidation district attorney should file an amended consolidated information, which was done, and upon the filing of consolidated information the court stated that it was not necessary to arraign defendant again, and court proceeded with the trial without objection of defendant, the failure to re-arraign defendant did not render the trial illegal, since the consolidated information was simply a combination of the two separate informations filed against defendant and the other.

20. Criminal law ⚷261(2)

Order of consolidation of robbery informations against defendant and another was sufficient without the filing thereafter of an amended consolidated information, and therefore re-arraignment under consolidated information was unnecessary.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Guy Thomas was convicted of robbery, and he appeals.

Affirmed.

Raymond W. Shellooe, of Salinas, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The defendant, Guy Thomas, appeals from a conviction of robbery. He was accused jointly with Edward Perona and John Carston by a complaint filed in the justice's court with having robbed William L. Douthett. Perona and Carston were held to answer on October 11, 1940, and an information filed against them in the Superior Court. Thomas, having been arrested later, was held to answer on October 14, 1940, and a separate information filed against him wherein he was charged also with three prior convictions of felony. All pleaded not guilty to the charge of robbery, and Thomas admitted the prior convictions. Thereafter it was ordered that the informations be consolidated for trial; however, prior to the date of trial a lesser charge was placed against Carston, to which he pleaded guilty, and as to him the charge of robbery was dismissed. The trial of Thomas and Perona took place before a jury, and they were found guilty of robbery in the first degree. Each was sentenced to imprisonment in the state prison for the term provided by law; but it having been disclosed at the trial by the cross-examination of Perona that previously he had served a portion of a penitentiary sentence for robbery and was then on parole, it was ordered that his sentence run concurrently with the one imposed for the prior conviction. Both appealed, but Perona afterwards abandoned his appeal.

[1] In support of the appeal taken by Thomas it is contended that the evidence is legally insufficient to sustain the conviction. Admittedly, however, on vital points, the testimony is conflicting; and since the jury resolved all conflicts against appellant, its verdict is controlling on appeal. The facts of the case as they were established by the prosecution were as follows: Douthett was a travelling engineer for Aluminum Company of America, and had been in its employ for many years. He drove into Salinas in his car on the morning of October 10, 1940, and about four o'clock that afternoon visited the Subway Liquor Store, wherein, after having two drinks with friends, he picked up an acquaintanceship with Thomas, Perona and Carston, all of whom lived in or near Salinas. Thomas had been working at odd jobs in cafes in Salinas; and Carston was a floor worker in a lettuce plant. The kind of employment Perona followed does not appear. The three men had been drinking during the day, and after Douthett joined them in the liquor store he bought four rounds of drinks. About six o'clock Carston suggested taking a ride out to "Eddie's place"; and Douthett, believing it was some sort of a road house, consented to go. It was then growing dark, and taking a bottle of liquor along with them they drove away in Douthett's car, a four-door sedan which he had parked nearby. Thomas did the driving, and he drove them to Fort Ord, where he left the others for a while to visit a friend; and then all started back toward Salinas, Thomas again doing the driving. Douthett sat beside him, and Perona and Carston occupied the back seat. It was then about eight o'clock and quite dark. Instead of continuing along the main highway to Salinas Thomas turned off on a by-road, and after travelling some distance pulled up along side of the road and stopped. It was there, according to the prosecution's evidence, that the robbery took place. In this regard Douthett testified that instantly after the car stopped he was struck on the head with a blunt instrument by one of the men on the back seat. He exclaimed, "For God's sake, what is going on here—if there is anything you want to have you don't have to go about it that way". He started to get out of the car, but Thomas grabbed him and he was struck a second blow on the head by someone behind him. Although wounded and bleeding, he succeeded in getting out of the car. Thomas and Perona followed, and approaching Douthett one of them said to him, "It is a stick-up and put up your hands"; whereupon they went through his pockets, taking therefrom a small amount of money, just how much Douthett was unable to state; and shortly afterwards Douthett discovered that the wallet he carried in his hip pocket was missing. After the two men rifled his pockets, they searched the back of his car. Perona then wiped the blood off Douthett's face and said to him, "You had better beat it, that fellow will kill you". Fearing further injury, Douthett started afoot down the road, and the three men drove away in his car. He continued down the road a short distance in a dazed condition from the effects of the blows on the head and fell in the ditch, lay there for a while, then got up and walked to a farm house and summoned the officers. He further testified that the voice of the man who ordered him to throw up his hands sounded like Thomas' voice; and when asked, "Are you able to testify positively now that Guy Thomas and Eddie Perona went through your pockets on the side of the road?" he answered, "Yes, I can testify to that".

Douthett's testimony as to the circumstances attending the robbery was corroborated by that of Carston, who was called as a witness for the prosecution. He testified that after starting on the ride they passed around the bottle they had with them, and that on the way back from Fort Ord Douthett and Perona became involved in an argument, during which mention was made of "two guns"; that about that time the car was stopped and Perona got out, and that Douthett started to get out but Thomas grabbed him and pulled him back; that someone said "hit him", and believing there was going to be a fight in which there might be some shooting, he, Carston, drew from his hip pocket a blackjack, made out of a short piece of rubber hose wrapped with friction tape at one end and an iron bolt inserted in the other, and struck Douthett over the head with it; that Douthett still tried to get out of the car, but Thomas held him back, and he, Carston, struck Douthett a second blow on the head with the blackjack; that blood started running down Douthett's face, and turning to Carston Douthett asked what had happened; that thereupon Douthett succeeded in getting out of the car, and Thomas followed; that Perona was already out of the car, and that he then saw Thomas and Perona go up to Douthett as he stood in the roadway, go through his pockets and thereupon search the trunk of his car, after which Perona said, "Come on, let's get out of here"; that Thomas and Perona then got back in the car, and leaving Douthett in the roadway they drove back to Salinas, parked the car near the liquor store, and shortly afterwards separated. Carston further testified that after leaving Douthett and before reaching Salinas Thomas again stopped the car, got out, and taking Douthett's valise from the tonneau of the car said he was going to make a telephone call; that he was gone about five minutes and returned without the valise; that afterwards when they got out of the car near the liquor store Thomas had Douthett's wallet in his hand, and started to throw it in the street, but at Perona's suggestion it was thrown on top of the building. Carston stated that he was carrying the blackjack for his own protection; that he had been threatened with violence by the divorced husband of a woman with whom he was keeping company.

[2] About 9:30 o'clock that night the officers located Douthett's abandoned car on the street, and early the next morning they found his wallet on top of the building where it had been thrown. Besides the valise and its contents consisting of Douthett's personal belongings, there was also missing from the car, according to Douthett, an envelope containing $160 in currency which he claimed he carried in his overcoat, in the car, for expense money on his trips. In view of the testimony so given by Douthett and Carston, and the corroborative facts above mentioned, it would seem that no discussion is required to demonstrate that the verdict of the jury is not without evidentiary support.

Thomas' version of the affair was that on the way back from Fort Ord Douthett became quarrelsome and wanted to fight with Perona; that he, Thomas, tried to pacify the two of them, but was unable to do so; that finally at Douthett's request he stopped the car and Perona got out, presumably to fight; that Douthett started to get out too, saying something about having two guns he would use if he was unable to whip Perona with his fists; that fearing someone might get shot he tried to prevent Douthett from getting out of the car, and that without any suggestion from any one Carston struck Douthett over the head twice, cutting his head, after which Douthett succeeded in getting out of the car. Continuing, he stated that in order to prevent further violence he got out too, and told Douthett to get in the car and behave himself, but that Douthett refused to get back in the car, whereupon he, Thomas, searched the trunk of the car to find out whether Douthett carried any guns; but none was found. Meanwhile, so Thomas testified, Douthett disappeared down the road; that they spent a few minutes trying to locate him and that he then told Perona to get back in the car and they would drive it back to Salinas and leave it where they found it; that as he got out of the car near the liquor store he picked up Douthett's wallet from on the seat of the car and started to throw it in the street, but at Perona's suggestion it was thrown on top of the liquor store. He denied having told Douthett that it was a "stick-up" or to throw up his hands, or having at any time gone through Douthett's pockets or taken anything from his person or his car.

Perona's story was somewhat different. He stated that when the car stopped on the way back from Fort Ord he got out to urinate; that he observed there was a disturbance in the car, and he heard a blow struck; that he then heard Douthett say, "Don't do that", and instantly a second blow was struck; that Douthett then got out of the car and that he, Perona, wiped the blood from Douthett's face, and said to the men in the car, "Don't hit him any more"; that he asked Douthett if he wanted to be taken to a hospital, but he replied he did not, adding, "just forget everything"; that he then said to Douthett, "For God's sake, get out of here, you may get hurt", and Douthett "took off" down the road. In the meantime, so he stated, Thomas had gotten out of the car and searched the trunk, and after doing so they drove back to Salinas. He denied having gone through Douthett's pockets or having taken anything whatever from him or his car.

[3-5] It is apparent that at best the testimony so given by Thomas and Perona does no more than create a conflict with that given by Douthett and Carston; therefore, under well settled rules, the conclusion reached by the jury upon the issue of whether there was a robbery is conclusive on appeal. It is true that at the time this happened Carston and Perona were very much intoxicated; that Thomas was more or less under the influence of liquor, and that Douthett had been indulging quite freely. But the record shows that although Douthett was subjected to a

rigid and thorough cross-examination, first by counsel for Thomas and then by counsel for Perona, his recollection as to what occurred that afternoon and evening was neither vague nor uncertain; nor was anything disclosed thereby which would justify this court in holding as a matter of law that his story of the robbery was inherently improbable. Obviously the jury, as evidenced by its verdict, was convinced of the truth of his testimony, and since it is the sole judge of the credibility of the witnesses and the weight to be given to their testimony its determination of the disputed issue of fact is controlling.

[6-9] It was alleged in the information that by means of force and fear the defendants took from Douthett "lawful current money of the United States, a leather wallet, a valise", and his automobile; and appellant argues that the evidence fails to show any intent to steal the automobile or that he took any of the other property mentioned. However, robbery does not depend upon the value of the property taken. The other elements being present, the crime is made out even though the property taken be of slight value (22 Cal.Jur. 841; People v. Walbridge, 123 Cal. 273, 55 P. 902; People v. Razo, 43 Cal.App. 251, 184 P. 881); and in the present case the evidence was such as to justify the conclusion that in any event Douthett was robbed of the small amount of money he had in his pocket, his wallet, and his valise; that being so, a case of robbery was established. Proof of motive or conspiracy to commit the robbery was not essential to a conviction, for neither deliberation nor premeditation is made an element of the crime. People v. De Fehr, 81 Cal.App. 562, 254 P. 588.

[10-15] Appellant assigns as error the trial court's ruling denying his motion to set aside the information upon the ground that he had not been legally committed by a magistrate. So far as the record shows, no evidence was introduced by appellant to establish the facts upon which he based the motion; and it is held that in the absence of supporting evidence it is not error to deny such a motion. People v. Hinshaw, 194 Cal. 1, 227 P. 156; People v. Williams, 84 Cal. 616, 24 P. 145. However, when the motion was made the district attorney in opposing the same in effect conceded the existence of the facts relied on by appellant, which, briefly stated, were these: At the time appellant's preliminary examination was held on October 14, 1940, the complaint theretofore filed before the magistrate accusing the three men jointly of robbery and upon which the warrants of arrest issued was on file in the office of the county clerk; for that reason the order of commitment made by the magistrate holding appellant to answer was attached to a true copy of the complaint, rather than being endorsed on the original; and thereupon said documents were filed with the county clerk. This procedure was followed because the order made by the magistrate on October 11, 1940, holding Perona and Carston to answer had been endorsed on the original complaint in accordance with the provisions of section 872 of the Penal Code, and the complaint then forwarded to the county clerk for filing. Appellant was at all times represented by counsel, and no objection was made against proceeding with the examination without having the original complaint in court; the testimony was reported, afterwards transcribed and filed; the order committing appellant for trial as filed with the county clerk was valid in form, and the offense charged in the information was the same offense for which he had been committed for trial and as shown by the reporter's transcript. In that state of the record the trial court was justified in denying appellant's motion to set aside the information. As held in the following cases, an information is not based on the complaint filed with the magistrate, but upon the order of commitment made by him (People v. Gregory, 8 Cal.App. 738, 97 P. 912; People v. Lee Look, 143 Cal. 216, 76 P. 1028; People v. Hinshaw, supra); and the fact that the order is not endorsed on the complaint itself does not serve as ground for setting aside the information. People v. Tarbox, 115 Cal. 57, 46 P. 896. Nor are we able to agree with appellant's contention that the magistrate lost jurisdiction to hold the examination when the original complaint was forwarded to and filed with the county clerk. If no complaint at all has been filed before the magistrate, he is doubtless without jurisdiction to proceed; but where as here a legal complaint has been duly and regularly filed charging a public offense, and the magistrate hears the evidence, holds the defendant to answer for trial, and a valid commitment is issued, the accused is "legally committed by a magistrate" within the meaning of section 995 of the Penal Code. People v. Dal Porto, 17 Cal. App.2d 755, at page 765, 62 P.2d 1061, 63

P.2d 1199; People v. Malowitz, 133 Cal. App. 250, 24 P.2d 177, 180. The most that could be said here is that there was an irregularity in conducting the examination; and as stated in People v. Malowitz, supra, "In each of the cases of People v. Van Horn, 119 Cal. [323] 333, 51 P. 538, and In re Mazuran, 57 Cal.App. 411, 207 P. 509, the principle of law is clearly announced that any irregularity in conducting the preliminary examination of a defendant which does not affect his substantial rights in the premises furnishes no ground for setting aside an information * * *." In the present case it is apparent that the absence of the original complaint at the time the examination was held did not affect any of appellant's substantial rights.

[16-18] Appellant contends that the provisions of section 954 of the Penal Code do not authorize the consolidation of separate informations against different defendants, even though the charges therein relate to the same circumstances, citing People v. Foward, 134 Cal.App. 723, 26 P.2d 532, and People v. O'Connor, 81 Cal. App. 506, 254 P. 630. Conceding that to be true, it has been definitely held in more recent cases that an error committed in this regard is not jurisdictional; that it is one of procedure, and that therefore before it becomes ground for reversal it must appear that the consolidation has resulted in prejudice to some substantial right of the accused. People v. Aguinaldo, 3 Cal. App.2d 254, 39 P.2d 505; People v. Shepherd, 14 Cal.App.2d 513, 58 P.2d 970. Here appellant makes no attempt whatever to point out wherein the consolidation of the informations operated to his prejudice, nor in reviewing the record on appeal has any reason been found which would justify such conclusion; furthermore, the factual situation here is the same as the one presented in the Aguinaldo case; therefore the decision in that case sustaining the conviction is directly in point.

[19, 20] On the day of trial the court expressed the opinion that in consummation of the order of consolidation the district attorney should file an amended consolidated information, and this was done. These proceedings took place after the jury had been selected but before it was sworn; and upon the filing of the consolidated information the court stated: "... I take it, it is not necessary to ... arraign them again ..."; thereupon, and without objection on the part of appellant the court proceeded with the trial. Appellant now contends that because he was not rearraigned the trial was illegal. We disagree with this contention. The consolidated information was simply a combination of the two separate informations theretofore filed against appellant and Perona. The charge of robbery made therein was in language identical with that set forth in the separate informations; and the allegations of the prior convictions were exactly the same as those made in the separate informations filed against appellant. Upon those separate informations appellant and Perona had been duly arraigned and entered their pleas of not guilty, and at that time appellant admitted the prior convictions; and that appellant acquiesced to the view expressed by the court that the arraignment of the defendants under the separate informations was legally sufficient for all purposes of the trial is demonstrated by the fact that no objection was made in his behalf against proceeding with the trial. Furthermore, the record shows that the trial proceeded upon that understanding because, in conformity with statutory requirement, the clerk of the court stated to the jury after it had been sworn that the defendants had entered pleas of not guilty to the charge of robbery; and the district attorney made no effort whatever to introduce any evidence as to the prior convictions; nor did he allude thereto, in any manner, until the defendant took the witness stand in his own defense, and thereby opened the way for the district attorney to ask appellant on cross-examination whether he had been previously convicted of a felony. Moreover, it is our conclusion that in any event the order of consolidation was sufficient without the filing thereafter of an amended consolidated information, and that therefore re-arraignment under the consolidated information would have amounted to nothing more than an idle act.

It appearing, therefore, that none of the assignments of error constitute grounds for reversal, the judgment of conviction and the order denying the motion for new trial are affirmed.

We concur: PETERS, P. J.; WARD, J.

45 Cal.App.2d 154

GILCHRIST v. HARRAH et al.

Civ. 12462.

District Court of Appeal, Second District, Division 1, California.

June 3, 1941.

Hearing Denied July 30, 1941.

1. Appeal and error ⚿110

On appeal from judgment and order denying motion for new trial, District Court of Appeal will consider merits of appeal from judgment only, as such order is not appealable. Code Civ.Proc. § 963.

2. Contracts ⚿126

While counsel may properly be employed to present reasons in favor of any public measure to body authorized to pass thereon or any of such body's committees empowered to collect facts and hear arguments, and parties interested may lawfully contract to pay for such service, it is improper to approach members of such body secretly with view to influence their action at time and in manner not allowing presentation of opposite views, and contract to pay attorney for such irregular and improper service will not be enforced.

3. Contracts ⚿141(3)

In attorney's action against client to recover compensation for services rendered under contract to secure postponement of action by county board of supervisors on proposed resolution initiating proceedings for county's acquisition of real property securing bonds owned by client, evidence *held* to support trial court's finding that such contract was valid and enforceable and not null and void or contrary to public policy as calling for exercise of undue influence over supervisors by attorney.

4. Contracts ⚿141(3)

Before relieving party to contract of responsibility thereunder on ground presented by him that consideration was against public policy and hence void, courts will require convincing proof of facts warranting such action.

5. Contracts ⚿141(3)

Before party will be permitted to escape payment of debt incurred by him for services rendered under contract by bringing invalidity thereof to public notice, a compelling reason must appear.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by J. Q. Gilchrist against John Harrah and William Harrah to recover compensation for services rendered by plaintiff as an attorney. Judgment for plaintiff against defendant William Harrah, who appeals.

Affirmed.

Harold B. Pool, of Los Angeles, for appellant.

J. Q. Gilchrist, of Los Angeles, in pro. per., for respondent.

DESMOND, Justice pro tem.

[1] Here plaintiff, an attorney, obtained a judgment against William Harrah in the sum of $1,000 for professional services rendered. From this judgment the defendant appeals, as well as from the order of the court denying his motion for a new trial. Such an order is not appealable (§ 963, Code Civ.Proc.), and we shall consider, therefore, the merits of the appeal from the judgment.

It is claimed that the contract of employment under which legal services were rendered by the plaintiff was invalid as against public policy, being predicated on plaintiff's agreement to see certain of the supervisors of Los Angeles county privately and to use his influence to secure postponement of action by the board of supervisors upon a proposed resolution initiating proceedings for acquisition by the county of certain real estate. Appellant was interested, as the owner of bonds secured by this real property. The resolution of intention was scheduled to come before the board of supervisors for action at a public hearing noticed for Tuesday, November 14, 1937. On the preceding Friday, November 10th, John Harrah, father of appellant, was introduced to the respondent; and at this meeting arrangements were made for respondent's employment.

According to the testimony, respondent considered that the advisable course, in view of the imminence of early action upon the resolution of intention, would be to secure a postponement of the public hearing, that on the following Monday, he saw one of the county supervisors at his office in the Hall of Records, and in a conversation with him was told "that the board of supervisors did not intend to take final action on the following day but that it would be continued". Respondent interviewed another supervisor at the latter's office on the following Monday and attended the public meeting of the board next day, at which time he learned that once more the proposed resolution would be continued. In the following week respondent interviewed a third supervisor at his office in the Hall of Records and when the matter came before the board for action on the following day he and many other persons addressed the board concerning the proposed purchase and once again the matter was continued.

[2] Respondent testified that at the meeting of November 10th, John Harrah stated to him that his son, William Harrah, was owner of the bonds and he wanted the respondent "to go ahead and either stop the sale of the Abbott Kinney property to the county or postpone the same until such time as better arrangements could be made with the people who wanted the bonds". It is claimed by appellant that respondent did in fact accomplish just what he was hired to do, but that he should not be paid for his services because of the rule laid down by Cooley in his treatise on constitutional limitations, at page 163—"While counsel may be properly employed to present the reasons in favor of any public measure to the body authorized to pass upon it, or to any of its committees empowered to collect facts and hear arguments, and parties interested may lawfully contract to pay for this service, yet to secretly approach the members of such a body with a view to influence their action at a time and in a manner that do not allow the presentation of opposite views is improper and unfair to the opposing interest; and a contract to pay for this irregular and improper service would not be enforced by the law."

[3] Appellant relies strongly upon Colusa County v. Welch, 122 Cal. 428, 55 P. 243; respondent upon Foltz v. Cogswell, 86 Cal. 542, 25 P. 60, (where pertinent language appears at pages 549, 550 of 86 Cal., at page 62 of 25 P.). In the Colusa County case the agreement was "to secure by means of personal solicitation, and by means of private interview with members of the legislature of California, and by means of lobbying, the defeat of said senate bill". [122 Cal. 428, 55 P. 245.] In that case all the activity of the attorney was to be performed privately, while in the instant case there was in contemplation of the parties not only the seeking of an injunction, as a last resort, if a continuance were refused, but a public hearing at which the respondent actually appeared. At that hearing both parties for and against the project had an opportunity to present their views and as we have noted, respondent and many other people then addressed the board. After this public hearing the matter was called once more, again continued and, so far as the record shows, was never revived. Neither is there anything in the record to indicate that respondent interviewed any of the supervisors after the public hearing. It may be noted here that during respondent's interview with the three supervisors whom he consulted a secretary was present throughout one conversation and a deputy from the office of the county counsel at another; that during the various conversations other persons were in and out of the office. Quoting from the transcript: "Mr. Gilchrist further testified that he knew that a so-called 'Davis Group' wanted to have the proposed sale consummated by the Board of Supervisors; that on his first visit to the office of Supervisor Jessup, Tom Davis, one of said group, entered the reception room and said to him, 'I see you are going to cause us some trouble'; that on an occasion when he visited the reception room of Supervisor Ford, another member of said group was present, Phil Davis; that said Phil Davis informed him that he (Phil Davis) was there to see Supervisor Ford relative to said proposed purchase; that so far as he was concerned any of the members of said group could have been present at any of the conversations and that, on the two occasions mentioned, they had knowledge of said conversations."

Appellant does not contend that the supervisors decided to abandon the proposed condemnation by reason of a malign influence exerted upon them by respondent. His objection goes to the character of the contract under which respondent was engaged. That contract he claims was void in that it called for employment by respondent of underhand methods proscribed by Professor Cooley and long recognized by the courts as a ground of invalidity.

It was shown, as we have indicated, that respondent on several occasions interviewed members of the board of supervisors, but looking to the contract nothing appears to indicate that such interviews were to provide opportunities for the exercise of improper influence. While respondent had some acquaintance with two of the supervisors, and thought that he could secure postponement, for at least a short time, we have found no record in the transcript that respondent agreed to see the supervisors secretly and the history of what transpired failed to convince the trial judge that there was in these meetings at the public offices of the supervisors any such secret approach as is denounced by Cooley.

Appellant feels that the contract of employment was improper because it called for the exercise of undue influence on respondent's part in securing a postponement. In this connection John Harrah testified that respondent stated at their first meeting "that he thought he could have influence enough to get them to hold it over for a while, or perhaps that the sale could be prevented. * * * he mentioned the matter of an injunction, if they would not listen to him on just holding it over, * * * I said that there wasn't any ground for an injunction. Of course, it might be used in some manner to perhaps hold it over a little bit. * * * He was going to call on them (three supervisors) and explain that he represented a bondholder, and that there had been some misrepresentations made by the people who were endeavoring to buy these bonds, and he had just been retained, and he wanted time to investigate the thing, and would like to have them lay it over for 30 days. He said that was the idea of what he was going to ask for. * * * He mentioned those three supervisors that he said he knew, and he was going to call them up and make appointments and go and see them. That is the way he expressed—going to call their offices". On cross-examination this witness was asked the question, "Then you did not employ the plaintiff on any representation that he had sufficient influence with the Board of Supervisors to get them to do what you wanted done?", and answered, "Arbitrarily, no". The next question asked by plaintiff in his own behalf: "What do you mean by 'arbitrarily, no'?", brought the answer, "Well, I mean on any positive representation that he could go and tell the Board of Supervisors to postpone the sale, and on your instructions they would postpone the sale." On this point respondent testified that he *"did not tell* John Harrah he was influential with any of the supervisors or that he could accomplish any of the desired results through personal or any other kind of influence; that he did tell John Harrah that he was acquainted with one or two of the supervisors, and that he was sure, when all of facts had been placed before the supervisors, they would at least postpone the proposed purchase for further investigation and in his (Mr. Gilchrist's) opinion, would refuse to consummate the sale entirely after such investigation. * * * *that there was no conversation* between William Harrah and Mr. Gilchrist *relative to the use of any influence,* and that Mr. Gilchrist stated that he thought he could secure a postponement of the proposed sale and would endeavor to see the supervisors for the purpose of placing all the facts before them; that the matter of securing an injunction or restraining order against the Board of Supervisors was discussed; that *Mr. Gilchrist did not tell him he could secure such postponement by the use of any influence with the board."* (Italics supplied.)

The following excerpt from respondent's deposition, taken before the trial, is cited by appellant as contradicting respondent's testimony on the trial:

"Q. Did you tell him how you were going to have the sale continued? A. I didn't tell him how, other than that I would get in contact with a sufficient number of supervisors and get the continuance.

"Q. Didn't tell him how you were going to have it done? A. That was the only thing to do—get in touch with the supervisors.

"Q. What were your intentions? A. By getting in touch with a sufficient number of supervisors and having it continued.

"Q. How did you intend to go about it? A. Well, partially from the merits of the whole situation and partially from personal influence.

"Q. What do you mean, personal influence? A. Well, friendship.

"Q. How many of them did you know? A. I knew two of them and I knew that I could be introduced to a third one.

"Q. How did you intend to use this influence and friendship? A. By requesting them to put it over.

"Q. Any other manner? A. No other manner. That is the only manner I know.

"Q. What did you tell Mr. Harrah? A. I told Mr. Harrah that I knew a couple of the supervisors and that I thought I could prevail upon them to put the matter over.

"Q. Was Buron Fitts' name mentioned? A. I don't know whether it was or not. It may have been.

"Q. What were the words you used? Did you tell Mr. Harrah that you would prevail upon the supervisors or did you say you didn't ask them anything, you told them what to do? A. So far as I recall, I told him I was pretty well satisfied that I thought I could put it over, and if he wanted it killed, I thought I could have it killed.

"Q. Did you tell him how you were going to have it killed? A. I don't think I did.

"Q. What means or method did you have in mind? A. The whole matter appeared to be such a steal that on the merits alone I thought I could kill it.

"Q. Without your friendship? A. No, I thought I would have to use my friendship to get a hearing and present the facts to them.

"Q. What did you tell Mr. Harrah? A. I told him that I was satisfied I could continue it and if he wanted the sale stopped, I could stop it."

Although it does appear from this excerpt that respondent felt he could secure a postponement partially through his "personal influence" with certain of the supervisors, he defined the term merely as "friendship" and said that through the use of "friendship" he expected to get a hearing and present the facts to the supervisors. Whether he meant a private or public hearing does not appear, but as we have noted, the record indicates that a public hearing was held which, in connection with the subject of the contract, must have been in contemplation of the parties. In this excerpt there is no statement that respondent told John Harrah that he had or intended to use any personal influence or friendship with any of the supervisors. Those expressions were used by respondent under interrogation as describing what was going on in his own mind, his plan of action, not as repeating what he told the other party to the conversation. It is apparent that the trial judge concluded that there was no actual contradiction, in the deposition, of respondent's testimony on the stand and that he would be justified in rejecting John Harrah's testimony that respondent *told him* "that he thought he could have influence enough to get them to hold it over for a while".

From all the testimony produced at the trial the court found "that the contract of service, as heretofore set forth, wherein plaintiff was employed to act as attorney for the defendant William Harrah, was a valid and enforceable contract and was not null or void or contrary to public policy".

We apprehend that the trial judge was satisfied that the interviews at the supervisors' offices were not secret; that they directed toward continuance of a matter to be decided on its merits, at a public hearing, where every interested party would have an opportunity to be heard, which hearing was held; that an agreement, which contemplated the obtaining of such a continuance, is not vitiated merely because the attorney who is engaged at the last minute depends in some measure upon receiving at the hands of five supervisors, of whom two are friendly to him, a continuance that very likely would have been granted to any reputable attorney representing an interested party; in other words, that there is nothing in such an arrangement which calls for the exercise of undue influence.

[4, 5] In conclusion we may say that the courts, before they will relieve a party to a contract of responsibility thereunder, on the claim, presented by such party, that the consideration was against public policy and therefore void, properly will require convincing proof that facts exist which warrant such action. This is so because if the Cooley rule is enforced it is, indeed, for the public good, but the immediate and incidental beneficiary is one who deserves no special consideration from the court. Having entered into a contract with full knowledge of its provisions, it may be assumed that any invalidity which he thinks he discovers after the work has been performed is brought to public notice not for the public interest but solely for his own advantage. Before a man will be permitted through such action to escape payment of a debt which he has incurred for services rendered a compelling reason

must appear. The trial judge in this case found no such reason and upon a review of the testimony and cases cited, neither do we.

Judgment affirmed.

We concur: DORAN, Acting P. J.; WHITE, J.

45 Cal.App.2d 5

NOCE v. DEPARTMENT OF FINANCE et al.

SLATER v. MOORE et al.

Civ. 6489, 6494.

District Court of Appeal, Third District, California.

May 22, 1941.

Hearing Denied July 17, 1941.

1. Officers 🔑26(1)

The statute respecting the right of permanent civil service employees to be given the position of operating displacing or supplementing machinery used for certain purposes, including printing, by state agencies could not be construed to authorize the appointment or transfer of one who had acquired the status of a permanent pressman in classification of "Platen Pressmen" in the state bureau of printing to the classification of lithographic offset pressman without competitive examination as required by Constitution. Gen.Laws 1937, Act 1404, §§ 114, 157; § 144, as amended by St.1939, p. 2508; Const. art. 24, §§ 1, 2(c), 5(c).

2. Constitutional law 🔑48

When there is a clear conflict between a constitutional provision and a statute, the former must prevail, but every intendment is in favor of validity of a statute and it should not be held to be void unless it is clearly repugnant to the Constitution.

3. Officers 🔑26(1)

The section of the Civil Service Act respecting the right of permanent civil service employees to be given the position of operating displacing or supplementing machinery used for certain purposes, including printing, by state agencies has no application to a transfer from one classification to another and the section cannot apply to the training of an employee so that he may automatically be transferred from one classification to another requiring different training, qualifications and duties without competitive examination. Gen.Laws 1937, Act 1404, §§ 114, 157; § 144, as amended by St.1939, p. 2508; Const. art. 24.

4. Officers 🔑26(1)

Ordinarily, a civil service employee may not be transferred from one distinct classification to another without competitive examination, the only exception to such rule being when the duties, qualifications, responsibilities and salaries of the different classifications are substantially the same. Gen. Laws 1937, Act 1404, § 114; § 144, as amended by St.1939, p. 2508.

5. Officers 🔑26(1)

The Civil Service Act prohibits the transfer of a civil service employee from one class in which he has attained permanent status to another distinct and duly adopted class involving substantially different qualifications and duties, except upon merit, efficiency and fitness as ascertained by competitive examination. Gen.Laws 1937, Act 1404, §§ 114, 157; § 144, as amended by St.1939, p. 2508; Const. art. 24, § 1.

6. Mandamus 🔑187(9)

In proceedings respecting the right of one who had acquired the status of a permanent pressman in classification of "Platen Pressmen" in state bureau of printing to a writ of mandamus compelling officers of the personnel board and department of finance to permit such person to qualify himself to hold office and perform services required of a lithographic offset pressman without taking a competitive examination, District Court of Appeal could not determine as a matter of law that duties, responsibilities and qualifications required of a platen pressman were substantially the same as those required of a lithograph offset pressman. Gen. Laws 1937, Act 1404, § 157; Const. art. 24.

7. Appeal and error 🔑1122(2)

An appellant is not prejudiced by a failure to adopt findings which, in support of judgment, would necessarily be adverse to him.

8. Appeal and error 🔑1122(2)
Mandamus 🔑187(10)

Where judgments appealed from in mandamus and injunction proceedings were to be

affirmed, District Court of Appeal could adopt additional findings of fact, in support of judgments, upon undisputed evidence. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Proceedings, consolidated for trial, by Andrew H. Noce against the Department of Finance of the state of California and others for a writ of mandamus and by F. P. Slater, etc., against George H. Moore, etc., and others for an injunction. From unsatisfactory judgments, Andrew H. Noce and George H. Moore, etc., and others appeal.

Judgments affirmed.

Hearing denied; GIBSON, C. J., not participating.

Albert Sheets and A. J. Kennedy, both of Sacramento, for appellant Noce.

Earl Warren, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for appellants Moore, and others.

Earl Warren, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondent Department of Finance.

Robert A. Zarick, and Thos. O'Hara, both of Sacramento, for respondent Slater, etc.

PER CURIAM.

The above-entitled actions were consolidated for trial. The Noce case is a petition for a writ of mandamus by an employee in the bureau of printing of the state of California, who has acquired the status of a permanent pressman in the classification of "Platen Pressmen". His application for the writ is made under the provisions of Section 157 of the Civil Service Act (Stats. 1937, p. 2085, 1 Deering's Gen.Laws of 1937, p. 742, Act 1404), to require the officers of the Personnel Board and the Department of Finance to permit him to qualify himself to hold the office and perform the services required of a separate classification in operating a Harris Offset Press, and to pay his wages during the period of training, in the sum of $99. The Slater case is an application by the President of the Amalgamated Lithographers of America to enjoin the same state officers from assigning to Mr. Noce a position with civil service status in a different classification of occupations from that which he holds, without first ascertaining his qualifications and fitness by competitive examination, as required by Article XXIV of the Constitution, and from paying to him the wages he claims during the period of his training. Findings were adopted and separate judgments were rendered against Mr. Noce in the two proceedings. The writ of mandate was denied in the Noce case, and the injunction was directed to issue as prayed for in the Slater proceeding. The trial court held that Section 157 of the Civil Service Act is in conflict with the spirit of Article XXIV of the Constitution and therefore void. From those judgments these appeals were perfected. Both cases are founded on the construction and application of Section 157 of the Civil Service Act. Upon stipulation the appeals are presented on one transcript of evidence. There is substantially no dispute regarding the facts of these cases. Both appeals will be determined by our conclusions in the application of Andrew H. Noce for a writ of mandamus.

Mr. Noce has been employed in the State Printing Bureau since February, 1930, as a permanent civil service pressman engaged in operating platen, vertical, high-speed or cylinder presses, commonly known as "flatbed" or "letter presses", as distinguished from lithographic offset presses. The position which he occupies was classified by the Personnel Board as "Platen Pressmen". The qualifications and duties of a platen pressman were prescribed by the board. From time to time, since 1935, several lithographic offset presses have been installed and used in the printing bureau. These lithographic machines have gradually superseded, to a considerable extent, the older type of cylinder presses. Both are designed to accomplish the same purpose, namely, the production of printed matter. The lithographic presses perform the work much more rapidly than the cylinder machines. It is conceded the methods of operating the two machines, and the qualifications and training required to do so, are essentially different; that the operator of a platen press is not qualified to handle a lithograph offset machine without additional special training and experience. The Personnel Board classified the position of operating the new machines as "Lithographic Offset Pressmen". The board also prescribed the qualifications and duties of the last-mentioned employees. Among the requirements qualifying operators of either of these types of machines under civil service is that they should have served at least two years as journeymen thereon. The maximum salary fixed by the board is slightly higher as a lithographic press operator. Transfers from one classification to the other without competitive examinations have not been made because of the essential differences in the character of the machines and the skill and training necessary to operate them. In March, 1939, at the request of the petitioner, Noce, the superintendent of the State Printing Bureau directed that he be given instructions for the operating of lithographic presses pursuant to the provisions of Section 157 of the Civil Service Act with the purpose of qualifying him and to automatically transfer him to that class of work. Mr. Noce began that course of training. Mr. Slater then commenced the action for injunction. Both suits were filed about the same time, and they were consolidated for trial. Both proceedings were determined against the petitioner Noce as we have previously stated.

[1] We are persuaded Section 157 of the Civil Service Act may not be construed, under the circumstances of these cases, to authorize the appointment or transfer of the petitioner Noce from his classification as platen pressman to that of lithographic offset pressman without the competitive examination required byArticle XXIV of the Constitution. Section 157 of the Civil Service Act provides:

"Whenever any machine used by any department, board, division, institution, commission, elective office or other State agency for the purpose of printing, offset printing, manufacture, maintenance, construction or office work is replaced, supplemented, or partially replaced or partially supplemented by new and/or different and/or additional machines and the purpose or product of such displacing or supplementing machine is for printing, off-set printing, maintenance, construction or office work or the purpose or product is of same, similar or analogous nature or a similar or an analogous result is accomplished by such displacing or supplementing machine the permanent civil service employee or employees operating such displaced or supplemented machine and who have operated the same for a period of four years must be given the position of operating said new or different or additional machine if such person or persons is then able to operate said machine without prior instruction. In the event that such person or persons is not able to operate said displacing or supplementing machine without prior instruction, each such person or persons must be given the continuous opportunity for a period of three months to learn to operate said displacing or supplementing machine; that during said period of three months such person or persons shall be paid wages or salary at the same rate as paid to such person or persons for the operation of said displaced or supplemented machine during a period of one year immediately prior to such displacement or supplement.

"If, upon the expiration of said period of three months, or at any sooner time, said employee or employees believes he can operate said machine he shall continue to operate said machine, retaining the same position and seniority as he possessed in the operation of the displaced or supplemented machine, and such employee or employees can only be removed from said position as provided by section 173; at all times the position of such employee or employees shall permit him to operate either the displaced or supplemented machine or the displacing or supplementing machine."

[2-4] We are not disposed to hold that Section 157 of the Civil Service Act is unconstitutional and void. It is true that when there is a clear conflict between a constitutional provision and a statute the former must prevail. Southern Cal. Tel. Co. v. County of Los Angeles, 212 Cal. 121, 125, 298 P. 9; 5 Cal.Jur. 569, sec. 16. Every intendment, however, is in favor of the validity of a statute, and it should not be held to be void unless it is clearly repugnant to the constitution. Bourland v. Hildreth, 26 Cal. 161; In re Miller, 162 Cal. 687, 124 P. 427; 5 Cal.Jur. 611, secs. 43-45. It is unnecessary for us to hold that section 157, supra, is unconstitutional and void, for we are of the opinion its provisions have no application to a transfer from one classification to another. Ordinarily a civil service employee may not be transferred from one distinct classification to another without competitive examination. Sec. 114, Civil Service Act; Pinion v. State Personnel Board, 29 Cal. App.2d 314, 319, 84 P.2d 185. The only exception to that rule is when the duties, qualifications, responsibilities and salaries of the different classifications are substantially the same. Sec. 144, Civil Service Act, as amended by St.1939, p. 2508. We therefore refrain from holding that Section 157 is unconstitutional. It may be true that it was intended to apply to the training of a

civil service employee having four years of experience in operating machinery in his particular classification of work, when modern machines have replaced the older types, so that he might retain his civil service status in that same classification, and not lose his position. But it certainly cannot apply to the training of an employee so that he may automatically be transferred from one classification to another, which requires different training, qualifications and duties without examination. That would be in direct conflict with the clear language and the very spirit of Article XXIV of the Constitution. That would result in giving an employee an entirely new and different job for which he is not qualified, without competitive examination. That application of the statute would exclude from competition for appointment or transfer to the other classes of work requiring different qualifications men who might have had years of experience in operating the new machines, and who are much better qualified to fill the positions. That is the exact result the constitution sought to prevent. The challenged section appears to deprive the appointing power of the right to determine whether the employee is qualified to operate the new machines, for it declares that "If, upon the expiration of said period of three months, or at any sooner time, said employee or employees believes he can operate said machine he shall continue to operate said machine, retaining the same position and seniority as he possessed in the operation of the displaced or supplemented machine." Article XXIV, Section 1, of the Constitution provides that: "Permanent appointments and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination."

Originally the Civil Service Commission was vested with the exclusive authority to classify positions. Stats.1913, pp. 1035, 1036, sec. 5, 1 Deering's Gen.Laws of 1931, pp. 621, 624, Act 1400. The State Personnel Board now possesses that exclusive province. Art. XXIV, sec. 5(c) Const., Stats.1935, pp. lxxxvi, lxxxviii, adopted Nov. 6, 1934. That section provides that: "The rules, regulations, classes and grades of positions heretofore lawfully adopted * * * are continued in force and upon the effective date hereof the same shall become the rules, regulations, classes and grades of positions of the board herein created subject to change by said board in the exercise of its powers herein conferred or as may be hereafter provided by law."

Section 2(c) of article XXIV of the Constitution specifically excepts from the authority conferred upon the executive officer of the board the right to determine the classifications and grades of officers, which remains the exclusive province of the Personnel Board. It reads:

"The board shall appoint and fix the compensation of an executive officer who shall be a member of the State civil service but not a member of the board.

"Said executive officer shall perform and discharge all of the powers, duties, purposes, functions and jurisdiction hereunder or which hereafter by law may be vested in the board except that the adoption of rules and regulations, the creation and adjustment of classifications and grades * * * shall be and remain the duty of the board."

Pursuant to that exclusive authority which is vested in the personnel board, it fixed and determined the classification and duties of "lithograph off-set pressmen" as distinguished from "platen pressmen", to which latter class the petitioner, Noce, belongs.

[5] The Civil Service Act appears to prohibit the transfer of a civil service employee from one class in which he has attained permanent status to another distinct and duly-adopted class involving substantially different qualifications and duties, except "upon merit, efficiency and fitness as ascertained by competitive examination". Const. art. 24, § 1. Section 114 of the Civil Service Act provides that: "No person shall be appointed under a class not appropriate to the duties to be performed and no person shall be assigned to perform the duties of any other class than that to which his position is allocated."

Section 144 of the act (Stats.1939, Ch. 898, at p. 2508) provides for certain exceptions to the preceding section, which we assume do not apply to the circumstances of these cases. It reads in part:

"An appointing power may at any time transfer any employee under his jurisdiction from one position to another in the same class or in another class having substantially similar duties, responsibilities, and qualifications and substantially the same salary range. * * *

"A permanent employee may attain eligibility for transfer from a position in one class to a position in another class involving substantially the same level of responsibility and qualification and salary but requiring additional or different special requirements by demonstrating in an examination conducted by the board that he possesses such additional or other special requirements of the class to which the transfer is proposed."

[6] We assume that the section from which we have last quoted has no application to the circumstances of these cases for several reasons. We may not determine as a matter of law that the duties, responsibilities and qualifications required of a platen pressman are substantially the same as those required of a lithograph offset pressman. Evidently the board considered them radically different for it created separate classifications for the two positions. Indeed, it is conceded the qualifications are substantially different. Moreover, the petitioner Noce is not seeking a transfer under section 144 of the act. If he did, he would have to demonstrate his ability and qualifications to fill the position of lithograph offset pressman by an examination before the board. He asks to be automatically transferred under section 157 to that classification without examination, competitive or otherwise.

[7, 8] The appellants contend that unless we hold with the trial court that section 157 of the Civil Service Act is unconstitutional and void it is necessary to reverse the judgment for lack of findings to the effect that the positions of platen pressman and lithograph offset pressman do not require substantially the same qualifications and that the Harris offset presses which replaced the cylinder presses were intended to produce the same or similar work. We think not. It is apparent that if section 157 does not apply to transfers from one classification to another where the qualifications and duties of the employee are essentially different, then the omitted findings would necessarily be adverse to the petitioner Noce. It has been uniformly held that an appellant is not prejudiced by a failure to adopt findings which, in support of the judgment, would necessarily be adverse to him. Kramer v. Sanguinetti, 33 Cal.App.2d 303, 312, 91 P.2d 604. Out of precaution, however, under the authority of Article VI, Section 4¾ of the California Constitution, Section 956a of the Code of Civil Procedure, and Tupman v. Haberkern, 208 Cal. 256, 268, 280 P. 970, we shall adopt the following additional findings, applicable to both cases, upon what we deem to be substantially undisputed evidence: "Andrew H. Noce has been a permanent civil service employee in the State Printing Bureau of California since February, 1930, and is classified as a 'platen pressman'; for more than four years he has operated platen cylinder presses in that bureau; since 1935, some of those presses have been displaced by lithograph offset presses which accomplish substantially the same result of producing printed matter for which platen presses were used; the qualifications and training necessary to operate these different types of machines are essentially different and require additional training, skill, responsibilities and duties of the employees; the Personnel Board has formally separated the operators of these two types of machines in different classifications termed 'platen pressmen' and 'lithograph offset pressmen'."

For the foregoing reasons the judgments are affirmed.

STATE ATHLETIC COMMISSION et al. v. MASSACHUSETTS BONDING & INS. CO. *

Civ. 11415.

District Court of Appeal, First District, Division 1, California.

June 2, 1941.

Rehearing Granted July 2, 1941.

1. Theaters and shows ⇔3

The judgment on a bond given to State Athletic Commission by boxing promoter which, exclusive of interest, was in excess of judgment recovered against promoter, was erroneous. Civ.Code, § 2809.

2. Principal and surety ⇔66(2)

The obligation of surety must be neither larger in amount nor in other respects more burdensome than that of principal, and, if in its terms it exceeds it, it is reducible in proportion to principal obligation, and, where judgment has been entered against principal, greater amount may not be recovered from surety in subsequent action brought against him. Civ.Code, § 2809.

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* Subsequent opinion 117 P.2d 75.

3. Appeal and error 🔑176

A contention that judgment for $2,750 on bond given to State Athletic Commission by boxing promoter exceeded judgment against promoter was not abandoned in trial court, although surety's counsel agreed with trial court's statement that amount involved was too small to receive serious consideration, where pleadings admitted promoter's liability to have been established by judgment at only $2,630.32, and therefore there was no fact issue before trial court and evidence thereon was not only unnecessary but unavailing against admitted fact. Civ.Code, § 2809.

4. Principal and surety 🔑144

A surety company, sued on bond given to State Athletic Commission by boxing promoter to recover amount of judgment against promoter in favor of unpaid fighter and manager, was entitled to have applied, in reduction of its liability on bond, cash deposited with commission by promoter on night of fight for express purpose of paying fighters. Civ.Code, §§ 2845, 2849, 2850.

5. Principal and surety 🔑173

As between principal and surety, principal is primarily liable and the surety who is called on to pay the debt of his principal may seek reimbursement. Civ.Code, § 2845.

6. Garnishment 🔑32

Money deposited by a boxing promoter with the representative of the State Athletic Commission for express purpose of paying fighters for services on particular program, was trust money to be used for a specific purpose and hence was not subject to garnishment.

7. Principal and surety 🔑144

The rights of surety company, sued on bond given by boxing promoter to State Athletic Commission to recover amount of judgment against promoter for sum agreed to be paid fighter for contest, to apply, in reduction of liability, money deposited by promoter with representative of commission at time of contest for purpose of paying fighters, could not be defeated by levy of attachment on such money by fighter and manager in suit for breach of contract by failure to hold second contest. Civ.Code, §§ 2845, 2849, 2850.

8. Principal and surety 🔑144

A surety company, sued on bond given by boxing promoter to State Athletic Commission to recover amount of judgment for sum agreed to be paid fighter for contest, was not precluded from applying, in reduction of liability, money deposited by promoter with representative of commission at time of contest for purpose of paying fighters, on ground that promoter exercised control over money after it was delivered to representative, where all that promoter said to representative was, "We will not pay off either one of the main event fighters tonight", but made no reference whatever to money deposited. Civ.Code, §§ 2845, 2849, 2850.

◆

Appeal from Superior Court, City and County of San Francisco County; Sylvain J. Lazarus, Judge.

Suit by the State Athletic Commission of California and others against the Massachusetts Bonding & Insurance Company, to recover money claimed to be due from defendant as surety on a bond. Judgment for plaintiffs, and defendant appeals.

Reversed with directions.

Charles V. Barfield, of San Francisco, for appellant.

Robert E. Hatch, of San Francisco, and Earl Warren, Atty. Gen., for respondents.

KNIGHT, Justice.

The plaintiffs sued to recover a sum of money claimed to be due from the defendant as surety on a bond. Judgment was given for plaintiffs, and defendant appeals. Defendant does not deny liability on the bond, but contends that the judgment was awarded for an amount in excess of its liability, and that as against the correct amount it was entitled to have credited the sum of $1,200 theretofore paid in cash by the principal to the obligee, and since held by the obligee for the purpose for which defendant became surety on the bond. We are of the opinion that both points are well taken.

The events which led up to and brought about the controversy are as follows: Rule 19 of the State Athletic Commission requires that "Every club making application for a professional boxing or wrestling license must furnish a surety bond to the State Athletic Commission for 70 per cent of the capacity of the house. This bond is to guarantee payment of boxers, wrestlers, timekeeper, announcer, club physician and referee, exclusively." And rule 139(a) required that "all payment of purses shall be made immediately after the contest or exhibition". Leo Levitt was a promoter of boxing contests, doing business under the name of East Bay Athletic Club; and for several years, in conformity with the requirements of rule 19 kept on file with the Commission a bond furnished by defendant in the sum of $4,000, which the Commission deemed adequate in amount to protect those participating in the ordinary programs put on by the club. On November 9, 1938, Levitt entered into a written contract with a pugilist named Gan (known professionally as "Small Montana") and his manager Sidney Wolfe, whereby Levitt agreed to stage a fight between Gan and another pugilist known as "Little Dado" in Oakland on November 30, 1938, for the "world's flyweight championship". Under the terms of that contract Gan and Wolfe were to receive $2,750 and three round trip transportations from New York to San Francisco. At the same time the parties entered into a second written contract calling for a return match between the same pugilists, to be held on March 29, 1939, in which contract Levitt agreed that in the event he did not produce "Little Dado" for that fight he would pay Gan and Wolfe $2,500. Shortly prior to the November 30 contest the Commission notified Levitt that according to the estimated gross receipts the amount of the bond posted by him was insufficient to protect all ten fighters who were engaged to participate on the program that night, and that consequently he would have to furnish an additional bond or the program would not be allowed to go on. In response to such demand Levitt informed the Chairman of the Commission and the Chief Inspector, Shields, that he would not have time to obtain a surety bond, but agreed to deposit cash with the Commission in an amount the Commission deemed sufficient. In consummation of this agreement Shields went over to Oakland the night of the fight, and about an hour before the program started Levitt's cashier took $1,200 from the box office receipts and handed it to Shields, for which Shields gave a receipt reading: "11/30/38. Rec'd. the sum of Twelve Hundred Dollars to pay fighters from B. Guthertz at 11:30 P. M. D. J. Shields"; but at 11:30 o'clock Levitt told Shields: "We will not pay off either one of the main event fighters tonight." The reason for withholding payment was, as subsequent events showed, that a dispute had arisen as to traveling expenses. However, that night all of the other fighters were paid, and the next morning Levitt paid "Little Dado". On the following day Gan and Wolfe complained to the Commission that they had not been paid; whereupon considerable effort was made to straighten out the matter. Shields phoned Levitt, and the latter indicated that he would pay Wolfe if he would come to Oakland. Wolfe went to Oakland, accompanied by Shields, but Levitt refused to pay. The same day the Commission demanded that the bonding company pay Gan $1,550, which as will be noted was the difference between the amount of Gan's guarantee of $2,750 and the $1,200 theretofore given by Levitt to Shields to pay the fighters. That same day also Wolfe, accompanied by Shields and a man named Kent, called on the representative of the bonding company and Wolfe stated to him that the Commission was willing to pay the $1,200 and he inquired when they could get the $1,550. However, it appears that Kent claimed to have an assignment from Wolfe; consequently payment by the bonding company was withheld for the purpose of ascertaining to whom the money should be lawfully paid. The result was that Gan and Wolfe were not paid by anyone, and on December 12, 1938, Shields obtained a certified check for the $1,200 which he sent to Sacramento, and it was deposited in the "cash trust account" of the Commission. Gan and Wolfe then commenced an action against Levitt for the $2,750 guarantee for Gan's participation in the November 30, 1938, fight, and on March 13, 1939, judgment was entered in their favor for $2,630.32 and interest. The matter of traveling expenses became a disputed issue in the case, which accounts for the lesser amount being awarded.

The return match set for March 29, 1939, failed to materialize; and on May 10, 1939, Gan and Wolfe brought a second action against Levitt for the recovery of the $2,500 guarantee agreed to be paid under the second contract; whereupon they levied an attachment on the $1,200 held by the Commission. Thereafter and on May 15, 1939, the State Athletic Commission joined with Gan and Wolfe in bringing the present action against the bonding company for the recovery of $2,630.32, interest and costs, which was the amount of the judgment theretofore awarded in favor of Gan and Wolfe in the action brought against Levitt. By cross-complaint the defendant alleged, among other things, the payment by its principal on the night of the contest to the obligee, the Commission, of $1,200 for the payment of the fighters, the failure of the obligee to apply said sum to such payment, and the retention of said sum by the Commission; and prayed judgment that Gan and Wolfe be decreed to have no rights in or lien upon said $1,200 by virtue of said attachment, and that the Commission be directed to apply said sum against any liability found to be due from defendant. The relief sought by the cross-complaint was denied, and judgment was awarded in favor of plaintiffs for $2,750, interests and costs, which as will be noted was $119.68 in excess of the judgment theretofore recovered by Gan and Wolfe against Levitt.

[1-3] As to the first point, it is obvious that since the judgment against Levitt, the principal, was for $2,630.32, plus interest, the liability of the surety, exclusive of interest, cannot exceed that amount. "The obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation" (sec. 2809, Civil Code; Alexander v. Bosworth, 26 Cal.App. 589, 596, 147 P. 607); and where judgment has been entered against the principal a greater amount may not be recovered from the surety in a subsequent action brought against him. United States v. Allsbury, 71 U.S. 186, 4 Wall. 186, 18 L.Ed. 321; 1 Freeman on Judgments [5th ed.] p. 1026, sec. 466; 21 R.C.L. 1085, 1091; 5 A.L.R. 594, note; 50 C.J. 93. Respondents assert that appellant abandoned this point in the trial court, but the record does not bear out this assertion. It is true that when considerable time was being consumed on this matter appellant's counsel agreed with the statement made by the trial court that the amount involved was too small to receive serious consideration; however, as appellant points out, the pleadings admit Levitt's liability to have been established by the judgment at only $2,630.32. Therefore there was no issue of fact before the trial court, and evidence thereon was not only unnecessary but unavailing against the admitted fact.

[4, 5] As to the issue of the $1,200, the undisputed evidence shows that at Levitt's request and with the approval of the Commission the inspector took from the box office $1,200 for the express purpose of paying the fighters that night. The receipt given by Shields for the money plainly so stated. It was cash that the promoter would have used to pay the fighters that night; and Shields would have used it that night to pay Gan for his participation in the fight if a dispute had not arisen. Under well-settled legal principles, therefore, the defendant surety company is entitled to have this cash applied in reduction of its liability on the bond. As shown, the deposit was made with funds of the principal; as between the principal and surety the principal is primarily liable; and the surety who is called upon to pay the debt of his principal may seek reimbursement. Section 2845, Civil Code, provides: "A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety can not himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced"; furthermore, section 2850 of the same code declares: "Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation." See 37 A.L.R. 1262, note, right of surety or his privies to require creditor to resort to security given by principal before enforcing security given by surety. These code sections are the enactment of rules developed in equity to give relief from the common law doctrine which permitted the creditor to enforce remedies against the surety without reference to his rights against the principal. See 21 R.C.L. 1124-1128; 50 C.J. 230-235; 23 Cal. Jur. 1071. In the present case the surety gave its personal obligation in the form of a bond, and the property of the principal given as security consisted of cash deposited with the State Athletic Commission as stakeholder. It would seem clear, therefore, that the surety may insist that the cash deposit reduce its liability in the present suit. Even assuming that the present judgment entered against the surety and in favor of the Commission, representing the unpaid fighter or his assignee, for the full amount of the claim, were permitted to stand, the surety would then be entitled to recover from the Commission the amount of the cash deposit which stood as additional security for the principal's obligation to pay Gan for the fight of November 30, 1938. This would follow from the well-settled rule of law, enacted in section 2849, Civil Code: "A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a co-surety at the time of enter-

ing into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not." It would be anomalous, therefore, to permit the Commission to recover the full amount of Gan's claim from the surety, remitting the surety to a separate action to recover from the Commission the amount of the cash deposit upon payment of the judgment. Here the surety filed a cross-complaint; therefore there is no sufficient reason why through the medium thereof the security, consisting of money, should not be applied in reduction of the monetary liability of the surety in the present suit.

Respondents contend that the $1,200 was taken and should be treated only as collateral security for the $4,000 bond, and therefore can be resorted to only in the event the $4,000 bond proves to be insufficient. But the undisputed facts show that such was not the purpose of the payment or acceptance of the money. As shown by the receipt given by Shields and by his testimony at the trial, it was delivered to and accepted by him for the purpose of paying the fighters therewith; moreover, the transactions which took place afterwards, in attempting to straighten out the matter, show beyond question that all of the parties, including the Commission, understood that the money was being held by the Commission for that specific purpose. Therefore under the legal principles above set forth the surety is entitled to have the money applied to the purpose for which it was paid and accepted.

[6, 7] Nor do we find any merit in respondents' contention that Gan and Wolfe acquired paramount rights to the $1,200 by virtue of the levy of attachment, for the reason that at the time of the levy it was not Levitt's money. As already pointed out, Levitt paid the money to and it was accepted by Shields as the duly authorized representative of the Commission, for the express purpose of paying the fighters therewith that night for the services rendered by them on that particular program. If it had not been so paid, the Commission would not have allowed the show to open. The moment the money was paid to and accepted by Shields, it became trust money to be used for a specific purpose, and hence not subject to garnishment. Van Orden v. Anderson, 122 Cal.App. 132, 9 P.2d 572. Stated another way, since the money was taken officially by the Commission and held in trust for the definite purpose of paying the fighters on that particular program, one of whom was Gan, the law will not permit him to defeat the rights of the surety to have the money applied to that purpose by attaching it for breach of contract for failure to hold the second contest.

[8] Respondents' assertion that Levitt exercised control over the money after it was delivered to Shields is not supported by the record. All that Levitt said to Shields that night was, "We will not pay off either one of the main event fighters tonight," but he made no reference whatever to the $1,200.

For the reasons hereinabove set forth, the judgment is reversed with directions to re-enter the same in accordance with the views herein expressed, respondents to recover interest on the net amount of the judgment as re-entered from December 1, 1938. Appellant will recover its costs of appeal.

We concur: PETERS, P. J.; WARD, J.

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45 Cal.App.2d 174

WASHAM v. PEERLESS AUTOMATIC STAPLE MACH. CO. et al.

Civ. 12999.

District Court of Appeal, Second District, Division 2, California.

June 3, 1941.

1. Automobiles 🔑208

Under statute, left turn on public highway should be made only when it can be done with reasonable safety. Vehicle Code, § 544, St.1935, p. 185.

2. Automobiles 🔑208

Under statute providing that motorist should turn only when turn can be made with reasonable safety, motorist making left turn must exercise that degree of care which should be exercised by person of reasonable caution and prudence under the same circumstances. Vehicle Code, § 544, St.1935, p. 185.

3. Appeal and error 🔑1008(1)

In action for injuries sustained in collision occurring when motorist made left turn at intersection, whether motorist exercised reasonable care was fact to be determined by trial court from all of the evidence. Vehicle Code, § 544, St.1935, p. 185.

4. Automobiles ⚷208

Under statutes, motorist making left turn must yield right of way to vehicle already within intersection, but, if vehicle is not within intersection, motorist must complete his left turn only after he has cautiously estimated that vehicle approaching from opposite direction is not so close to intersection as to constitute an immediate hazard, and, if motorist miscalculates and collision occurs, whether reasonably prudent person in making the same turn would, under such circumstances, have reached the same conclusion, is a fact to be determined from the evidence. Vehicle Code, §§ 544, 551, St.1935, pp. 185, 186.

5. Negligence ⚷136(9)

Contributory negligence is a "question of law" only when from all the facts and circumstances of the case reasonable men can draw only the inference that plaintiff was negligent and that his negligence contributed to his injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of law".

6. Automobiles ⚷204

Where two motorists collide on highway, there is no prescribed act which will constitute contributory negligence, and the only rule which can be followed in ascertaining the liability of either under such circumstances is the rule of negligence as to what a reasonably prudent man would do under similar circumstances.

7. Automobiles ⚷208

Under statutes, a motorist, before turning left in center of highway, must use such care as would be exercised by a reasonably prudent person acting under similar circumstances. Vehicle Code, §§ 544, 551, St.1935, pp. 185, 186.

8. Appeal and error ⚷1008(1)

Whether motorist, before turning left in center of highway, exercised such care as would be exercised by a reasonably prudent person acting under similar circumstances, must be determined by the trial court from all the circumstances. Vehicle Code, §§ 544, 551, St.1935, pp. 185, 186.

9. Automobiles ⚷208

Under statutes relating to turns, motorist making left turn need not be certain of absolute safety before he turns and before he proceeds. Vehicle Code, §§ 544, 551, St. 1935, pp. 185, 186.

10. Automobiles ⚷206, 208

Under statutes relating to turns, motorist seeking to make left turn must see that he can make his turn in safety, but he can assume that all others using the same highway will exercise reasonable care. Vehicle Code, §§ 544, 551, St.1935, pp. 185, 186.

11. Automobiles ⚷206

A motorist about to turn left is not required to leave his automobile and scan the horizon or by trigonometrical computations calculate the yards distant of the approaching automobile to insure his own safety against a collision with one who ignores the law and the rights of others lawfully within an intersection. Vehicle Code, §§ 544, 551, St.1935, pp. 185, 186.

12. Negligence ⚷68

One who is not otherwise negligent cannot be held "negligent" by reason of a failure to assume that another person will be careless or violate the law.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligent".

13. Appeal and error ⚷1008(1)

Evidence whether motorist colliding, while making left turn, with defendant's automobile, was contributorily negligent, was for trial court. Vehicle Code, §§ 544, 551, St. 1935, pp. 185, 186.

14. Automobiles ⚷168(1)

Motorists while traveling on public highway must at all times keep their automobiles under control so that they may avoid colliding with any person or vehicle lawfully on the highway.

15. Automobiles ⚷146, 168(3)

Where motorist is traveling on open remote highway distant from human habitations, pedestrian paths, and vehicular traffic, and has a clear view whereby he may discern that there is no person or object that may traverse his course, he has a wide discretion as to speed, but his speed must decelerate and his caution must accelerate as evidences appear indicating increasing numbers of men or vehicles at any point on highway.

16. Automobiles ⚷244(59)

In action for damages sustained by motorist colliding, while making left turn, with defendant's automobile, "last clear chance" doctrine was not applicable under evidence which justified finding that plaintiff was free from contributory negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Roy Washam against the Peerless Automatic Staple Machine Company and others, for injuries to property and persons resulting from an automobile collision. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Cecil A. Borden, of Los Angeles, for appellants.

Betts & Garrison, of Los Angeles, for respondents.

MOORE, Presiding Justice.

Defendants appeal from a judgment which awarded plaintiff the sum of $1,173 as damages suffered by reason of injuries to property and persons resulting from an intersectional collision, and which denied relief under the cross-complaint. The findings of the court were that by reason of the negligence of defendants in the operation of their automobile, it collided with the automobile of plaintiff and caused him certain physical injuries; that at the time the plaintiff was operating his automobile in a careful and prudent manner.

From the testimony of the witnesses and the reasonable inferences deduced therefrom, the facts which supported the court's findings are that as plaintiff traveled westerly on Wilshire boulevard, he was going at about 20 miles per hour as he approached Bonsall street; that when he was 100 feet from the intersection, he observed the automobile of defendant about 400 feet west of the intersection, which added to the 50-foot width of Bonsall made the distance about 550 feet between the parties at the time of such observation; that at the same time defendants' car was preceded by another westbound car hereinafter referred to as the "Y" car; that defendant was traveling at a speed of 30 to 40 miles per hour. It was plaintiff's intention to make a left-hand turn at the right angle intersection of Wilshire boulevard and Bonsall street and he decelerated his speed to about 10 miles per hour in order to make the turn and to permit the "Y" car to turn north on Bonsall. As plaintiff turned around the center of the intersection, he calculated that he could move southward on Bonsall without interference from defendants' car. The rear of his car was about even with the center of Wilshire boulevard and his front bumper was about to enter the middle lane of the southerly half of Wilshire. At that moment, defendants' car was about 130 feet west of plaintiff's car which placed it about 76 feet west of the southerly line of Bonsall street. Having calculated that he might proceed with safety, plaintiff continued across the southerly half of Wilshire until the front wheels of his car had crossed the extended southerly curb line of Wilshire boulevard. As he was entering the middle lane of the southerly half of Wilshire, he saw that defendant was veering from the lane lying adjacent to the center line of the boulevard into the middle line of the south half. But assuming that defendant would slow down or that he would turn back into the lane in which he had been traveling, or otherwise obey the law, plaintiff continued his southerly course across the southerly half of Wilshire boulevard. The impact was so violent that plaintiff's car was caused to slide along the pavement some six or eight feet and a deep groove was made by the force of the rim of the front wheel of plaintiff's car.

Defendants base their appeal upon two propositions: (1) That plaintiff was guilty of contributory negligence per se; and (2) that plaintiff had the last clear chance to avoid the accident.

In support of their contention, defendants invoke two of the statutes embodied in the Vehicle Code, to-wit:

Section 544. "* * * No person shall turn a vehicle unless and until such movement can be made with reasonable safety * * *." St.1935, p. 185.

Section 551. "The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard but said driver having so yielded and having given a signal when and as required by this code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn." St. 1935, p. 186.

[1-3] It will be observed from the language of section 544 that a left-hand turn on a public highway shall be made only when it can be done with reasonable safety. No definite distance from the turning vehicle is prescribed for the moving object which might interfere with safety. From the language of that section, it is to be concluded that the driver making the left turn must exercise that degree of care that should be exercised by a person of reasonable caution and prudence under the same circumstances. Whether the party making the turn exercised such reasonable care was a fact to be determined by the trial court from all of the evidence in the case. If this were not so, the legislature would have prescribed a definite distance in yards or meters that a moving object must be from the turning vehicle before it could proceed to make a left turn.

[4] From a consideration of section 551, it is made to appear definitely that the party making the left turn must yield the right of way to another vehicle which is already within the intersection. But if such other car is not within the intersection, the motorist must complete his left turn only after he has cautiously estimated that the vehicle approaching from the opposite direction is not "so close [to the intersection] as to constitute an immediate hazard". If he miscalculates and a collision occurs, upon a trial of the resulting controversy, it is a fact to be determined from the evidence whether a reasonably prudent person in making the same turn would, under such circumstances have reached the same conclusion.

[5, 8] In spite of the statutory provisions above quoted, it is contended that the behavior of plaintiff was such as to constitute contributory negligence as a matter of law. But it has been repeatedly held that contributory negligence is a matter of law only when from all the facts and circumstances of the case reasonable men can draw but one inference, to-wit, the inference that plaintiff was negligent and that his negligence contributed to his injury. Ford v. Wilson, 107 Cal.App. 131, 290 P. 120. There is no prescribed act which will constitute contributory negligence when two motorists collide on the highway. The only rule which can be followed in ascertaining the liability of either under such circumstances is the rule of negligence as to what a reasonably prudent man would do under similar circumstances. A fair construction of the code section must mean that before turning left in the center of a highway, the motorist must use such care as would be exercised by a reasonably prudent person acting under similar circumstances. Ruperto v. Thomas, 113 Cal.App. 523, 526, 298 P. 851. Whether he exercised such care is to be determined by the trial court from all the circumstances.

[9] It was not intended by the legislature that the party making such turn must be certain of absolute safety before he turns and before he proceeds. Such a construction would produce absurd results for on many highways in the vicinity of Wilshire boulevard streams of traffic flow so steadily that at some intersections the motorist would find it difficult to make a turn except in the dead of night.

[10-13] The obligation which the statute imposes on the driver seeking to make a left turn is that he must see that he can make his turn in safety, but may assume that all others using the same highway will exercise reasonable care. Inouye v. Gilboy Co., 115 Cal.App. 25, 300 P. 835. In a case where the facts were similar to those of the case at bar, the court stated: "If another driver, by reason of his violation of a statutory provision, or by reason of other negligent conduct, collides with him, he is not chargeable with contributory negligence." Hanson v. Cordoza, 106 Cal.App. 500, 505, 290 P. 62, 64. A motorist about to turn left is not required to leave his car and scan the horizon or by trigonometrical computations calculate the yards distant of the approaching car to insure his own safety against a collision with one who ignores the law and the rights of others lawfully within an intersection. Such a construction of the statute would be unreasonable and entirely impracticable on busy thoroughfares. "One who is not otherwise negligent cannot be held negligent by reason of a failure to assume that another person will be careless or violate the law." Id. It appears from innumerable authorities that the negligence of plaintiff was a question for the trial court to determine from all the evidence and its reasonable deductions. Donat v. Dillon, 192 Cal. 426, 221 P. 193; Ford v. Wilson, supra; Leblanc v. Coverdale, 213 Cal. 654, 3 P.2d 312.

[14, 15] Motorists must bear in mind that while traveling upon any public highway, it is their duty at all times to keep their cars under control that they may avoid colliding with any person or vehicle lawfully upon the highway. Where a motorist is traveling on an open remote highway distant from human habitations, pedestrian paths and vehicular traffic, and has a clear view whereby he may discern that there is no person or object that may traverse his course, he has a wide discretion as to his speed. But his speed must decelerate and his caution must accelerate as evidences appear indicating the increasing numbers of men or vehicles at any point upon the thoroughfare.

[16] The doctrine of the last clear chance is not applicable. Having concluded that the court was justified by the evidence in finding that plaintiff was free from contributory negligence, it follows that the doctrine does not apply. 2 Cal.Jur.Supp. secs. 119, 120; Bright v. Zabler, 43 Cal. App.2d 706, 111 P.2d 387.

The judgment is affirmed.

We concur: McCOMB, J.; WOOD, J.

JALOF v. ROBBINS et al.

Civ. 12924.

District Court of Appeal, Second District, Division 2, California.

June 3, 1941.

Hearing Granted July 30, 1941.

1. Dismissal and nonsuit 🔑7(1)

The words "before trial", in statute providing that an action may be dismissed by plaintiff at any time before trial, mean before submission. Code Civ.Proc. § 581, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Before Trial".

2. Dismissal and nonsuit 🔑7(1)

The practice of first ascertaining views of court, after a fair trial, and then dismissing and suing again, if such views are adverse, should not be encouraged. Code Civ. Proc. § 581, subd. 1.

3. Courts 🔑26

Trial courts are created for purpose of arbitrating controversies arising among people, and it is their duty to endeavor to administer equal justice, and they must also strive to avoid worthless delays, needless litigation and repetitious proceedings.

4. Dismissal and nonsuit 🔑12

Under statute authorizing dismissal of actions under certain conditions, it would be assumed that a dismissal is not justified under any circumstance other than those prescribed and that in order to obtain a dismissal a litigant must strictly comply with language of the statute. Code Civ.Proc. § 581.

5. Dismissal and nonsuit 🔑7(2)

Where argument of counsel and subsequent oral observations of trial court indicated that both court and counsel considered the case submitted for decision, and trial court indicated that judgment should go for defendants, it was too late for plaintiff to thereafter effectually file an ex parte dismissal or for court in session to do so upon plaintiff's motion, though no formal order of submission had been made. Code Civ.Proc. § 581, subds. 1, 4.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Suit by William R. Jalof, etc., against Harry Robbins and another upon an open book account for value of merchandise plaintiff had sold to defendants. From order dismissing the action ex parte, from order refusing to vacate the ex parte dismissal and ordering the cause dismissed, and from order denying the motion of defendants to vacate the order dismissing the action and to permit findings, decision and judgment to be filed in favor of defendants, the defendants appeal.

Orders reversed.

Samuel W. Newman and Meyer M. Willner, both of Los Angeles, for appellants.

Robert M. Clarke, of Los Angeles, for respondent.

MOORE, Presiding Justice.

This appeal involves the extent of plaintiff's right to a dismissal after trial and argument. Plaintiff sued defendants Robbins upon an open book account for $3,262.62, the value of certain merchandise he had sold to defendants.

The trial occurred on June 3, 1940. The litigants and all of their witnesses testified and all competent documents offered by each were received in evidence. The evidence was closed at about 3:30 o'clock p. m., with the testimony of plaintiff in rebuttal. Both counsel announced to the court "That's all". Following the court's declaration of a desire to see a designated authority, the transcript contains the one word "argument". Following the last mentioned entry, the transcript contains 16 pages of the stenographic report of the proceedings had on July 22d with reference to the hearing of plaintiff's motion for dismissal filed by plaintiff on July 18th. Following the report of the proceeding on the motion to dismiss, the transcript contains 22 pages of exhibits. After the exhibits there appears "oral remarks of the court" made on June 3, 1940. Obviously this discussion by the judge followed the argument of counsel above indicated. In the course of oral remarks the court discussed the evidence at length and stated that the "facts in this controversy are practically without dispute"; that while defendants had been indebted to plaintiff, they were entitled to a credit on their account in the sum of $220.83; and that inasmuch as defendants had paid to the Halper Construction Corporation, a creditor of plaintiff, the sum of $3,041.79 upon plaintiff's request, it was necessary to make that corporation a party-defendant as provided by section 389 of the Code of Civil Procedure. Thereupon the court, without request from either party, entered an order directing that the Halper Construction Corporation be made a party to the action and continued the cause until July 8th in order to determine whether such answer complied with the order of the court. Pursuant thereto that corporation filed its answer on July 8, 1940, admitting receipt from defendants of the sum of $3,041.79 with plaintiff's consent and that this sum had been credited to plaintiff's account. The action was then continued to July 22d on which date it was made to appear to the court that plaintiff had on the 18th day of July filed a dismissal with the clerk. Defendants registered their objections to such dismissal but they were overruled and the court ordered the cause dismissed.

Notice of motion to vacate the dismissal and to permit findings, conclusions of law and judgment to be filed were presented to the court on the 9th day of August pursuant to notice of motion duly served. This motion was likewise denied. We have, therefore, three appeals: (1) from the ex parte dismissal of the action filed July 18th; (2) from the order of the court of July 22d, refusing to vacate the ex parte dismissal and ordering the cause dismissed, and (3) from the order of the court on the 9th day of August denying the motion of defendants to vacate the order of July 22d and to permit findings, decision and judgment to be filed, in favor of defendants.

Section 581 of the Code of Civil Procedure provides that an action may be dismissed under subdivision 1 by the plaintiff by written request to the clerk filed with the papers in the case at any time before trial provided no affirmative relief has been sought by cross action or answer; and by subdivision 4 "by the court, when upon the trial and before the final submission of the case, the plaintiff abandons it".

[1-3] In view of the fact that the case had been completely tried, the filing of the dismissal ex parte on July 18th was an abuse of the right of dismissal. While it is held that the words "before trial" mean "before submission" (9 Cal.Jur. 510) yet it is unnecessary to discuss at length the ex parte dismissal filed by plaintiff in view of our conclusions with reference to the dismissal ordered by the court when all parties were present on July 22d. The only statutory authority under which the plaintiff might have proceeded to effectuate a dismissal are contained in subdivision 4, section 581 of the Code of Civil Procedure. Under the circumstances disclosed by the record, it is clear to us that the court exceeded its statutory authority in ordering the dismissal. Having indicated that judgment should go for defendants, the court had thereby performed substantially the service required of it by the Constitution and the laws of the state. No other duty was left to the trial judge except to sign and file findings and judgment. As an intermediary or preliminary duty to the entry of such judgment in final form, the court conceived that, in order for the judgment to operate effectively and fully for the protection of plaintiff, the judgment should declare that the sum theretofore paid by defendants to Halper Construction Corporation should be declared so paid by

the judgment. The order making Halper Construction Corporation a party defendant was not in the slightest essential or material to the formal award of a judgment in favor of defendant. That order was merely a precautionary measure. The order having been made, the case was effectually submitted then; but if not, then surely no other status could have been in contemplation on July 8th, after the new party's answer had been filed by the clerk of the court. "The practice of first ascertaining the views of the court, after a fair trial, and then dismissing and suing again, if such views are adverse, should not be encouraged." Yarn v. Ft. Dodge R. Co., 8 Cir., 31 F.2d 717, 720. The trial courts will do well to remember that they are created by the state for the purpose of arbitrating controversies arising amongst the people; that on the one hand it is their duty to endeavor earnestly to administer equal justice, while on the other they must also strive to avoid worthless delays, needless litigation and repetitious proceedings. The practice of allowing a disconcerted litigant to consume the time of such tribunals to the point of ascertaining the disposition of the trial judge and then to retire to a position from which he may with impunity again harry his justified foe should be discouraged.

[4, 5] In view of the provisions of section 581 of the Code of Civil Procedure authorizing dismissals under certain conditions, we must assume that a dismissal is not justified under any circumstance other than those prescribed and that in order to obtain a dismissal a litigant must strictly comply with the language of the statute. An attempt to dismiss the action after the trial had been completed and the court had indicated its judgment is not a strict compliance with subdivision 4 of the section. Where no formal order is made submitting a case, the conduct of the court and the parties following the argument may be the equivalent of an order of submission. Such behavior is that which is presented by this record. So definitely does it appear that the parties as well as the court intended a submission of the case following argument on June 3d, that before either party could have presented additional evidence it would have been necessary for such party to present a formal motion requesting a reopening of the case. If we are correct in saying that it would have been necessary to reopen the case by a formal proceeding, in order to present additional evidence, then clearly the case was under submission after adjournment on June 3d. If the case had been formally reopened at any time after June 3d, the plaintiff would have been within his rights to file an ex parte dismissal under subdivision 1 and the court would have been authorized to grant a dismissal under subdivision 4. But inasmuch as the court practically awarded judgment to the defendants at the close of the trial on June 3d, it was thereby indicated that all had been done by way of proof or argument necessary to a determination of the issues. Argument of counsel and the subsequent oral observations of the court equally indicate that both court and counsel considered the case was then submitted for decision. At any time after the adjournment on June 3d, it was too late for the plaintiff effectually to file an ex parte dismissal or for the court in session to do so upon motion. Brown v. Harter, 18 Cal. 76; Heinlin v. Castro, 22 Cal. 100; Casey v. Jordan, 68 Cal. 246, 9 P. 92, 305; Casner v. Daily News, 16 Cal.2d 410, 106 P.2d 201 [dissenting opinion]; Rutherford v. Peppa, 53 Cal.App. 309, 199 P. 1111.

In Rutherford v. Peppa, it appears that the trial court had indicated its intention to render judgment for the defendant when the plaintiff attempted to dismiss the action but it was held that the dismissal came too late and the court's action in refusing to permit the dismissal and ordering judgment for defendant was approved by the appellate court. In MacDermot v. Grant, 181 Cal. 332, 184 P. 396, judgment had been ordered, findings and judgment had been prepared and signed but not yet filed when a dismissal was unsuccessfully attempted. In Casey v. Jordan, supra, plaintiff attempted to dismiss the action after submission upon briefs to be filed. At first the court granted the motion to dismiss and later vacated the order of dismissal. On appeal it was held that after the case had been tried and submitted, it could not be dismissed on plaintiff's motion.

In the instant action respondent urges: (1) that there was never a final submission of the cause; (2) that the trial had been continued by the court for the purpose of bringing in an additional party and (3) that his right to a dismissal continued for the reason that no formal order of submission had been made. In support of his contention, he undertakes to apply recent decisions (King v. Superior Court, 12 Cal. App.2d 501, 56 P.2d 268; Long v. Superior Court, 14 Cal.App.2d 753, 754, 58 P.2d 952), but in vain.

In King v. Superior Court, supra, following trial judgment had been ordered for the defendant and his counsel had been directed to prepare findings and decision. Before findings were served plaintiff's counsel moved to reopen the case in order that he might introduce further evidence. The case having been reopened for the reception of any evidence by either party, the order had the effect of vacating the submission of the cause. It was so understood by the parties concerned. The order of submission having been vacated generally so that either party might offer evidence or reargue his case, the right of dismissal was available to the plaintiff.

In Long v. Superior Court, supra, the action was to quiet title. After plaintiff rested his case, defendant moved for nonsuit to which plaintiff consented. The nonsuit having been granted, plaintiff filed a voluntary dismissal. The court then attempted to render and enter judgment quieting their title against plaintiff without offering any evidence. Finally, it was held that the cause had been dismissed before the trial court attempted to order judgment for defendants and for that reason the court was without jurisdiction to proceed further. That case had not been submitted. No order of submission had been made and none could have been made for the reason that the conventional nonsuit was granted at the conclusion of the plaintiff's evidence.

By no reasonable construction can the order, making the Halper Construction Corporation a party, be construed to mean the vacation of the submission. Nothing is thereby indicated that additional testimony was in prospect. The only purpose of designating a specific date to which the case should be continued was to see that the order made had been complied with. No other order having been made which could indicate the intention of the court to vacate the submission of the cause, a resubmission was wholly unnecessary. The case was ready for decision following the filing of the new answer.

Finally, respondent's attempt to apply the case of Franks v. Cesena, 192 Cal. 1, 3, 218 P. 437, is unavailing. There, after the evidence was closed, it was ordered that the case be "submitted * * * for consideration and decision on briefs of 10, 15 and 5 days". On the 13th day following the order plaintiff filed an abandonment of the action. Thereafter the court construed his order to mean a submission for argument.

All three orders are reversed.

I concur: McCOMB, J.

WOOD, Justice, (dissenting.)

I dissent.

In my opinion the cause was not under submission upon the adjournment on June 3. The last item of the minutes of the court of June 3 reads as follows: "The court under section 389, Code of Civil Procedure, orders the Halper Construction Corporation made a party defendant and to file necessary pleading regarding the item of $3,041.79. Trial is continued to July 8, 1940, at 10:00 a. m." The record does not disclose the proceedings on July 8, 1940. The minutes of July 22, 1940, read as follows: "Trial is resumed from July 8, 1940 with all parties present as before. W. N. Tiffany, reporter 10:05 A. M. to 10:30 A. M. Plaintiff on July 18, 1940 filed with the clerk a dismissal and defendants now object to plaintiff dismissing this action. The Court overrules objection of defendants and orders the cause dismissed. Defendants' Exhibit G (Oral remarks by the Court) is admitted and filed." The order of the court requiring a new party defendant to be named and requiring such party "to file necessary pleading" prevents a ruling that the cause was submitted on the day of the making of the order. I agree with the view expressed in the majority opinion that the practice should be discouraged of dismissing actions after the views of the court are ascertained upon a fair trial, but under the statutes as enacted by the legislature and as interpreted by the courts, plaintiff was within his rights in filing the dismissal. If such practice is to be prevented, the remedy must be afforded by the legislature.

In re WEAR'S ESTATE. *

Civ. 11637.

District Court of Appeal, First District,
Division 2, California.

May 27, 1941.

Rehearing Denied June 26, 1941.

Hearing Granted July 24, 1941.

1. Executors and administrators ⚷513(9)

The probate court's settlement of special administrator's final account is conclusive and "res judicata" as to all matters included or necessarily involved in such settlement.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Executors and administrators ⚷513(9)

A settlement of special administrator's account is not conclusive as to matters not included therein and not actually passed on by probate court.

3. Executors and administrators ⚷513(9)

The probate court's settlement of special administrator's final account was not conclusive or "res judicata" as to items not included or passed on by court therein on subsequent accounting by such administrator as executor of same estate.

4. Executors and administrators ⚷231

An executor, whose claim against estate for money due him from testatrix was not filed with clerk of probate court or presented to judge thereof, as required by statute, cannot retain any part of money, received by him as special administrator of testatrix' estate pending determination of will contest or as executor, in payment of testatrix' debt to him. Probate Code, § 703.

5. Executors and administrators ⚷224

The fact that executor was secured creditor of testatrix did not relieve him from mandatory statutory requirement that executor who is creditor of decedent shall file claim with clerk of probate court for presentation to judge thereof. Probate Code, § 703.

6. Mortgages ⚷218

Debts secured by mortgage are generally subject to rules of law applicable to those not secured, and mortgage creditor's only advantage over other creditors of mortgagor is in respect to remedy for obtaining payment of amount due.

7. Executors and administrators ⚷486

An executor, presenting no claim against testatrix' estate for money due him from testatrix, was properly charged by probate court with amount of cash, received by him as special administrator of estate pending determination of will contest and as executor thereof, in excess of sum reported by him, and balance due as estate's interest in note held by him in trust as security for money advanced by him to testatrix, without deduction of amount due executor from testatrix. Probate Code, § 703.

8. Trial ⚷388(2)

Fact findings and conclusions of law are not required in probate court's order settling executor's account, but are implied in support of order as made.

9. Executors and administrators ⚷513(11)

Claims against testatrix' estate were approved by probate court's decree settling and allowing executor's account with certain amendments and surcharges, and no additional ruling by court on such claims was necessary.

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Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge.

In the matter of the estate of Katie Richards Wear, deceased. From an order and decree settling the first account of Edward Rolkin, as executor of deceased's will, contested by Theodore J. Miller and others, the executor appealed, and after his death pending appeal, Arline M. Rolkin and another, executors of his estate, were substituted as appellants.

Affirmed.

Frank J. Mahoney, of San Francisco, for appellants.

James M. Hanley and Herbert Chamberlin, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is the second appeal by Edward Rolkin, executor of the last will and testament of Katie Richards Wear, from an order and decree settling his first account. Because of the death of Edward Rolkin during the pendency of this appeal his executrix, Arline M. Rolkin, and his executor, Bohdan Gillewitz, have been substituted as appellants in his place and stead.

In 1920 Mrs. Wear, the decedent, owned certain real property situated in Agua Caliente, Sonoma County, against which there was a deed of trust securing a promissory note for $27,800, and a mortgage securing a note for $3,525. Mrs. Wear was without funds to meet the demands for payment made by the holders of these securities who were threatening to foreclose. On January 31, 1920, Edward Rolkin entered into a written agreement with her whereby he agreed to advance the money to purchase the two notes and the instruments securing them and she agreed to pay these notes to him; Mrs. Wear further agreed to sell her lands in Sonoma County and to apply the money received from such sales to the payment of the notes. Continuing, the agreement provided that after the notes had been paid all money received from the sale of the lands was to be divided in proportions of seventy-five per cent to Mrs. Wear and twenty-five per cent to Rolkin; if the lands were not sold within six years Mrs. Wear agreed to convey a one-fourth undivided interest in the lands remaining unsold to Rolkin. Rolkin put up the cash to purchase the notes and the instruments securing them, and they were assigned to him. On September 29, 1922, Mrs. Wear sold certain of her properties to Thomas H. Corcoran and wife for $49,000; the purchasers paid $9,000 down and in payment of the balance of the purchase price gave their promissory note for $40,000 secured by a mortgage and deed of trust. The note, mortgage and deed of trust were made out to Rolkin and were delivered to him; Rolkin executed and delivered to Mrs. Wear a declaration that he held the same only as security for the money advanced by him, which declaration of trust was recorded.

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* Subsequent opinion 124 P.2d 12.

Mrs. Wear died on April 7, 1930, at which time the unpaid balance on the Corcoran note was $26,000. Her last will nominated Rolkin as executor and devised certain portions of the residue of her estate to the contestants in the present litigation. Rolkin offered the will for probate and was appointed special administrator pending the determination of a contest which had been filed; he continued in this capacity until April 7, 1932, when the will was admitted to probate and he was appointed executor. On August 23, 1932, Rolkin filed his final account as special administrator; this account stated that the cash on hand belonging to the estate amounted to $2,443.43 and that the share of the decedent in the unpaid balance of the note was $11,954.39 at the time of her death; the schedule in the account showed that certain payments of principal and interest had been received on the note since Mrs. Wear's death. A supplemental account was filed which increased the cash on hand to $2,829.43 and stated that the estate had an interest in the note. The contestants filed exceptions to this account and were represented by counsel. On September 22, 1932, the court found that these accounts were true and correct, and the accounts were approved and settled as rendered; the court ordered that fees in the amount of $1,300 be paid to certain persons and that the balance of the cash on hand in the sum of $1,529.43 as well as the interest in the promissory note be distributed to Rolkin as executor. No appeal was taken from this decree.

On January 3, 1934, Rolkin filed his first account as executor, which account is now under consideration. He reported that the cash on hand belonging to the estate totaled $1,677.32, and that the interest of the estate in the Corcoran note was $8,740. The contestants filed exceptions and the court ordered a reference for the purpose of taking an account. As a result of the referee's report the court charged the executor with $5,395.75 cash on hand and with $19,000 as the interest of the estate in the Corcoran note. The executor appealed from the decree and it was reversed in Estate of Wear, 17 Cal.App.2d 703, 62 P.2d 779.

On retrial, the record on the former appeal, reports of the referee, and a stipulation that Rolkin had never filed a claim against the estate were before the trial court. Rolkin objected to an examination of any matters prior to the period of this account on the ground that these matters had been concluded by the settlement of the special administrator's account which had become final, and they were thus res judicata. The court entered a minute order and a decree settling the first account of the executor in which it was found that the plea of res judicata was not available to the executor and that the court must proceed to interpret the agreement of January 31, 1920; the court charged the executor with $7,450.66 cash on hand which was $5,773.34 over and above the sum reported by him in his account and with an unpaid balance of $19,000 belonging to the estate on the promissory note instead of $8,740 reported in the account. The decree further stated that "with the foregoing amendments and surcharges, the first account of said executor will be settled and allowed". The executor appeals from this order and decree settling his first account.

[1-3] Appellants contend that "the final account and supplemental account of appellant as special administrator having been approved and settled by an order which had become final, all persons, including the respondents, were concluded in his subsequent account as executor by the court's finding, which determined the items and amount of the estate". It is true that the former settlement of the special administrator's final account by the probate court is conclusive and res judicata as to all matters included in such settlement or necessarily involved therein. 24 Corpus Juris 1029; 11b Cal. Jur. 614, 615. However, the accounts of Rolkin as special administrator and the settlement thereof did not involve a consideration of the agreement of January 31, 1920, or the rights of the parties to that agreement, nor did they involve a consideration of the accounts of Rolkin as trustee; further, in these previously settled accounts Rolkin made no claim to an interest in the Corcoran note nor did he state that he had received from Corcoran larger sums than those turned over to the estate. These items were introduced into the controversy for the first time in the executor's account and were not passed upon or adjudicated by the court in its decree settling the special administrator's account. The law is well established that the settlement of an account is not conclusive as to matters not included in it and not actually passed upon by the probate court. Estate of Adams, 131 Cal. 415, 416, 63 P. 838; Estate of Ross, 179 Cal. 358, 362, 182 P. 303; Sontag v. Superior Court, 1 Cal.App.2d 138, 141, 36 P.2d 140; 24 Cor.Jur. 1029. Such matters not having been included or passed upon by the court in its settlement of the special administrator's final account that decree is not conclusive as to these items, and the trial court properly found in its order and decree that the plea of res judicata was not available to the executor.

[4-7] Appellants argue further that "assuming that the court did have power to reconsider these matters already adjudged, it erred in determining the amount of estate with which appellant should be charged". We find no error in the amounts charged to the executor by the trial court. A perusal of the contestants' exhibits shows that between the date of the agreement and the date of Mrs. Wear's death, Rolkin received $89,483.95 for her account which sum was greatly in excess of the amount required to liquidate her indebtedness to him. Appellants contend that Rolkin paid out $86,386 to or for Mrs. Wear from the amount received, but this argument fails to substantiate the claim that he did not receive enough money to liquidate Mrs. Wear's debt to him.

The unpaid balance due on the Corcoran note at the time of Mrs. Wear's death was $26,000. Between the date of Rolkin's appointment as special administrator and the date of the account in question, he received $7,000 principal on the note leaving an unpaid balance of $19,000 due. During the same period he collected $5,451.15 interest which brought the total amount received on the note to $12,451.15. He turned over $5,727.52 to the estate and retained $6,723.62. The question is whether Rolkin had a right to retain any of this money which he received on the note subsequent to the date of his appointment as a special administrator.

Section 703 of the Probate Code reads in part: "If the executor or administrator is a creditor of the decedent, he shall file his claim with the clerk, who must present it for allowance or rejection to the judge. Its allowance by the judge is sufficient evidence of its correctness, and it must be paid as other claims in due course of administration. * * *" It is stipulated that Rolkin never filed a claim against the estate. He acquired no title to the money under the agreement and he further disclaimed any title in the declaration of trust. Hence as his claim was not filed with a clerk and presented to the judge as required by the aforementioned section of the Probate Code he cannot retain any part of the money received by him as special administrator or as executor. Estate of Hildebrandt, 92 Cal. 433, 436, 28 P. 486. The fact that Rolkin was a secured creditor did not relieve him from the mandatory requirement of the Code section which contains no exceptions express or implied. "Debts secured by mortgage are generally subject to the rules of law applicable to those which are not secured, the only advantage which a mortgage creditor has over others being in respect to his remedy for obtaining payment of the amount due him." 11a Cal.Jur. 697, 698. The conclusion follows, therefore, that Rolkin was not entitled to retain any part of the moneys received by him in his capacity as special administrator or executor, and that the court properly charged him with $5,773.34 as cash on hand over and above the sum reported by him and with an unpaid balance of $19,000 as the interest of the estate in the note instead of $8,740 reported in his account.

[8, 9] Appellants' final contention is that the court erred in failing to make findings of fact and to rule upon the claims presented against the estate. We cannot agree with this argument. Findings of fact and conclusions of law are not required in the order settling an account, but are implied in support of the order as made. Estate of Machado, 186 Cal. 246, 250, 199 P. 505; Estate of McPhee, 156 Cal. 335, 337, 104 P. 455, Ann.Cas.1913E, 899; Estate of Adams, 131 Cal. 415, 420, 63 P. 838; 11b Cal.Jur. 603. Further, the court did not fail to rule upon the claims presented against the estate. Such claims were approved by the decree which stated: "With the foregoing amendments and surcharges, the first account of said executor will be settled and allowed." No additional ruling upon the claims was necessary.

The order and decree appealed from are affirmed, respondents to have their costs on appeal, payable out of the assets of the estate.

We concur: STURTEVANT, J.; SPENCE, J.

SPARKS v. BERNTSEN et al.

JOHNSON v. SAME.

COKER v. SAME. *

Civ. 6470–6472.

District Court of Appeal, Third District, California.

May 29, 1941.

Hearing Granted June 26, 1941.

1. Trial 🔑339(4)

A motion to have verdicts returned to jury for correction, which was not made at time specified by statute but after jury had been polled, was too late. Code Civ.Proc. §§ 618, 619.

2. Appeal and error 🔑832(1)

Plaintiffs in automobile accident could not complain that decision of District Court of Appeals resulted in "miscarriage of justice" where, in each case, court ordered judgment which as against operator was exactly what verdict specified, and against owner court ordered judgments which increased the awards.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

3. Trial 🔑339(1)

Where verdicts against operator of automobile were not informal or insufficient, they did not come within the statute relating to return of verdict to a jury for correction, and the only question that could be raised thereafter was with reference to the verdict against owner of the automobile. Code Civ. Proc. § 619.

Appeal from Superior Court, Placer County; Raymond McIntosh, Judge.

On petition for rehearing.

Rehearing denied.

For prior opinion, see 112 P.2d 742.

Hoge, Pelton & Gunther, of San Francisco, and Butler, Van Dyke & Harris, of Sacramento, for appellants.

Henry & Bedeau, of Sacramento, Nathan Goldwater and Leo Murcell, both of Oakland, and Orrin J. Lowell, of Auburn, for respondents.

PER CURIAM.

[1] It is urged by respondents upon petition for rehearing that the first verdicts were informal and insufficient, and that the trial court properly granted their motion to have them returned to the jury for correction, under the provisions of section 619 of the Code of Civil Procedure. Such application must be made, however, *"When the verdict is announced"*. The motion was not made at the time specified by the statute, but after the jury had been polled. Under such circumstances, and in the language of section 618 of said code, "the verdict is complete" and the motion was therefore made too late.

[2] The verdicts against the *operator,* in each case, were not informal nor were they insufficient. They therefore did not come within the provisions of said section 619. The only question that could be raised thereafter was with reference to the verdicts against the *owner* of the car. This court modified the *latter* only, to conform to the law. The judgment upon the second verdict was also entered with a

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* Subsequent opinion 121 P.2d 4

modification by the trial court of the verdict against the owner.

[3] As to the contention that the jury showed an intention to allow plaintiff damages in the sum of $11,000 (assuming that such contention has any pertinency) the answer is that such verdict provided in the Sparks case that "we assess damages against defendant Paul Anker Berntsen (the operator), in the sum of $8,000, and assess damages against defendant Reidar Enge (the owner) in the sum of $3,000.00". As to the *operator*, this amount is exactly what we have held to be the correct one. As against the owner, we have held that respondent was entitled to $5,000, which is $2,000 in excess of the amount of the second award, and the precise amount of the judgment which respondents are seeking to uphold. The verdicts for the other two plaintiffs are similar, and in each of those we have ordered a judgment which, as against the operator, is exactly what the verdict specifies. Against the owner, we have ordered judgments which increase the awards.

Under such facts, the assertion by respondents that our decision has resulted in "a miscarriage of justice" would seem to lack substance.

Rehearing denied.

WENNERHOLM et al. v. STANFORD UNIVERSITY SCHOOL OF MEDICINE et al. *

Civ. 11439.

District Court of Appeal, First District, Division 1, California.

June 3, 1941.

Hearing Granted July 30, 1941.

1. Fraud 🔑50

Fraud is never presumed, but must always be pleaded and established.

2. Fraud 🔑41

A complaint should substantially show the representation of a material fact, the falsity thereof, knowledge of such falsity, or the making of a representation without sufficient knowledge, the intent to deceive, or induce one to enter into a transaction, the participation of the defendants accused of the fraud, the belief in the truth of the representation, the reliance thereon, and the consequent damages to the parties injured.

3. Pleading 🔑42

A pleading may be sufficient if it states a cause of action against the defendant although it may be amenable to attack by special demurrer.

4. Fraud 🔑41

In action for fraud, the defendant is entitled to have the complaint set forth specific averments of fraud, or state why the plaintiff is unable to do so.

5. Druggists 🔑10

Complaint seeking to recover for blindness induced by taking of the drug dinitrophenol manufactured, distributed, sold, or dispensed by defendants was inadequate, where it did not allege whether plaintiff took the drug upon prescription or upon directions if any, given on the container, or upon any direction at all.

6. Pleading 🔑193(1)

In action for blindness allegedly induced by taking of drug dinitrophenol manufactured, distributed, sold, and dispensed by defendants, pleading defendants' knowledge of the dangerous character of the drug by way of recital or parenthetically, rather than positively, subjected complaint to demurrer.

7. Druggists 🔑10

In action for blindness allegedly resulting from taking of drug dinitrophenol in reliance upon published false statements and representations of defendants that the drug was harmless, complaint failed to allege how plaintiff was induced to use or take the drug, in view of the inconsistent allegations that the precise names, titles, and exact contents and tenor of publications allegedly containing the representations were unknown to plaintiff and that the plaintiff heard, read, and believed in and relied upon the allegedly false statements.

8. Pleading 🔑252(2)

An amended complaint supersedes the original, but, in determining whether an amended pleading may be truthfully further amended, recourse may be had to prior pleadings.

9. Pleading 🔑241

If essential factual matters successively pleaded are so inconsistent upon their face that, if one is true, the other of necessity must be false, and there appears no explanation in the latter pleading of the contradictory factual allegations, the objections to the pleading should be sustained without leave to amend, particularly if no request therefor is made.

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* Subsequent opinion 128 P.2d 522.

10. Pleading ⚷252(2)

The rule permitting an examination of previous pleadings is applicable when verified contradictory statements essential to the cause of action are alleged.

11. Pleading ⚷8(15, 17)

Negligence is an "ultimate fact" and not a "conclusion of law" and may ordinarily be pleaded in general terms but fraud may be alleged in general terms only in the absence of a demurrer.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law" and "Ultimate Fact".

12. Pleading ⚷8(2, 15)

Intent is a "question of fact" and may be alleged generally but allegations of false representations relied upon are insufficient unless probative facts are pleaded.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

13. Druggists ⚷10

In action for blindness allegedly induced by reason of false representations that the drug dinitrophenol manufactured, sold, dispensed, and distributed by defendants was harmless, complaint was defective for failure to allege that the drug used by plaintiff had been manufactured, sold, dispensed, or distributed by defendants.

14. Druggists ⚷10

In action to recover damages for blindness allegedly induced by taking of the drug dinitrophenol, allegation that defendants were in business of manufacturing drugs and manufactured large quantities of specific drug allegedly causing blindness and distributed them to retail merchants, and that plaintiff purchased and took internally the "said" drug, did not definitely show that drug taken by plaintiff was manufactured or sold by defendants, where there was no allegation that defendants were exclusive manufacturers of such drug.

See Words and Phrases, Permanent Edition, for all other definitions of "Said".

15. Druggists ⚷10

In action for damages from blindness allegedly induced by the drug dinitrophenol falsely represented by defendants to be harmless, defendants were entitled either to a direct allegation that the drug manufactured by them was the particular drug taken by plaintiff, or allegations from which such fact might be definitely and reasonably ascertained, and, in absence of sufficient allegations of causation between alleged manufacture and distribution of drug by defendants and its use by the plaintiff, no cause of action was stated.

PETERS, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Cecilia Wennerholm and another against Stanford University School of Medicine and others, for loss of eyesight of named plaintiff through the alleged negligence of defendants. From a judgment for defendants, the plaintiffs appeal.

Judgment affirmed.

Vincent W. Hallinan and Emmett R. Burns, both of San Francisco, for appellants.

Hester W. Webb, of San Francisco, for respondent L. Stanford Jr. University, etc.

Cooley, Crowley & Supple, of San Francisco, for respondent Andrew B. Stockton.

Charles V. Barfield, of San Francisco, for respondent Cutter Laboratory.

WARD, Justice.

Plaintiffs appeal from a judgment against them following an order sustaining defendants' demurrers to their fifth amended complaint. The complaint alleged that the plaintiff Cecilia Wennerholm lost her eyesight through taking the drug dinitrophenol, and seeks to hold defendants responsible therefor. The defendants appearing by demurrer are Stanford University School of Medicine, Stanford University Hospital, Lane Hospital, The Board of Trustees of Leland Stanford Junior University and Wallace H. Alexander, Harry Chandler, Leland W. Cutler, Frank P. Deering, W. P. Fuller, Jr., Joseph D. Grant, Herbert C. Hoover, Ira S. Lillick, C. O. G. Miller, John T. Nourse, Francis Price, Paul Shoup, Stuart L. Rawlings and M. C. Sloss as members thereof and individually, L. R. Chandler, Cutter Laboratory, a corporation, and Maurice Tainter.

The charge in the fifth amended complaint is that defendants, "in the business of manufacturing, distributing, selling and dispensing drugs, medicines and chemical compounds, designed and purporting to cure and relieve human sickness, * * * by means of statements and articles caused by said defendants to be printed in newspapers of general circulation throughout the entire State of California, and elsewhere and in divers printed pamphlets and circulars, circulated and disseminated to the general public throughout the said state and elsewhere, and by divers publications in purported medical journals, the precise names and titles and exact contents and tenor of said publications being now unknown to plaintiffs, and being now well known to defendants, did falsely state, represent, allege and say in substance and effect that a certain chemical compound, commonly known as dinitrophenol, was a drug and chemical compound which could be taken internally by human beings and was a harmless drug which would relieve and cure divers illnesses and afflictions of the human body, and in particular would reduce excessive weight and would alleviate obesity without causing physical illness or harm; whereas, in fact and in truth, as they, the said defendants, and each of them * * * well knew, the said dinitrophenol was a drug dangerous, detrimental, poisonous, deleterious to the human body and system, and was inherently dangerous to human life and limb, and liable to cause blindness * * *; that the said defendants * * * did manufacture, sell, dispense and distribute throughout the State of California * * * through the medium of wholesale and retail druggists and physicians * * * large quantities of the said dinitrophenol, and the said plaintiff Cecilia Wennerholm heard, read, believed in and relied upon all and singular the aforesaid false *statements and representations* * * * and * * * ignorant of the aforesaid falsity of the aforesaid statements and representations * * * and * * * relying upon, all and singular, the aforesaid statements and representations of said defendants, and not otherwise, purchased and took internally the said dinitrophenol for the purpose of reducing over-weight and obesity * * *, on or about the said 9th day of March, 1934, and continued taking the same internally each and every day until and including the 30th day of December, 1934, and that by reason of the taking of said dinitrophenol * * *," so she claims, she became blind. The plaintiff husband also seeks recovery for moneys expended and incurred by reason of such injuries.

The principal questions raised by the appeal are whether the fifth amended complaint sets forth facts entitling the plaintiff to relief on the ground of fraud, and if so, whether a general demurrer should have been sustained without leave to amend.

[1-4] Fraud is never presumed; it must always be pleaded and established. Harding v. Robinson, 175 Cal. 534, 166 P. 808. The complaint should substantially show the representation of a material fact. The falsity thereof, the knowledge of such falsity or the making of a representation without sufficient knowledge, the intent to deceive or induce one to enter into a transaction, the participation of the defendant or defendants accused of the fraud, the belief in the truth of the representations, the reliance thereon and the consequent damages to the party or parties injured, are essentials necessary to be specifically alleged or necessarily implied from facts pleaded. A pleading may be sufficient if it states a cause of action against the defendants, although it may be amenable to attack by special demurrer. In that event the defendant is entitled to have the complaint set forth specific averments of fraud or state why a plaintiff is unable to do so. 12 Cal. Jur. 800; 24 Am.Jur. 71; 21 R.C.L. 440. The grounds of demurrer of the individual and various group defendants herein are not identical, particularly in setting forth special grounds of demurrer, but all agree in urging that the fifth amended complaint does not state a cause of action. Some of the special grounds of demurrer, though not phrased in the same language, are substantially the same and are aimed at the same alleged defects.

[5] The complaint does not give adequate information concerning the charges defendants are called upon to meet. It is not alleged whether plaintiff took the drug upon prescription, upon directions, if any, given on the container, or upon any direction at all. Irrespective of a possible defense of superseding cause, these circumstances should be alleged to apprise the defendants of the nature of the charge and to permit them to prepare a defense. The allegation that defendants were the manufacturers of the drug, and gave directions

for its use, may be matters peculiarly within the knowledge of defendants, but whether plaintiff wife followed such directions is a subject upon which defendants are entitled to be informed. It is material for them to know whether plaintiffs predicate the complaint for damages upon the quantity, the dosage or the continuous use of the chemical.

[6] The manner in which defendants' knowledge of the dangerous character of the drug is pleaded, by way of recital or parenthetically rather than positively, is subject to demurrer. California Trust Co. v. Gustason, 15 Cal.2d 268, 101 P.2d 74; Carlson v. Farm Land Investment Co., 32 Cal.App. 538, 164 P. 344, 348; Swasey v. de L'Etanche, 17 Cal.App.2d 713, 62 P.2d 753.

[7] The present complaint fails to allege how plaintiff wife, relying upon the alleged published false statements and representations of defendants that the drug was harmless, was induced to use or take the drug when it further appears in the complaint that "the precise names and titles and exact contents and tenor of said publications" are "now unknown to plaintiff, and" are "now well known to defendants". The allegations are contradictory and inconsistent with the allegation that plaintiff "heard, read, believed in and relied upon all and singular, the aforesaid false statements * * * and not otherwise purchased" the drug.

Plaintiffs seem to be satisfied with the averment that "the precise names and titles and exact contents and tenor of said publications being now unknown to plaintiffs, and being now well know to defendants" is sufficient to identify the alleged false publications. The complaint simply alleges that "the said defendants and each of them" did that of which plaintiffs complain. Assuming that the precise names and titles and exact contents of the publications are "now unknown to plaintiffs", still the tenor or purport of the publications must be the groundwork upon which it is necessary that plaintiff rely. Assume further that the purport of the advertisement was to the effect that "a certain chemical compound, commonly known as dinitrophenol * * * was a harmless drug", the complaint is uncertain in the allegation that the chemical compound, dinitrophenol, advertised, was the dinitrophenol manufactured, or that the advertised dinitrophenol was the "certain chemical compound" which plaintiff took internally "for the purpose of reducing overweight and obesity".

There is no intention herein to hold that a tort action based upon false advertising may not be maintained when properly pleaded. However, this is the fifth amended complaint. A more strict rule should be invoked when heretofore five efforts have proved futile to state a cause of action.

In examining the previous complaints on the allegation of inducement, it is discovered that in a prior amended complaint verified by the husband, one of the plaintiffs, the details and circumstances of the use by the plaintiff wife of this chemical compound are set forth and, as so stated, are inconsistent with the allegation in the present complaint that plaintiff relied upon the advertisements "and not otherwise". In later amendments, including the present complaint, by reason of the absence of plaintiffs from the county, the verification is by one of their attorneys.

[8, 9] It is true that an amended complaint supersedes the original (Russell v. Ramm, 200 Cal. 348, 254 P. 532), but in determining whether an amended pleading may be truthfully further amended, recourse may be had to prior pleadings. If essential factual matters successively pleaded are so inconsistent upon their face that if one is true the other of necessity must be false, and there appears no explanation in the latter pleading of the contradictory factual allegations, the objections to the pleading should be sustained without leave to amend, particularly if no request therefor is made. Otherwise the complaint would state a sham cause of action. This rule should not be confused with the privilege of the pleader to state several causes of action in conformity with correct rules of pleading. In the present case the complaint purports to state a cause of action based upon fraud. In the verified first amended complaint the following allegations appear: "That on or about the 9th day of March, 1934, the plaintiff Cecilia Wennerholm consulted her family physician in regard to her health, particularly her obesity; that the said physician prescribed medicine for her, to-wit, Dinitrophenol on written Prescription No. 26524, which was filled at the Rodeo Drug Store, Rodeo, California." In the fifth amended verified complaint, it is alleged that the plaintiff wife relied upon "the aforesaid false statements"

[advertisements] *"and not otherwise"* (italics added).

[10-13] The rule permitting an examination of previous pleadings is often used to determine whether the statute of limitations has expired. The reason for this rule is to discover the truth. The rule is equally applicable when verified contradictory statements essential to the cause of action are alleged; for example, in a complaint for fraud, wherein it is necessary that the particular facts constituting the fraud must be alleged. Vandervort v. Farmers, etc., Nat. Bk., 7 Cal.2d 28, 59 P.2d 1028. Negligence is an ultimate fact and not a conclusion of law and may ordinarily be pleaded in general terms, but fraud may be alleged in general terms only in the absence of a demurrer. Intent is a question of fact and may be alleged generally (Rosson v. Villanueva, 175 Cal. 632, 634, 166 P. 1004), but allegations of false representations relied upon are insufficient unless probative facts are pleaded. Lewis v. San Francisco, 2 Cal.App. 112, 82 P. 1106; Goodwin v. Whittier, Coburn Co., 170 Cal. 305, 149 P. 583. If it is plaintiffs' suggestion that the allegations in the several complaints are possibly consistent upon the theory that plaintiff "heard, read, believed in and relied upon" the alleged false representations made by defendants by merely taking the "prescribed medicine" under her physician's direction, that is, that she was in fact ignorant of the contents of the compound but relied upon her physician, then defendants are entitled to know through the allegations of the present complaint whether in administering the drug the physician followed directions, if any, given by defendants. "As an element of such a cause of action against the defendants, they must be shown either to have participated in the making of the representation or in some manner to have assumed responsibility for it." Rhode v. Dock-Hop Co., 184 Cal. 367, 382, 194 P. 11, 17, 12 A.L.R. 437.

It is alleged that defendants manufactured, sold, dispensed and distributed dinitrophenol, but it is not alleged that the dinitrophenol used by plaintiff wife had been manufactured or sold or dispensed or distributed by defendants. Hruska v. Parke, Davis & Co., 8 Cir., 6 F.2d 536, relied upon by appellants, may be readily distinguished from the present case. In the Hruska case, a "Camphor Solution Neutral" was prepared, manufactured, sold and dispensed by the defendants. The opinion in effect held that physicians generally know that camphor prepared with vegetable or animal oil is harmless to the individual, easily absorbed, and often helpful as a stimulant in cases of exhaustion, whereas mineral oil used by defendants in that case in the preparation of the solution could not be absorbed by the human body, and was therefore injurious. Relating the facts in that case, the court said (page 537 of 6 F. 2d): "Further, plaintiff * * * was ill and under the care of a physician, who knew of the use made of camphor in solution with an animal or vegetable oil for subcutaneous injection, but who did not know that *defendant* had prepared *its* 'Camphor Solution Neutral' with mineral oil, and, believing the same to be safe, helpful, and harmless, did inject large quantities of the *same* into the body and system of plaintiff" (italics added).

[14] It is not clear whether the charge against defendants is merely that they disseminated in printed matter false statements that the drug dinitrophenol was harmless when they knew it to be dangerous, or whether defendants are also charged with having manufactured and distributed the *particular* quantities or portions of the drug which plaintiff took. Appellants contend that the word "said" cures any uncertainty in the allegation. The complaint alleges that defendants, being in the business of manufacturing, distributing, selling and dispensing drugs, medicines and chemical compounds designed to cure bodily ailments, disseminated to the general public through printed pamphlets, circulars and medical journals the false statement that the drug was harmless. It further alleges that at all times defendants manufactured, sold, dispensed and distributed through the medium of wholesale and retail druggists and physicians "large quantities of the said dinitrophenol" and that plaintiff "purchased and took internally the said dinitrophenol". It is not alleged that defendants were the exclusive makers of the drug. It cannot be definitely ascertained whether the "said" dinitrophenol refers to the drug manufactured by defendants or to dinitrophenol generally.

The gravity of the failure to properly plead is emphasized when it is found that the fifth amended complaint does not allege from whom plaintiff purchased the drug,—whether it was a retailer or a wholesaler.

In prior complaints the place where the drug was obtained and purchased is directly alleged.

[15] It is not to be assumed from the foregoing that it is the intention to hold it is always necessary to allege a previous combination among those charged, or that one confederated or conspired with another. The tort committed is the wrong alleged, which is usually sufficient in pleading; participation may be proof of a conspiracy, which is an ultimate fact often drawn by inference from the evidence. However, in the present case the uncertainty in alleging a definite causation necessitates specific allegations in respect to matters that ordinarily need not be alleged. Defendants are entitled either to a direct allegation that the dinitrophenol manufactured, sold, dispensed and distributed by them was the particular dinitrophenol taken by plaintiff, or allegations from which such fact may be definitely and reasonably ascertained. In the absence of sufficient allegations of causation between the alleged manufacture and distribution of the drug by defendants and its use by plaintiff, no cause of action is stated.

The demurrers specify additional grounds upon which the trial court's ruling might be properly sustained, but in view of the conclusions reached on those already pointed out a discussion of the others becomes unnecessary.

Appellants have declined to amend, and by failing to present such a request are forced to stand on the pleading.

The judgment is affirmed.

I concur: KNIGHT, J.

PETERS, Presiding Justice (dissenting).

I dissent.

The majority opinion holds that the trial court properly sustained the general and special demurrers to the fifth amended complaint. In so holding this court has applied a doctrine of strict construction of pleadings that, in my opinion, has long since been abandoned in this state. It must be remembered that the purpose of a special demurrer is not to require plaintiff to file a complaint that is an artistic masterpiece, but to require the plaintiff to furnish his adversary with a reasonably complete and clear statement of facts upon which the action is predicated. Tested by this standard, and stripping the complaint of all unnecessary allegations, what does this fifth amended complaint allege? It charges that the defendants are in the business of manufacturing, distributing, selling and dispensing drugs and medicines for human use; that by means of statements and articles in newspapers and medical journals, and in pamphlets and circulars disseminated to the public, these defendants falsely represented that a certain drug could be taken internally by human beings; that such drug was harmless and would relieve obesity; that defendants knew the drug was dangerous and poisonous and was inherently dangerous to human life and liable to cause blindness; that the defendants manufactured, sold and dispensed the drug throughout the state; that plaintiff wife heard and read, believed and relied on the false representations; that in reliance thereon she purchased and took internally the drug; that as a result thereof she became blind. It is true that the complaint is not as artistically framed as might be desired. But does not that complaint contain all the essential allegations to state a cause of action against defendants? I think it does.

To this complaint various general and special demurrers were interposed. All defendants did not urge the same grounds of demurrer. Many of the grounds urged are stated in vague and uncertain language. The majority opinion applies the strictest possible rule of interpretation to the complaint, but applies a very liberal rule, indeed, to some of the demurrers. However this may be, the grounds urged in the various demurrers, giving them the same liberal interpretation that I believe should be applied to the complaint, can be classified as follows:

1. That the cause of action is barred by the statute of limitations;

2. That no cause of action has been stated because no privity has been alleged between plaintiffs and defendants;

3. That it would be a defense to the action if the plaintiff wife took the drug upon the prescription of a physician; that this fact was alleged in prior complaints; that its omission from the fifth amended complaint does not cure the pleading; that the fifth amended complaint, in the absence of an explanation as to why this allegation was omitted, must be deemed to include this omitted allegation;

4. The contents of the publications are not sufficiently alleged;

5. That the complaint insufficiently sets forth the relationship, if any, between the defendants, and fails to set forth the particular acts done by them, simply alleging in general terms that "defendants, and each of them", did the acts of which complaint is made;

6. Connected with No. 5, supra, is the contention in two of the four demurrers (Defendant Tainter and the Stanford University defendants), that several causes of action are improperly united without being separately stated;

7. That it is uncertain whether the complaint charges defendants as the manufacturer of the particular drug which plaintiff used, or merely with making false statements about the drug, generally;

8. That the facts as to plaintiff's taking the drug are too incompletely and insufficiently alleged to be good against special demurrer.

There are other minor points urged in the four demurrers, but the above eight points are the main grounds urged. The majority opinion relies upon some, but not all, of these contentions. In my opinion, none of the contentions is well taken.

1. The contention that the cause of action is barred by the statute of limitations is based on the theory that the fifth amended complaint states a new cause of action from that stated in the original complaint. If the cause of action set forth in the fifth amended complaint is not a new one, the original complaint was admittedly filed in time. In view of the many recent decisions on this question it hardly seems necessary to again review the fundamental principles involved in determining whether an amended pleading states a new cause of action from that contained in the original complaint. It is fundamental that, unless the amended complaint sets forth an entirely different cause of action from the original, the amended complaint, for the purposes of the statute of limitations, must be deemed filed as of the date of the original complaint. In the case of Day v. Western Loan & Bldg. Co., 42 Cal.App.2d 226, 108 P.2d 702, I recently reviewed this very question, and discussed some of the authorities. The authorities there cited are conclusive on this point.

An examination of the various complaints discloses that the original complaint charged that the representations as to the harmless character of the drug were negligently made, while the fifth amended complaint charges that the representations were made knowing they were false, and knowing that the drug was dangerous. Certainly, it cannot be held that the last complaint states an entirely different cause of action under the rules above-discussed. Any contrary intimation in several of the early cases cited by respondents must be deemed to have been long since overruled by the more recent cases on this point.

2. The contention that the complaint fails to state a cause of action because no privity is alleged between plaintiffs and defendants is obviously without merit. The trial court, according to what was said on the oral argument and in the briefs, sustained demurrers to some of the earlier complaints on the theory that in a negligence action no liability exists in the absence of privity. That doctrine has no application to fraud cases, nor has it any application to tort cases involving dangerous instrumentalities. Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013. That this doctrine applies to the sale of drugs dangerous to human life is amply demonstrated by the authorities. See, 17 Am.Jur., 863; 111 A.L.R. 1241; Hruska v. Parke, Davis & Co., 8 Cir., 6 F.2d 536. The element of privity in either a fraud or negligence action of this type is a false quantity.

3. It is next urged that the first complaints alleged that the drug had been taken on the prescription of a physician; that, although that allegation is omitted from the fifth amended complaint, the allegation must be read into the last complaint; that if that allegation is read into the fifth amended complaint the fact that the drug was taken on the prescription of a physician would be a complete defense as a matter of law. I agree with the holding in the majority opinion that, if an early verified pleading contains an allegation which renders a complaint vulnerable, the defect cannot be cured by simply omitting the allegation, without explanation, in a later pleading. But I vigorously disagree with the contention of respondents that, if the allegation in question is read into the fifth amended complaint, the complaint would then be vulnerable. It seems quite clear to me that one who manufactures and sells a drug dangerous to life and health, well knowing it to be dangerous, as alleged in this complaint, is liable even though the prescribing physician might also be culpable. See annotation 80 A.L.R. 452. The mere fact that the doctor might also be liable

would not release defendants from liability. Moreover, it cannot be said, as a matter of law, that the mere fact the drug was prescribed by a physician determines that the doctor was negligent. Obviously, practicing physicians have neither the time nor the facilities for extensive research. They, like the public, must rely on the findings and research of reputable laboratories and hospitals. Whether, in a particular case, the physician is negligent in relying on the representations made by such laboratories and hospitals depends upon the proof in that case.

Certainly, it cannot be held, as a matter of law, that the acts of the doctor, even if negligent, would constitute a superseding cause so as to break the chain of causation. That is obviously a matter of defense which need not, and should not, be anticipated by the plaintiffs. The contrary holding in Young v. Park, Davis & Co., Inc., 49 Pa. Super.Ct. 29, relied upon by respondents, is not sound and should not be followed.

4. Some point is made that the contents of the publications are not sufficiently alleged. This contention is without merit. Inasmuch as the complaint charges the defendants as the manufacturers and sellers of the drug which they distributed knowing it to be dangerous to health and life, the general allegations in reference to the statements alleged to have been made by defendants are clearly sufficient. It would be a harsh and unwarranted rule of law that would bar the plaintiffs from all relief for injury caused by the fraudulent statements of defendants where the plaintiffs cannot now recall in just what publications the statements appeared, and cannot remember their exact context except that such statements conveyed to the reader the belief that the drug was beneficial for obesity and could be taken without danger.

5 and 6. It is next urged that the complaint insufficiently sets forth the relationship, if any, between the defendants, and fails to set forth the particular acts done by them. Connected with this same point is the contention urged in two of the demurrers that several causes of action have been improperly united.

The complaint alleges that the "defendants, and each of them", did the acts of which complaint is made, that is, made and published false statements concerning the drug in question, and manufactured, sold, dispensed and distributed it. It is my opinion, based on well-settled law, that such allegations, not only are sufficient to state a cause of action, but also state but one cause of action against all defendants. Allegations such as are contained in this complaint are clearly sufficient to charge defendants as tort feasors who acted pursuant to unity of design or agreed purpose. In such event they are co-conspirators, each liable as a joint tort feasor for all the damage suffered by the plaintiff. Loeb v. Kimmerle, 215 Cal. 143, 9 P.2d 199; McPhetridge v. Smith, 101 Cal.App. 122, 281 P. 419; Mox Incorporated v. Woods, 202 Cal. 675, 262 P. 302; 20 Cal.Jur., 510; 24 Cal. Jur., 597; 1 Cal.Jur., 363. No necessity exists for pleading the fact of the conspiracy.

This principle of law is similar to the rule in the law of agency that a complaint against the principal which seeks to hold him liable for the contracts or delicts of his agent may allege a contract or tort committed by the principal without referring to the agent at all. Simpson v. Bergmann, 125 Cal.App. 1, 13 P.2d 531; Resetar v. Leonardi, 61 Cal.App. 765, 216 P. 71. Similarly, under the authorities first cited above, upon a complaint charging defendants and each of them with certain acts, it may be shown at the trial that they were committed pursuant to a common design and agreed purpose without alleging that fact.

The theory behind this rule is quite clear. In actions against co-conspirators the gist of the action is the wrongful act or acts done, rather than the conspiracy or agreement. It is not the agreement which gives rise to liability, but the wrongful acts done pursuant thereto. Acts otherwise lawful, except in rare situations, do not become actionable because done pursuant to agreement. Acts of co-conspirators which give rise to liability are generally acts for which the individual committing them would be liable in the absence of a conspiracy. For this reason, the fact that acts were done pursuant to a conspiracy need not be alleged. The fact of conspiracy is important only as establishing liability of each person who joined in the agreement for the wrongful acts of any of them done pursuant thereto. Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann.Cas.1915B, 1011; 5 Cal.Jur., 528, 533. But the conspiracy need not be expressly alleged in order to hold that what was done was done pursuant to a conspiracy. McPhetridge v. Smith, supra. It is sufficient, as in the case herein, to charge each defendant with having committed all wrongful acts. In Loeb v. Kimmerle, supra, 215 Cal. at page 152, 9 P.2d at page 203, the Supreme Court stated the rule as follows: "Appellant next assails the judgment because, he says, the verdict is against law and gives as his reason therefor the fact that the complaint did not charge or set out facts indicating a conspiracy so as to warn him that he was being held as a party to the assault because he did conspire with Kimmerle. In our discussion of the previous contention we have already observed that 'it is the civil wrong, not the conspiracy, which constitutes the cause of action.' Smith v. Blodgett, supra. In Herron v. Hughes, 25 Cal. 555, we find this succinct statement of the rule, which has been quoted with approval in the more recent case of Bowman v. Wohlke, 166 Cal. 121, 135 P. 37, Ann.Cas.1915B, 1011: 'Where two or more are sued for a wrong alone, it may be necessary to prove previous combination in order to secure a joint recovery, but it is never necessary to allege it, and if alleged it is not to be considered as of the gist of the action. That lies in the wrongful and damaging act done' * * *. Considerable reliance is had by appellant upon the case of McPhetridge v. Smith, 101 Cal.App. 122, 281 P. 419, but we find no statement therein which indicates that in an action for the tort of two or more persons it is essential to a recovery against an indirect actor and participant therein [to allege] that he confederated and conspired with the one who directly acted. In fact, the case is in full accord with those authorities from which we have already extracted excerpts. Sound reason brings us to the same conclusion. The actionable wrong is the tort committed. The liability is determined by the ultimate fact of whether the defendant participated in the commission of the wrong. The evidence establishing the conspiracy is merely proof of the ultimate fact." See, also, Ramsey v. Powers, 74 Cal.App. 621, 241 P. 567.

Under this rule the allegations contained in the complaint that the acts were done by "defendants, and each of them", may be supported at the trial by proof of acts done by any of the defendants pursuant to the common design or conspiracy between them. In view of this well-settled rule of law it seems quite clear to me that the plaintiffs were not required to allege which of the defendants manufactured the drug, who sold it, who dispensed or distributed it, or who made the false statements concerning it. The law does not require, in a case like the one here involved, that the plaintiffs allege the particular acts of each defendant, nor is it required that the plaintiffs allege the relationship existing between the defendants.

7 and 8. It is next urged that it is uncertain whether the complaint charges defendants as the manufacturers of the particular drug which plaintiff wife used, or with merely making false statements about the drug. It is also contended that the facts as to the taking of the drug are too incompletely and insufficiently alleged to be good against special demurrer.

These two contentions can be considered together. It must be conceded that the complaint is not as clear as might be desired on the question as to whether the defendants are charged with manufacturing the particular drug taken by plaintiff wife, or whether they are simply charged with making false statements about the drug. However, reasonably construed, the complaint, in my opinion, is sufficient. The allegations are quoted in the majority opinion. After alleging that the defendants are in the business of manufacturing, distributing and selling drugs and medicines designed to cure bodily ailments, and, after setting forth that defendants knowingly made false statements concerning this particular drug in printed pamphlets and circulars, and that plaintiff wife relied upon such statements, the complaint goes on to allege that the defendants did manufacture, sell, dispense and distribute through the medium of wholesale and retail druggists and physicians "large quantities of said dinitrophenol", and that plaintiff wife "purchased and took internally the said dinitrophenol" for the purpose of reducing obesity. This sufficiently alleges that the drug taken by plaintiff wife was the drug manufactured and sold by defendants, if such allegation is necessary. Certainly these allegations are as clear and certain as the demurrers filed by the respective respondents on this point.

The majority opinion makes much of the fact that the complaint fails to disclose whether plaintiff took the drug on prescription, where she bought it, and whether she took the drug upon directions, if any, given on the container, or upon any direction at all. What is the necessity for alleging these facts? The plaintiffs allege, in no uncertain language, that defendants knowingly and fraudulently made false statements concerning the drug; that "relying upon, all and singular, the aforesaid statements and representations of said defendants, *and not otherwise,*" the plaintiff wife purchased and took internally the drug, and that as a direct result she became blind. That is all that was necessary. If it is a fact that her doctor or druggist were negligent, or that she took the drug improperly or in violation of directions, these things, at most, are matters of defense which the plaintiff need not, and should not, anticipate.

The majority opinion assumes that the complaint is based solely on the theory of fraud. If this assumption is correct, the complaint is clearly sufficient. The allegations necessary to support a fraud action are set forth in the majority opinion. This complaint alleges every necessary fact. However, a reading of the complaint demonstrates that, although the basic theory of recovery is predicated on fraud, the complaint also states a cause of action for negligence. As already pointed out in this dissent, the lack of privity would not defeat such an action.

The problems presented on this appeal are strikingly similar to those involved in Hruska v. Parke, Davis & Co., supra. The Circuit Court of Appeals was there required to pass upon the question as to whether the trial court had properly sustained a demurrer to a complaint similar in many respects to the one here involved. What was said in that opinion in holding the complaint sufficient is equally applicable here. On page 537 of 6 F.2d it is stated:

"Do the facts well pleaded in the petition by plaintiff state an actionable controversy by plaintiff with defendant? The defendant says 'No,' to this question, because it says the cause of action as pleaded is bottomed upon negligence, and, as there is no privity of contract between the defendant manufacturer of the solution and plaintiff, there is no neglect of duty owed by defendant to plaintiff, hence no negligence.

"A careful reading and analysis of the pleading of plaintiff will disclose the action as pleaded to be not entirely based on negligence, but to possess many, if not all, the elements of an action for fraud, in which the element of privity of contract would not be an essential one. * * *

"However, it is not necessary in this case to go farther than to ascertain if the facts well pleaded constitute any cause of action whatever, either for negligence, or for fraud, or both combined, as the only objection to the pleading which is here involved, as determined by the trial court, was the defect of such issuable facts in the pleading as will warrant a recovery by plaintiff. However, should the case be regarded solely as one for negligence, still the absence or want of privity of contract is not, in our judgment, fatal to the pleading. It must be borne in mind this is not the usual case of manufacture and sale discussed by the authorities. On the contrary, defendant in this case is conducting a highly technical and specialized business, that of a manufacturing chemist. The products so prepared by it are placed on the market, to be purchased and employed in curing the ills of the human body and in preserving human life. The defendant deals with the public to be treated with its preparations and drugs, not on an equal footing, but with the understanding the public will trust to the superior intelligence and general knowledge of defendant, its agents and employés, in the manufacture and preparation of its products; also, when its compounds, drugs, and preparations are placed on the market, that they are safe, harmless and beneficial in use. In other words, the public relies on the truth of such statements employed in advertising by the defendant, and does not seek expert advice from others regarding the propriety of the use of the commodities defendant has manufactured and placed on the market. Defendant company is constantly dealing with human health and human life. It manufactures and sells compounds and drugs represented to be harmless when employed as directed, and, being so represented to the public, they must be, as represented, harmless in use. Health is too dear, and life too sweet, and consequences too great, to admit of either carelessness or mistake in manufacture or fraud in inducing the sale of the same."

In my opinion, the judgment should be reversed.

45 Cal.App.2d 87

PEOPLE v. BLACK et al.

Cr. 3204.

District Court of Appeal, Second District,
Division 2, California.

May 28, 1941.

Rehearing Denied June 12, 1941.

Hearing Denied June 26, 1941.

1. Statutes 🔑183

Once the intention of the legislature is ascertained, it will be given effect, even though it may not be consistent with the strict letter of the statute.

2. Statutes 🔑181(2)

A statute should not be construed in a manner resulting in a palpable absurdity.

3. Criminal law 🔑13

The statute making it unlawful to throw, drop, etc., in, upon or about enumerated places of public assemblage any substance injurious to person or property or nauseous, sickening, irritating or offensive to any of the senses, and making it a felony if any person in violating those provisions willfully employs or uses any substance of that nature or willfully employs or uses acid, denounces the willful throwing, dropping, etc., of injurious or irritating acids and is not invalid as too indefinite, uncertain, and broad in its terms. Pen.Code, § 375 (1, 4); Const.Cal. art. 1, §§ 1, 13; U.S.C.A. Const. Amend. 14.

4. Statutes 🔑183

A statute will not always be held to include every case which falls within its literal terms.

5. Constitutional law 🔑42

Defendants who were charged with willfully placing injurious and offensive acid in places of business in violation of statute were in no position to attack validity of statute on ground that a particular subsection thereof is so broad in its scope that it would permit the prosecution of an individual for the innocent possession or use of acid in his business. Pen.Code, § 375(1, 4).

6. Constitutional law 🔑46(1)

Where argument advanced in support of contention that statute under which defendants were prosecuted was void was based entirely on a hypothetical situation not involved in the case, defendants' contention that the statute was invalid was not required to be considered.

7. Constitutional law 🔑42

One who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks, and that he is actually aggrieved by its operation.

8. Conspiracy 🔑43(6)

A count of an indictment accusing defendants of the crime of conspiracy to violate enumerated sections of the Penal Code, charging them generally with a conspiracy to commit assaults, to extort money, and to throw acid in places of business, and alleging 19 separate overt acts as having been committed in furtherance of conspiracy, was sufficiently definite and certain to charge defendants with the crime of conspiracy. Pen.Code, §§ 245, 375(4), 518.

9. Conspiracy 🔑28

The gist of the crime of "conspiracy" is the unlawful agreement to commit any crime accompanied by an overt act in furtherance of such agreement. Pen.Code, §§ 182, 184.

See Words and Phrases, Permanent Edition, for all other definitions of "Conspiracy".

10. Conspiracy 🔑37

The fact that conspirators may succeed in perpetrating the acts which they conspired to commit and that such acts constitute separate crimes cannot operate to relieve them from liability for the conspiracy.

11. Indictment and Information 🔑125(19)

Each of five counts of an indictment charging defendants in language of statute with unlawfully throwing, dropping, pouring, depositing, releasing, discharging, or exposing injurious and offensive acid in places of business charged but the single offense of putting a substance which is injurious to person or property or is offensive to the senses in designated places, since the gravamen of the offense is the putting of the substance in a place of public assemblage, and the means employed is wholly immaterial. Pen.Code, §§ 375(1, 4), 950, 951, 952, 954.

12. Indictment and Information 🔑110(3)

An indictment charging defendants with unlawfully placing injurious and offensive acid in places of business properly charged commission of offense in language of statute making that action unlawful. Pen.Code, § 375(1, 4).

13. Criminal law 🔑1178

Where the several claims of error are accompanied neither by argument nor citation of appropriate authority, the reviewing court is not called on to consider the points so presented.

14. Criminal law 🔑1144(10)

Where the trial court repeatedly admonished the jury to disregard improper questions and statements of the district attorney and to draw no inferences therefrom, the reviewing court was required to presume that the jury heeded the admonition and that no harm resulted.

15. Criminal law 🔑1166½(12)

Alleged misconduct on part of trial court could not be complained of on appeal, where statements alleged to constitute misconduct were of a trivial nature and in most instances were accompanied by an admonition to the jury to disregard them.

16. Criminal law 🔑1037(1)

Alleged misconduct of the district attorney in his argument to the jury would not be considered by the reviewing court where it appeared that many of the matters assigned as error were not objected to at the time the statements were made.

17. Criminal law 🔑1144(10)

Where the prosecutor in a few instances during argument departed from the record and so exceeded the bounds of propriety, but on numerous occasions during course of argument jurors were admonished to disregard prosecutor's objectionable statements and were instructed that their verdict should be based on the evidence as they heard it in the courtroom and on nothing else, the reviewing court was required to assume that those admonitions were followed.

18. Malicious mischief 🔑9

Evidence was sufficient to connect defendants with offenses charged in five counts of an indictment charging defendants with willfully placing acid which was injurious to person and property, and offensive to the senses in various places of business in violation of statute. Pen.Code, § 375(4).

19. Conspiracy 🔑41

All conspirators are liable for the acts of their co-conspirators committed in furtherance of the proven purpose of the conspiracy.

20. Criminal law 🔑1159(6)

Where evidence connecting defendants with commission of crime charged was circumstantial, but circumstances reasonably justified verdict of guilty, the reviewing court was not warranted in interfering with the verdict.

21. Criminal law 🔑822(1)

Instructions given in a criminal case should be considered as a whole.

22. Criminal law 🔑763(8)

An instruction that if a conspiracy was established and jury also found that in pursuance of that conspiracy and the object of that conspiracy acts set forth in five counts of an indictment were committed, all members of that conspiracy were equally guilty of the offenses charged in those counts, if jury found that those offenses were, however, committed, correctly stated the law and did not amount to a "directed verdict".

See Words and Phrases, Permanent Edition, for all other definitions of "Directed Verdict".

23. Criminal law 🔑511(2)

Evidence corroborative of an accomplice's testimony need not of itself establish guilt or encompass every detail of such testimony, but it is sufficient if, standing alone, it tends to connect defendant with the commission of the offense charged.

24. Criminal law 🔑511(1)

Evidence was sufficient to corroborate the testimony of accomplices relating to conspiracy to violate statute making it an offense willfully to place acid which is injurious to person and property and offensive to the senses in places of business. Pen.Code, § 375(4).

25. Conspiracy 🔑47

A conspiracy may be proved by circumstantial evidence.

26. Criminal law 🔑369(2)

Defendants convicted of conspiracy to violate statute making it an offense willfully to place injurious and offensive acid in a place of business and of violation of statute could not complain of introduction of evidence concerning asserted independent crimes and acts of sabotage under rule that evidence of independent crimes is not competent if it has no tendency to prove some material fact in connection with crime charged, where defendants were charged with a conspiracy to commit numerous unlawful acts, and many of the acts in question were shown to have been committed shortly after the making of threats by defendants or at a time when one of them was on the premises involved. Pen.Code, § 375 (4).

27. Conspiracy ⚷47, 48

In prosecution for conspiracy to violate statute making it an offense willfully to place injurious and offensive acid in a place of business and for violation of statute, it was not necessary that defendants be directly connected with all of the various acts of sabotage and violence concerning which the prosecution was permitted to introduce evidence, and it was for the jury to determine from all circumstances whether the various acts were committed by one or more of the defendants in furtherance of the general design or objects of the conspiracy. Pen.Code, § 375(4).

28. Criminal law ⚷422(1)

In prosecution for conspiracy to violate statute making it an offense willfully to place injurious and offensive acid in a place of business and for violation of statute, testimony of conversations and acts of conspirators which occurred more than three years before date of indictment was properly admitted as tending to show formation and continuance of conspiracy from the time of its inception until 1938. Pen.Code, § 375(4).

29. Criminal law ⚷404(4)

In prosecution for conspiracy to violate statute making it an offense willfully to place injurious and offensive acid in a place of business and for violation of statute, metallic potassium which had been identified as the actual substance which conspirators had acquired for use in furtherance of the objects of the conspiracy was admissible in evidence. Pen.Code, § 375(4).

30. Criminal law ⚷650

In prosecution for conspiracy to violate statute making it an offense willfully to place injurious and offensive acid in a place of business and for violation of statute, it was within the trial court's discretion to permit an expert witness for the prosecution to conduct an experiment before the jury to demonstrate the flame reaction and other dangerous qualities of metallic potassium, where it was conducted under substantially similar conditions to those which were shown in evidence. Pen.Code, § 375(4).

31. Criminal law ⚷650

The mere fact that metallic potassium was obtained by defendants for use in furtherance of the objects of a conspiracy to violate statute making it an offense willfully to place injurious and offensive acid in a place of business constituted an "overt act", evidence of which was properly admitted in prosecution for conspiracy and for violation of statute, and hence an experiment which demonstrated the destructive qualities of metallic potassium was corroborative of the prosecution's theory that possession of the substance amounted to an overt act and tended to aid rather than confuse the jury. Pen.Code, § 375(4).

See Words and Phrases, Permanent Edition, for all other definitions of "Overt Act".

32. Criminal law ⚷780(2)

Where certain prosecution witnesses testified to acts done by them which were clearly performed in furtherance of the purposes of conspiracy with which defendants were charged, and there was no conflicting evidence on the point, the trial court properly charged the jury that as a matter of law those witnesses were "accomplices". Pen. Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

33. Criminal law ⚷772(4)

Where each of five counts of an indictment charged but a single crime and alleged that it had been committed on or about a specified date, and the only evidence relating to each count showed that but one offense was committed as charged and that it was within three years before filing of indictment, it was proper to instruct the jury that it was immaterial on what particular day any offense charged was committed, provided jury believed that such offense was committed within three years before filing of indictment.

34. Criminal law ⚷565

Where each of five counts of an indictment charged but a single crime and alleged that it had been committed on or about a specified date, and the only evidence relating to each count showed that but one offense was committed as charged and that it was within three years before filing of indictment, it was necessary for jury to find under count charging conspiracy to commit offenses only that any one of the overt acts charged in that count had been committed within three years before filing of indictment.

35. Criminal law ⚷829(1)

Where the jury was fully instructed that defendants were not on trial for any offense not charged in the indictment, the trial court did not err in refusing to give defendants' requested instruction that they were not charged with a conspiracy to establish uniform prices in the cleaning industry or to control the taking of "stops" from one cleaner by another.

36. Criminal law ⚷814(1)

Where defendants were not charged with unlawfully striking nor with conspiracy to do so, a requested instruction concerning the right of labor to strike was properly refused.

McCOMB, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Lewis Black and others were convicted of a conspiracy to violate sections 245, 375 (4) and 518 of the Penal Code, and of five separate violations of section 375(4) of the Penal Code, and they appeal from the judgments and from orders denying their motions for a new trial.

Judgments and orders affirmed.

Rehearing denied; McCOMB, J., dissenting.

Joseph W. Ryan, of Los Angeles, for appellants.

J. E. Simpson, of Los Angeles, for appellant Lushing.

Swarts & Tannenbaum, of Los Angeles (Seymour P. Steinberg, of Los Angeles, of counsel), for appellant Meyers.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and A. H. Van Cott and Arthur Veitch, Deputy Dist. Attys., all of Los Angeles, for respondent.

PER CURIAM.

By an amended indictment defendants were charged in count I with a conspiracy to violate sections 245, 375(4) and 518 of the Penal Code, and in counts VI to X inclusive with five separate violations of section 375(4) of the Penal Code. Counts II, III, IV and V, which charged the commission of other offenses, were dismissed. The trial, which lasted more than three months, resulted in verdicts finding all the defendants, other than those against whom the charges had been dismissed, guilty of the offenses alleged in counts I and in counts VI to X inclusive, and judgments of conviction were accordingly entered. From such judgments and from the orders denying their motions for a new trial defendants have appealed.

The testimony in the voluminous record (more than 9400 pages) is conflicting in many respects and much of it is circumstantial. Viewing the evidence most favorably to the prosecution, the facts are as follows: In 1926 a group of persons, including some of the defendants, organized an association of cleaners and dyers, the object of which was to control, by means of picketing and sabotage, the prices and practices of the cleaners and dyers in the city of Los Angeles and vicinity. This association continued in existence from 1926 until 1938, although its name was changed from time to time and different individuals became participants in its activities. There is no occasion for detailing the acts committed by the members of the association or their hirelings at a time more than three years prior to the filing of the indictment herein. For the purpose of showing the continuing character of the conspiracy it is sufficient to observe that during the first nine years of its existence the members of the association were endeavoring by every means possible to "whip outlaw cleaning plants into line". The cleaners and dyers who refused to accede to the demands of the conspirators were subjected to many atrocious acts of violence and sabotage. During this period a representative was sent to Chicago to study the methods used by racketeers in the same industry. He returned with a list of the chemicals and acids which were used in that city and disclosed some of the means of sabotage which were there employed. Defendants were informed by the representative that if metallic potassium be concealed in garments sent to be cleaned it would cause fires during the cleaning process; that acid could be sprayed on clothing from fire extinguishers or other instruments, and that indelible dye could be hidden in clothing which, when placed in cleaning solvent in the cleaning drum, would damage all other clothing in the drum. Defendants procured chemicals, acids and equipment and proceeded to apply these methods in Los Angeles.

During the period within three years prior to the filing of the indictment defendants were shown to have been actively connected with the association and were conspirators in furtherance of its objects. Defendants Cowan, Keller and Meyers were owners and operators of both wholesale and retail cleaning establishments and were the moving force in the conspiracy. Defendants Black, Blumenberg, Dansky and Porter were representatives of various labor unions. The association sought to compel the many cleaners and dyers in the Los Angeles area to enter into agreements with labor unions, to fix the price to be charged for cleaning garments and to prevent anyone not a member of the association from encroaching upon the territory of any member. To enforce their demands defendants and various employees of the association contacted many cleaners and dyers and threatened to cause strikes, to picket the places of business, to assault the owners or operators, to damage property and even to kidnap a child. Many of the cleaners and dyers who refused to comply with these demands discovered to their sorrow that the association was making no idle threats. Noncomplying cleaners suddenly found themselves victims of a series of atrocious acts. Windows were broken, indelible dye placed in cleaning drums and powdered dye scattered over clothing in their establishments, "stink bombs" were thrown into their places of business, an obnoxious smelling "perfume" sprayed over garments, acid thrown into the establishments and over garments, a truck filled with clothing was stolen and the garments destroyed by acid, assaults were committed upon cleaners and their employees and pickets were placed in front of the places of business. As a result of such acts much property was damaged, several cleaners were forced to quit business and their establishments were acquired by one or more of the defendants.

In the briefs filed by defendants, which consist of nearly 1,500 pages, a multitude of errors are urged. Many of them concern inconsequential matters, and as to others defendants have seen fit to advance no argument whatever. This opinion will be confined to those rulings which if erroneous might have resulted in prejudice to defendants.

Particular stress is laid on defendants' contention that section 375 of the Penal Code is unconstitutional and therefore void. The title and material portions of that section are as follows:

"Putting offensive substance in theater or other place of public assemblage: Making or possessing such substance with unlawful intent: Punishment: Use of substance likely to produce serious illness or permanent injury: Use of tear or mustard gas, acid or explosives: Punishment.

"(1) It shall be unlawful to throw, drop, pour, deposit, release, discharge or expose, or to attempt to throw, drop, pour, deposit, release, discharge or expose in, upon or about any theater, restaurant, place of business, place of amusement or any place of public assemblage, any liquid, gaseous or solid substance or matter of any kind which is injurious to person or property, or is nauseous, sickening, irritating or offensive to any of the senses. * * *

"(4) Any person who, in violating any of the provisions of subdivision (1) of this section, willfully employs or uses any liquid, gaseous or solid substance which may produce serious illness or permanent injury through being vaporized or otherwise disbursed in the air or who, in violating any of the provisions of subdivision (1) of this section, willfully employs or uses any tear gas, mustard gas or any of the combinations or compounds thereof, or willfully employs or uses acid or explosives, shall be guilty of a felony and shall be punished by imprisonment in the State prison for not less than one year and not more than five years."

[1, 2] It is asserted that section 375 is so indefinite, uncertain and broad in its terms that it prohibits the legitimate use of acid in industry or in any place of business, and that the crime is not made dependent upon the malicious use of acid with a criminal or wrongful intent. Accordingly defendants contend that the statute violates sections 1 and 13 of Article I of the Constitution of the state of California and the fourteenth amendment of the Constitution of the United States. The statute must be construed in the light of certain well settled principles. We are enjoined by section 4 of the Penal Code to construe the provisions of the code "according to the fair import of their terms, with a view to effect its objects and to promote justice". Once the intention of the legislature is ascertained it will be given effect even though it may not be consistent with the strict letter of the statute. In re Sekuguchi, 123 Cal. App. 537, 11 P.2d 655; Crawford v. Payne,

12 Cal.App.2d 485, 55 P.2d 1240. In construing a statute it must be remembered that no law is to be construed in such a manner as to result in a palpable absurdity. People v. Craycroft, 111 Cal. 544, 44 P. 463.

[3, 4] Defendants were charged with a conspiracy to violate, and with several violations of, subsection (4) of section 375. That subsection, it will be recalled, denounces as a felony the willful use of acid in violating subsection (1) of the same section. Construing subsection (4) in the light of the foregoing rules of statutory construction, the legislative intent is clear. The crime denounced is the willful throwing, dropping, etc., in, upon or about any of the enumerated places of public assemblage, of an acid which is injurious to person or property, or is nauseous, sickening, irritating or offensive to any of the senses. The element of willfulness set forth in subdivision (4) is expressly made applicable to subdivision (1) by the use of the words, "Any person who, in violating any of the provisions of subdivision (1) of this section * * * willfully employs or uses acid * * *." Such a construction which is consonant with reason and common understanding, renders the statute definite and certain and does not violate any of the constitutional guarantees. The objection that the word "acid" is too indefinite since in its ordinary meaning it includes many non-harmful liquids and substances is fully met by the construction which we have placed upon such section. The acid must be such as is injurious to person or property, or is nauseous, sickening, irritating or offensive to any of the senses, and the use of such non-harmful acids as vinegar and the like is not prohibited. If, as contended by defendants, the terms of the statute are to be applied literally, then it might be so construed as to prohibit the possession or use of acid in hospitals, laboratories, drugstores, acid manufacturing plants and similar businesses. By employing the term "willfully", however, the legislature has expressly manifested an intent to exclude from the operation of the statute the innocent use of acid in the normal course of business. Such literal construction as defendants urge would result in an absurdity, for, as stated in People v. Craycroft, supra, 111 Cal. at page 547, 44 P. at page 463: "* * a statute will not always be held to include every case which falls within its literal terms. The penalty of death denounced against any person who draws blood in the street is not incurred by a surgeon who bleeds one who has fallen in a fit; and so, generally, no law will be so applied as to work a palpable absurdity." Our conclusion is further strengthened by the fact that in subsection (2) of section 375 the legislature has dealt with the subject of the manufacture, making or possessing of such substances and has declared such acts to be criminal only when done with intent to throw, drop, etc., such substance in any of the enumerated places of public assemblage.

[5-7] Moreover, it should be observed that defendants are not in a position to attack the validity of the statute. The principal ground urged against the constitutionality of the statute is that subsection (1) is so broad in its scope that it would permit prosecution of an individual for the innocent possession or use of acid in his business. Defendants were not charged with a violation of subsection (1) but only with a violation of subdivision (4), consisting of the willful placing of acid in a place of business. The record fails to disclose any evidence whatever that any of the acts committed by defendants consisted of the innocent use of acid in their places of business. The argument advanced in support of the claim that the statute is void is based entirely upon a hypothetical situation not involved in this case. Under such circumstances defendants' claim that the statute is invalid need not be considered. People v. Busick, 32 Cal.App.2d 315, 89 P.2d 657; People v. Rogers, 112 Cal.App. 615, 297 P. 924. One who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation. In re Durand, 6 Cal.App.2d 69, 44 P.2d 367; People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331.

[8-10] The assertion that count I of the amended indictment does not state a public offense because it cannot be determined therefrom wherein, how or why defendants have violated a statute of this state cannot be sustained. The material portion of count I is as follows: "The Grand Jury * * * hereby accuses (defendants) of a felony, to-wit, the crime of conspiracy to violate section 245, Penal Code of California, section 518, Penal Code of California, and section 375, sub-

division 4, Penal Code of California. * * *" The following portions of the count consist of allegations charging defendants generally with a conspiracy to commit assaults, to extort money and to throw acid in places of business. Nineteen separate overt acts are alleged to have been committed in furtherance of the conspiracy. The attack upon the sufficiency of this count is apparently based upon the claim that the crimes, the commission of which was the alleged object of the conspiracy, are not alleged with sufficient particularity as to times, places and persons. Defendants were not charged in count I with the actual commission of the specific crimes but were charged merely with a conspiracy to commit such crimes. It must be borne in mind that the gist of the crime of conspiracy is the unlawful agreement to commit any crime accompanied by an overt act in furtherance of such agreement. People v. Cory, 26 Cal.App. 735, 148 P. 532; Pen.Code, secs. 182 and 184. The fact that the conspirators may succeed in perpetrating the acts which they conspired to commit, and that such acts constitute separate crimes, cannot operate to relieve them from liability for the conspiracy. People v. Martin, 114 Cal.App. 337, 300 P. 108. In the light of such principles count I is sufficiently definite and certain to charge defendants with the crime of conspiracy.

[11, 12] It is next contended that counts VI to X, inclusive, are fatally defective in that each count charges the commission of more than one offense and therefore does not comply with the requirements of sections 950, 951, 952 and 954 of the Penal Code. The argument is directed against that portion of section 375(1) of the Penal Code which reads: "It shall be unlawful to throw, drop, pour, deposit, release, discharge or expose * * * any liquid * * *." Defendants contend that this section makes it unlawful to commit seven different crimes, namely: (1) to throw; (2) drop; (3) pour; (4) deposit; (5) release; (6) discharge; and (7) expose, any liquid substance, etc., in the places prohibited by the statute. Since in each of the counts in question defendants are charged with a violation of section 375 of the Penal Code in substantially the same language which is employed in the statute, it is asserted that each count charges defendants with the commission of seven different crimes. In People v. Pierce, 14 Cal.2d 639, 96 P.2d 784, a similar contention was made with respect to an information which charged defendants in the language of the statute with a violation of section 337a(2) of the Penal Code. That section provides essentially that it shall be unlawful for anyone to keep or occupy a "room, shed, tenement, tent, booth, building, float, vessel, place, stand and inclosure" for the purpose of recording bets. Defendants argued that a single count of the information charged them with the commission of eleven different offenses. The court held, however, that but one offense was charged, namely, the keeping and occupying of any place for the purpose of illegal wagering, and that the type of place was wholly immaterial. We therefore hold that each of the counts in question sets forth but a single offense, that of putting a substance which is injurious to person or property or is offensive to the senses in any of the designated places. The means employed to put or place the substance is wholly immaterial, for the gravamen of the offense is the putting of the substance in a place of public assemblage. Contrary to the contention of defendants, it was entirely proper to charge the commission of the offense in the language of the statute. People v. Pierce, supra.

[13-17] A large portion of defendants' briefs is devoted to numerous assignments of alleged misconduct on the part of the deputy district attorney and the court. Although the various statements, questions, objections and rulings of the court are set forth in the briefs, in only one or two instances has an attempt been made to point out wherein such conduct was prejudicial to the rights of defendants. Furthermore, the only authorities cited are general ones which sustain the proposition that if there is misconduct which is prejudicial to the substantial rights of the defendants the judgment of conviction should be reversed. Where the several claims of error are accompanied neither by argument nor by citation of appropriate authority, we are not called upon to consider the points so presented. People v. Koenig, 133 Cal.App. 701, 24 P.2d 852; People v. Hallowwa, 138 Cal.App. 174, 31 P.2d 821. In those few instances where some impropriety appears in the questions asked or statements made by the prosecutor, no prejudice resulted therefrom. Moreover, since the trial court repeatedly

admonished the jury to disregard the questions and statements of the district attorney and to draw no inferences therefrom, it must be presumed that the jury heeded the admonition and that no harm resulted from such conduct. People v. Bosse, 21 Cal.App.2d 276, 68 P.2d 990. The claim of misconduct on the part of the court is without merit, for the statements complained of were of a trivial nature and in most instances were accompanied by an admonition to the jury to disregard them. With respect to the alleged misconduct of the district attorney in his argument to the jury, it appears that many of the matters now assigned as error were not objected to at the time the statements were made and accordingly will not be considered by this court. People v. Kennedy, 21 Cal.App. 2d 185, 69 P.2d 224. It must be conceded that in a few instances during the argument the prosecutor did depart from the record and in so doing exceeded the bounds of propriety. However, on numerous occasions during the course of the argument the jurors were admonished to disregard objectionable statements of the prosecutor and were instructed that their verdict should be based upon the evidence as they heard it in the courtroom and upon nothing else. We must assume that these admonitions were followed.

It must be remembered that the present trial was hotly contested and that it lasted several months. It would be very unusual for such a lengthy trial to be entirely free of improper conduct on the part of the prosecutor, defense counsel or even the court. After a careful consideration of the entire record, including the evidence, we are satisfied of the guilt of defendants and are convinced that such improprieties as may have existed did not result in a miscarriage of justice. Art. VI, sec. 4½, Const. of California.

[18-20] It is argued that the evidence is insufficient to sustain convictions under counts VI, VII, VIII, IX and X of the amended indictment. Each of these counts charged defendants with a violation of section 375(4) of the Penal Code, differing only as to the places where the offenses were alleged to have been committed. It would unduly prolong this opinion to discuss in detail the sufficiency of the evidence as to each count, and since in general the evidence as to each count is similar to the evidence in the others we will confine our discussion to count VI.

Defendants take the position that there is no evidence tending to connect any of them with the commission of the offense charged in count VI or to show that the acid used was irritating or offensive to the senses. By count VI defendants were charged with willfully placing acid which was injurious to person and property and offensive to the senses in a place of business located at 827 South Vermont avenue, Los Angeles. The evidence shows that this cleaning establishment was owned by one Pogrell. On numerous occasions Pogrell had been approached by one or more of the defendants, who requested that he raise his prices. Upon his refusal to meet the demands of the association threats were made, particularly by defendants Keller, Lushing and Cowan, who threatened to put him out of business. Several of the defendants told Pogrell that they had dealt with many recalcitrant cleaners and if he failed to comply with their demands they "had a lot of different ways and means to whip him in line", and boasted of having sprayed acid over garments in other shops. Following the threats various acts of sabotage were committed against Pogrell. The windows of his store were broken on three separate occasions, clothing was stolen, stench bombs and dye which caused damage to garments were placed in his shop, pickets were stationed in front of his store and attempt was made to assassinate him. When the windows were broken for the third time acid which destroyed or damaged many garments was thrown into the store. Pogrell's fingers were burned by the acid when he attempted to clean it up. Because of the losses which he sustained Pogrell was forced into bankruptcy. That the acid was injurious to person and property and offensive to the senses is evident. When this evidence is considered together with the evidence relating to the conspiracy and the fact that the conspirators had procured acid for such uses, it is sufficient to connect defendants with the commission of the offense charged. All conspirators are liable for the acts of their co-conspirators committed in furtherance of the proven purpose of the conspiracy. People v. Cowan, 38 Cal.App. 2d 231, 101 P.2d 125. While the evidence connecting defendants with the commission of the crime charged in count VI was circumstantial, such circumstances reasonably justify the verdict and we therefore are not warranted in interfering with the determination of the jury. People v. Newland, 15 Cal.2d 678, 104 P.2d 778. The evidence is likewise sufficient as to counts VII, VIII, IX and X.

[21, 22] After deliberating for three days the jury returned into court and requested additional instructions. Defendants contend that the statements or instructions which the court gave in answer to the questions of the jury were erroneous. Defendants have singled out for criticism isolated words or phrases used by the court on this occasion. Instructions are to be considered as a whole. People v. Countryman, 115 Cal.App. 36, 300 P. 871; People v. White, 35 Cal.App. 2d 61, 94 P.2d 617. We are satisfied that those instructions concerning which only a portion is subjected to criticism are, when considered in their entirety, correct statements of the law. The court was also asked "if the acts charged in counts six, seven, eight, nine and ten are found to be acts committed in furtherance of the conspiracy, does it then follow that any person found guilty under count one of the indictment would then be guilty under counts six, seven, eight, nine and ten of the indictment." In reply the court stated: "The answer is that if a conspiracy is established and that the jury also finds that in pursuance of that conspiracy and the object of that conspiracy the acts set forth in counts six, seven, eight, nine and ten were committed, that all * * * members of that conspiracy are equally guilty of the offenses charged in counts six, seven, eight, nine and ten, if you find that those offenses were, however, committed." Defendants assert that not only is this instruction an incorrect statement of the law, but also that it amounts to a directed verdict. On the contrary, the instruction correctly states the law (People v. Cowan, supra) and obviously does not amount to a directed verdict, for it is clearly left to the jury to decide whether a conspiracy actually existed and whether any of the offenses charged in counts VI to X were committed.

[23, 24] Much of the testimony relating to the conspiracy came from the witnesses Fred Chesney, Morris Malter and Paul Mitchell, who were accomplices. Defendants contend that the testimony of these witnesses was not corroborated and is therefore insufficient to sustain the verdict under count I. The rule in this respect is that evidence corroborative of an accomplice's testimony need not of itself establish guilt or encompass every detail of such testimony, it being deemed sufficient "if standing alone, it tends to connect defendant with the commission of the offense charged". People v. Martinez, 19 Cal.App.2d 599, 603, 66 P.2d 161, 163. In our statement of facts we have set forth some of the circumstances, such as the purchase of acid and equipment and the making of threats, which tend to corroborate the testimony of the accomplices. Many other corroborative circumstances appear in the record but it would be superfluous to set them forth herein. We are satisfied after reading the entire record that, measured by the rule above stated, there is ample evidence to corroborate the testimony of the accomplices.

[25-28] Complaint is made of the action of the court in permitting the prosecution to introduce evidence concerning asserted isolated, independent and unconnected crimes and acts of sabotage. The evidence in question is that which shows a series of overt acts committed in furtherance of the continuing conspiracy to organize the cleaning industry which began in 1926 and continued until 1938. In relying upon the familiar rule that evidence of independent crimes is not competent if it has no tendency to prove some material fact in connection with the crime charged, defendants have completely ignored the fact that they were charged with a conspiracy to commit numerous unlawful acts. While it is true that some of the evidence relating to acts of sabotage and violence committed against various cleaners and dyers was not directly attributed to any of the defendants, it was not necessary that defendants be directly connected with all of the acts of violence. From the very secretive nature of a conspiracy it would not ordinarily be possible to prove such a crime by direct evidence. Accordingly it is settled that a conspiracy may be proven by circumstantial evidence. People v. Yant, 26 Cal.App. 2d 725, 80 P.2d 506; People v. King, 30 Cal. App.2d 185, 85 P.2d 928; People v. Schmidt, 33 Cal.App. 426, 165 P. 555. Many of the acts in question were shown to have been committed shortly after the making of threats by defendants or at a time when one of the defendants or an employee of the association was on the premises. It was for

the jury to determine from all of the circumstances whether the various acts of sabotage and violence were committed by one or more of the defendants in furtherance of the general design or objects of the conspiracy. This they did under appropriate instructions on the subject from the court. Defendants contend that the court erred in admitting testimony of the conversations and acts of the conspirators which occurred at a time more than three years prior to the date of the indictment. A similar contention is disposed of in People v. Stevens, 78 Cal.App. 395, 248 P. 696, wherein the court likens a conspiracy to a large tree, which originates in a tiny tendril and requires a long time and persistent nurture to develop into a matured tree, and at page 407 of 78 Cal.App., at page 700 of 248 P., states: "In our opinion there is no valid objection to evidence in conspiracy cases which tends to show, step by step, the gradual formation of a criminal concord in the minds of those charged with the illicit combination, merely because the evidence begins at a time long anterior to the wrongful meeting of minds. It is necessary only that the evidence, in all its parts, tends to prove the formation of the conspiracy." The evidence was properly admitted because it tended to show the formation and continuance of the conspiracy from the time of its inception until 1938. People v. Cowan, supra.

[29-31] The action of the court in permitting an expert witness for the prosecution to conduct an experiment before the jury for the purpose of demonstrating the flame reaction and other dangerous qualities of metallic potassium is assigned as prejudicial error. It is contended that no foundation was laid for the admission of such evidence, and further that there is no evidence that such substance was ever used by the conspirators. The metallic potassium was admissible in evidence since it had been identified as the actual substance which the conspirators had acquired for use in furtherance of the objects of the conspiracy. People v. Ferdinand, 194 Cal. 555, 229 P. 341; People v. Wilkins, 158 Cal. 530, 111 P. 612. It was entirely within the discretion of the trial court to permit the evidence of the experiment, for it was conducted under substantially similar conditions to those which were shown in evidence and the result of the experiment was clearly material. People v. Ferdinand, supra; People v. Ely, 203 Cal. 628, 265 P. 818. Upon his return from Chicago where he had been sent by defendants to study methods of sabotage used in that city, Paul Mitchell informed defendant Keller what chemicals he would have to procure, naming metallic potassium as one. After the chemicals were procured Mitchell told Keller that the metallic potassium should be sliced and sewed in the seams of garments and that it would catch fire if it came in contact with any moisture. There is evidence from which the jury might have inferred that such substance was used by defendants in committing acts of sabotage. However, the mere fact that metallic potassium was obtained by defendants for use in furtherance of the objects of the conspiracy constituted an overt act, evidence of which was properly admitted. The experiment which demonstrated the destructive qualities of metallic potassium was therefore corroborative of the prosecution's theory that possession of the substance amounted to an overt act and tended to aid rather than confuse the jury.

[32-34] The remaining contentions are concerned with the giving or refusal to give certain instructions. The court did not err in instructing the jury that as a matter of law the prosecution witnesses Malter, Mitchell and Chesney were accomplices. Each of these witnesses testified to acts done by him which were clearly performed in furtherance of the purposes of the conspiracy. Their own and other testimony is sufficient to show that they were members of the conspiracy. They were therefore liable to prosecution for the identical offense charged against the defendants on trial, and accordingly were accomplices. Pen.Code, sec. 1111. Since each witness freely testified to his part in the conspiracy and there is no conflicting evidence on the point, the court properly gave the instruction complained of. People v. Bailey, 82 Cal.App. 700, 256 P. 281. It was proper to instruct the jury that it was immaterial upon what particular day any offense charged in the indictment was committed, provided the jury believed that such offense was committed within three years prior to the filing of the indictment. Under the conspiracy count it was only necessary for the jury to find that any one of the overt acts charged in count I had been committed within three years prior to the filing of the indictment. Each of counts VI to X inclusive charged but a single crime and alleged that it had been

committed on or about a specified date. The only evidence relating to each of such counts shows that but one offense was committed, as charged, and that it was within three years prior to the filing of the indictment.

[35, 36] It was not error for the court to refuse to give defendants' requested instruction to the effect that they were not charged with a conspiracy to establish uniform prices in the cleaning industry or to control the taking of "stops" from one cleaner by another. The jury was elsewhere fully instructed to the effect that defendants were not on trial for any offense not charged in the indictment. The requested instruction concerning the right of labor to strike was properly refused, for it was not pertinent to any issue in the case. Defendants were not charged with unlawfully striking nor with a conspiracy to do so.

The judgments and orders denying the motions for new trials are affirmed.

McCOMB, Justice (dissenting).

I dissent. These are appeals by defendants from (1) a judgment of guilty of conspiracy to violate sections 245, 375, subdivision 4, and 518 of the Penal Code, and (2) five judgments of guilty of violating section 375, subdivision 4, of the Penal Code, after trial before a jury. There are also appeals from the orders denying the motions of defendants for a new trial.

Viewing the evidence most favorable to the People (respondent), it appears that during the last half of 1937 and the year 1938 defendants entered into a conspiracy to force the various cleaning and dyeing establishments in the Los Angeles area to enter into agreements with the labor union known as the International Association of Cleaning and Dye House, Local No. 5, and that pursuant to this conspiracy numerous heinous barbaric and atrocious acts were perpetrated in order to force the owners of cleaning and dyeing plants to enter into contracts with the association. For example, rocks were thrown through the windows of establishments that did not accede to the demands of the conspirators, stink bombs were thrown into the places of business of non-cooperating cleaners, shots were fired into establishments of non-cooperating cleaning and dyeing operators and numerous other acts of a criminal nature were committed which would have dimmed the fame of the wicked and villainous vandals of the dark ages. It would serve no useful purpose to enumerate them in this opinion. The testimony upon which the foregoing facts are predicated was principally based on circumstantial evidence or came from the mouths of admitted co-conspirators. As is usually the case in such a trial, there was a sharp conflict in the evidence, the defendants denying any participation in the crimes charged.

Numerous errors are urged by defendants for reversal of the judgments against them. However, it is only necessary to decide the following questions:

First: Is section 375, subdivision 4, of the Penal Code constitutional?

Second: Assuming that section 375, subdivision 4, of the Penal Code is unconstitutional, can the conviction of defendants upon count I of the indictment as amended be sustained, in view of the fact that it charged a conspiracy upon the part of defendants to violate not only section 375, subdivision 4, of the Penal Code, but also sections 245 and 518 of the same code, and considering also that there was substantial evidence (which, however, was contradicted) received during the trial to support a finding by the jury that defendants violated each or all of the Penal Code sections just mentioned?

The first question should in my opinion be answered in the negative and is governed by this principle of law: That a citizen pursuant to section 1 of the Fourteenth Amendment of the Constitution of the United States and section 1, article I of the Constitution of the State of California, may not be deprived of the right to the enjoyment and use of his property by a statute which is unreasonable and oppressive, and a statute depriving a citizen of his property is unreasonable and oppressive when it has no reasonable relation to the police power. In re McCapes, 157 Cal. 26, 27, 106 P. 229.

Section 375, subdivision 4, of the Penal Code reads thus:

"*Use of substance likely to produce serious illness or permanent injury: Use of tear or mustard gas, acid or explosives: Punishment.* Any person who, in violating any of the provisions of subdivision (1) of this section, willfully employs or uses any liquid, gaseous or solid substance which may produce serious illness or permanent injury through being vaporized or otherwise disbursed in the air or who, in violating any of the provisions of subdivision (1) of this section, willfully employs or uses any tear gas, mustard gas or any of the combinations or compounds thereof, or willfully employs or uses acid or explosives, shall be guilty of a felony and shall be punished by imprisonment in the State prison for not less than one year and not more than five years."

Subdivision (1) of section 375 of the Penal Code, referred to in subdivision (4) of the same section, reads thus:

"It shall be unlawful to throw, drop, pour, deposit, release, discharge or expose, or to attempt to throw, drop, pour, deposit release, discharge or expose in, upon or about any theater, restaurant, place of business, place of amusement or any place of public assemblage, any liquid, gaseous or solid substance or matter of any kind which is injurious to person or property, or is nauseous, sickening, irritating or offensive to any of the senses."

From a reading of subdivisions (1) and (4) of section 375 of the Penal Code it appears that the legislature has attempted to make it unlawful for a citizen to drop, pour, deposit or expose in any place of business any liquid, gaseous or solid substance or matter which is injurious to person or property or is nauseous, sickening, irritating or offensive to any of the senses.

It is evident that if the wording of this statute is constitutional it would be unlawful for a druggist to expose in his apothecary shop asafetida, carbolic acid, bichloride of mercury, nitric acid or numerous other acids and substances which are daily employed for the protection of the life and health of mankind. Therefore, the statute is unreasonable and oppressive and falls within the purview of the rule of law above stated as being violative of section 1 of the Fourteenth Amendment of the Constitution of the United States and of section 1, article I of the Constitution of this state, and it is therefore unconstitutional. (In re McCapes, supra.)

In the McCapes case our Supreme Court had before it the question of the constitutionality of subdivision 3 of section 384 of the Penal Code, which made it a misdemeanor for any person willfully or negligently to build "a fire on his own land for the purpose of burning brush, stumps, logs, rubbish, fallen timber, fallows, grass or any other thing whatsoever, * * * provided that any state or district fire warden may in his reasonable discretion give a written permit to any person desiring to build fires". Mr. Justice Henshaw, speaking for the court, said at page 27 of 157 Cal., at page 229 of 106 P.:

"It is to be noted that the act is designed to prevent the destruction of property, and particularly of forests, by the careless setting of fires. In its purview and purpose, therefore, the act is within the police power of the state. No one at this day can be unaware of the great havoc wrought by forest fires, and, indeed, in states such as this, which undergo long periods of drouth, of the loss which results from fires sweeping over the farming lands and destroying the crops. The purpose of the law being for the general good of the state to prevent the destruction of property by fires carelessly set and allowed to escape control, not only brings the act strictly within the police power, but the purpose must commend the act to every court. Nevertheless, in the accomplishment of that purpose, it is quite plain that the Legislature has transgressed all reasonable bounds. It is an exemplification of what this court said in Ex parte Jentzsch, 112 Cal. 468, 44 P. 803, 32 L.R.A. 664: 'So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the Legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant.' * * *

"Such a law upon the face of it is an unreasonable interference with the rights of property. But if it be said that, notwithstanding the language, the law will be given a construction which will avoid hardship, it must be answered that by its terms it makes it a crime for any man to light a fire on his land for the purpose of burning 'anything whatsoever,' and declares the person who does so a criminal, regardless of the fact that the fire was carefully set and guarded, and regardless of the fact that no injury to anybody resulted from the setting. In other words, every person so setting a fire would be guilty of a crime, and the question as to whether he should be punished or not would rest largely in the friendship or hostility of his neighbors, or of the informer who by this law receives one-half of the fines upon conviction. The facts in the case at bar may be referred to in illustration of the working of such a law. The petitioner was digging a well upon his own land. It became necessary for him to blast rock. Fearful lest a burning fuse hurled by the exploding blast might set fire to the grass in the vicinage, he prudently and carefully burned off this dry grass without causing the slightest damage to any property. He built this fire, however, without obtaining permission from a district fire warden. Indeed, at the time that he set it there was no district fire warden. Subsequently the county of Madera caused the appointment of a fire warden, and this fire warden procured the arrest of the defendant for a violation of the law. This brief statement will better serve to illustrate the unreasonableness of the law than would many pages of exposition."

To the same effect see San Diego T. Ass'n v. East San Diego, 186 Cal. 252, 253, 200 P. 393, 17 A.L.R. 513; In re Farb, 178 Cal. 592, 593, 174 P. 320, 3 A. L.R. 301; In re Kelso, 147 Cal. 609, 610, 82 P. 241, 2 L.R.A.,N.S., 796, 109 Am.St. Rep. 178; In re Hall, 50 Cal.App. 786, 787, 195 P. 975.

It is therefore evident that the conviction of defendants on counts VI to X of the indictment charging violations of section 375, subdivision (4) of the Penal Code should be reversed.

The second question should also be answered in the negative. Count I of the amended indictment read in part as follows:

"The Grand Jury of the County of Los Angeles, State of California, hereby accuses LEWIS BLACK, SAMUEL BLUMENBERG, ROBERT COWAN, HARRY DANSKY, JOSEPH M. INGLER, CAL T. FISH, BEN KELLER, ALFRED LUSHING, JAMES MEYERS, FRED MOODY, THOMAS PORTER, GEORGE RUBEN, FRANK D. SCOVEL and BEN TORICI alias BEN TORTORICI, of a felony, to-wit, the crime of CONSPIRACY TO VIOLATE SECTION 245, Penal Code of CALIFORNIA, SECTION 518, PENAL CODE OF CALIFORNIA, and SECTION 375, SUBDIVISION 4, PENAL CODE OF CALIFORNIA, in that, within three years prior to the finding of this amended indictment and continuously thereafter, in the County of Los Angeles, State of California, the above named defendants did willfully, unlawfully and feloniously conspire, combine, confederate and agree together, and with divers other persons whose true names are to the Grand Jury unknown, to commit assaults upon the person of other persons by means of force likely to produce great bodily injury, and further to obtain property of other persons not these conspirators, with the consent of said other persons, which was induced by the wrongful use of force and fear.

"And further to willfully throw, drop, pour, deposit, release, discharge, and expose in, upon and about, places of business, said places of business not being the places of business of these conspirators, a liquid substance and matter containing acid, which said substance and matter is and was injurious to person and property and which was and is irritating and offensive to the senses, and which substance containing acid, as aforesaid, was willfully and knowingly employed and used by the aforesaid defendants."

In the balance of the count nineteen specific overt acts were alleged.

As stated above, the evidence in support of the conviction under count I of the indictment was highly conflicting, circumstantial, and came principally from the mouths of admitted accomplices. The jury might have believed the evidence tending to find defendants guilty of violating section, 375, subdivision 4 of the Penal Code and disbelieved the evidence tending to show defendants guilty of violating sections 245 and 518 of the Penal Code. If this were true, defendants would not be guilty of any offense under count I of the indictment, and, since I am unable to determine which evidence the jury believed (since count I of the indictment charged a violation of all three of the sections of the Penal Code, including the unconstitutional section), the judgments of guilty on count I should in my opinion be reversed. Whether guilty or innocent, the defendants were entitled to have their case tried according to the established rules of law; and though the trial in the instant case may have resulted in justice to the particular defendants, yet such justice is unjust and dangerous to the community. In a recent case Mr. Justice White has pungently stated the principle thus: "The doctrine that respect for the law cannot be inspired by withholding the protection of the law is one which recognizes no exceptions." (People v. Braun, 31 Cal.App.2d 593, 603, 88 P.2d 728, 733).

For the foregoing reasons the judgments in my opinion should be reversed and new trials ordered.

45 Cal.App.2d 138

BANK OF AMERICA N. T. & S. A. v. KATZ.

Civ. 11486.

District Court of Appeal. First District, Division 1, California.

June 2, 1941.

Hearing Denied July 30, 1941.

1. Execution 🔑75

Executors and administrators 🔑213

Mere lapse of time after entry of judgment does not deprive trial court of power to order issuance of execution, and, when judgment debtor has died and statute of limitations has run against judgment, court may grant judgment creditor leave to enforce judgment by presentation of claim against debtor's estate and by bringing of action thereon if claim is rejected. Code Civ.Proc. § 685.

2. Judgment 🔑855(1)

Whether dormant judgment shall be enforced is a matter within sound discretion of trial court. Code Civ.Proc. § 685.

3. Execution 🔑75

"Execution", within statute providing for execution of judgment after five years from its entry, is used in broad sense of execution or carrying into effect by such means as are provided by law for enforcement of various classes of judgments. Code Civ.Proc. § 685.

See Words and Phrases, Permanent Edition, for all other definitions of "Execution".

4. Executors and administrators 🔑213

The statute providing for "execution" of judgment after five years from its entry authorizes enforcement of money judgment against deceased debtor by presentation of claim against his estate and bringing of action thereon if claim is rejected, notwithstanding another statute authorizing issuance of execution on certain types of judgments, not including money judgments, after death of judgment debtor. Code Civ.Proc. §§ 685, 686.

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Proceeding by the Bank of America N. T. & S. A., etc., against Phil C. Katz, etc., to enforce a money judgment against the estate of the deceased judgment debtor. From an adverse order, Katz appeals.

Affirmed.

Henry F. Boyen and Frank J. Fontes, both of San Francisco, for appellant.

Robert E. Hatch, Carl Conradi, Jr., and Charles H. McDonald, all of San Francisco, for respondent.

KNIGHT, Justice.

This is an appeal from an order made pursuant to the provisions of section 685 of the Code of Civil Procedure, granting leave to enforce a money judgment against the estate of the deceased judgment debtor by the presentation of a claim against his estate and by bringing an action thereon if the claim is rejected. That portion of section 685 upon which the order was based reads: "*In all cases* the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court * * *." (Italics ours.)

Appellant makes no complaint that the trial court abused its discretion in granting the order. The sole contention made is that the provisions of section 685 may not be invoked for the enforcement of a money judgment against the estate of a judgment debtor. The substance of the theory upon which appellant bases his contention is that in the event of the death of the judgment debtor, the provisions of section 686 of said code operate as a limitation upon the exercise of the discretionary powers granted by section 685; that under section 686 judgments may be enforced only by way of execution and only in the particular class of cases specified therein, namely, when the judgment is for the recovery of real or personal property, or the enforcement of a lien thereon; that therefore, subsequent to the death of the judgment debtor, the application of the provisions of said section 685 must be restricted to that class of judgments.

[1, 2] In five comparatively recent cases, however, orders of the kind here assailed, made under the authority of section 685, granting leave to enforce money judgments against the estates of deceased judgment debtors, have been upheld. Those cases are: Saunders v. Simms, 183 Cal. 167, 190 P. 806; Faias v. Superior Court, 133 Cal.App. 525, 24 P.2d 567; Palace Hotel Co. v. Crist, 6 Cal.App.2d 690, 45 P.2d 415; Tolle v. Doak, 12 Cal.App.2d 195, 55 P.2d 542; Pacific Gas & Elec. Co. v. Elks Duck Club, 39 Cal.App.2d 562, 103 P.2d 1030. In upholding the order in the Faias case [133 Cal.App. 525, 24 P.2d 569], the court said in part: "Under this section [685] mere lapse of time after the entry of a judgment does not deprive the trial court of the power to order the issuance of an execution (Welk v. Conner, 102 Cal. App. 286, 282 P. 963); and when the judgment debtor has died and the statute of limitations has run against the judgment the court may under this section grant the judgment creditor leave to enforce the judgment by the presentation of a claim against the estate and by the bringing of an action thereon if the claim is rejected (Saunders v. Simms, 183 Cal. 167, 190 P. 806). * * * Whether a dormant judgment shall be enforced is a matter within the sound discretion of the trial court (11 Cal.Jur., Executions, § 12, p. 51), which may, as was done in Saunders v. Simms, supra, grant the judgment creditor leave to present a claim against the estate of a deceased debtor, and, in case of its rejection, to bring an action to establish its validity." So far as our attention has been called, the correctness of the doctrine thus stated has never been questioned. It may be taken, therefore, that the law governing the matter is well settled.

[3, 4] Appellant contends, however, that the above cases should not be considered as controlling authority as to the scope of section 685 because section 686 was not expressly referred to therein. While it is true that section 686 is not mentioned, it does appear from the decision in the Saunders case, which was the first to deal with the subject and which has since been cited and consistently followed, that some similar theory was there advanced to the effect that in the case of the death of a judgment debtor the provisions of section 685 were limited to the enforcement of judgments by way of writ of execution only; and in disposing of the point the court said [183 Cal. 167, 190 P. 807]: "We fail to understand upon what theory of construction appellant claims that the relief granted by section 685 in case of a money judgment is limited to enforcement by execution. It is true the text of the section is introduced by the disconnected clause 'execution after five years,' but it is apparent from the context, which provides that 'in all cases the judgment may be enforced or carried into execution after the lapse of five years,' that the word 'execution' is used in the broad sense of execution or carrying into effect by such means as are provided by law for the enforcement of various classes of judgments."

In any event, we have found nothing in the arguments advanced by appellant, nor in the cases cited by him, which tends to cast any doubt as to the soundness of the decisions in the above cited cases, much less to warrant a repudiation of the construction therein placed on said section 685.

The order is affirmed.

We concur: PETERS, P. J.; WARD, J.

45 Cal.App.2d 170

PEOPLE v. KABAKOFF.

Cr. 3452.

District Court of Appeal, Second District, Division 2, California.

June 3, 1941.

1. Gaming 🔑75(1)

Under statute denouncing as a crime the keeping or occupancy of any room or tenement with books, papers, or other devices, or paraphernalia for purpose of recording or registering bets on the result of any contest, it is not the actual making of bets, but the occupancy of such a room with the equipment used for recording bets, which constitutes the offense denounced. Pen.Code, § 337a, subd. 2.

2. Criminal law 🔑562

When the corpus delicti of a crime has been established, in order to justify a conviction of accused, it is necessary only to prove accused's participation in the crime.

3. Gaming 🔑98(5)

Evidence sustained conviction under statute denouncing as a crime the keeping or occupancy of any place or part thereof with books, papers, or other device or paraphernalia for purpose of recording or registering bets on the result of any contest. Pen.Code, § 337a, subd. 2.

4. Criminal law 🔑260(11)

Where accused waived a jury and was tried to the court, on appeal from conviction, appellate court was not required to retry the case or make inferences from the facts proved, but only to determine whether upon the face of the evidence sufficient facts could have been found to sustain inference of guilt.

5. Criminal law 🔑260(11)

To warrant reversal on the ground of insufficiency of the evidence to sustain a conviction in case tried to the court without a jury, appellate court must be convinced that upon no hypothesis is there any sufficient substantial evidence to support conclusion reached by trial court.

6. Criminal law 🔑260(11)

Deputy district attorney's statement, which was made on the hearing of accused's motion for new trial, that in his opinion evidence was insufficient to sustain judgment was without authority and of no effect as against trial court's finding that accused was not entitled to a new trial and such statement could not be considered on appeal.

7. Criminal law 🔑260(11)

On appeal from judgment of conviction in case tried to the court without a jury and from order denying new trial, the complete record of the trial together with the inferences which the judge may fairly have drawn embodied the total of opinions and facts which might be considered by appellate court.

◆

Appeal from Superior Court, Los Angeles County; Frank Smith, Judge.

Harry Kabakoff was convicted for occupying a room with paraphernalia for the purpose of recording bets in violation of Section 337a, subd. 2, of the Penal Code, and he appeals.

Judgment affirmed.

Philip W. Erbsen, Joseph L. Fainer, and Russell E. Parsons, all of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant appeals from an order denying his motion for a new trial and from the judgment of conviction. He was accused by information with violations of section 337a of the Penal Code as follows: Count I for violation of subdivision 1; count II for violation of subdivision 2; count III for violation of subdivision 6. Trial by jury was waived. He was found not guilty on counts I and III, but he was convicted under count II of a violation of subdivision 2 hereinafter quoted. His motion for a new trial having been denied, he was sentenced to the County Jail for 180 days, which sentence was suspended and probation granted for three years under specified conditions.

The facts are substantially as follows: On October 12, 1940, two police officers entered apartment 207, located at 726 North Van Ness avenue, in the city of Los Angeles, at about two o'clock in the afternoon. It was a single apartment consisting of a combination living room and bedroom, with kitchen and bath adjoining. Upon entry the officers found appellant alone in the apartment, dressed in his trousers but without a shirt. On the kitchen table the officers found the following: two telephones, one bearing a Hillside number, the other a Granite number; betting markers on which numerous notations recorded horse racing bets; two scratch sheets giving notice of different races at different tracks and the names of the horses and jockeys and their weights and the probable odds and post positions. One of the scratch sheets bore the date of October 5th and the other of October 12th. Officer Barry testified that this paraphernalia was that commonly used by bookmakers. The telephones rang. Officer Barry had two telephonic conversations in each of which he was requested to place a bet on a certain horse. The officers thereupon placed appellant under arrest.

On the trial appellant testified that he had occupied this apartment for two weeks prior to the date of his arrest "to sleep there"; that a party named "Brownie" granted him the free use of the apartment; that it was his residence and that he slept there and was there every day during the two weeks. He denied all connection with the acceptance or writing of bets, or that he "forwarded" any of them, or that he had ever seen any bet recorded or that he knew what the apartment was used for. He had come up to the apartment on that afternoon to take a shower.

Subdivision 2 of the section provides that anyone who, "whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any * * * place * * * or any part thereof * * * with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets * * * upon the result * * * of * * * contest * * * Is punishable * * *."

The narrative above recited establishes conclusively that appellant occupied an apartment containing: two telephones with different numbers and racing paraphernalia used by bookmakers. He had occupied the apartment every day for two weeks, was found alone and at that very time telephones were in use by outside parties who attempted to make bets. It was two o'clock in the afternoon when it is commonly known that races are being run, as emphasized by the experience of Officer Barry in answering the telephones during the brief space of time in which he was in the apartment.

[1-5] But appellant contends that the State did not sustain the burden of proving beyond a reasonable doubt that the occupancy of the apartment was for the purpose of recording bets. In a recent case, the proof received against the defendant was quite similar to that contained in this record against appellant. It was there declared that the offense was complete when it was shown that the accused occupied a room with papers and paraphernalia for the purpose of recording bets on horse races; that it is not the actual making of bets but the occupancy of such a room with the necessary equipment used for recording bets which constitutes the offense denounced by subdivision 2. People v. Manning, 37 Cal.App.2d 41, 98 P.2d 748. It is the law that when the corpus delicti of a crime has been established, in order to justify a conviction of the accused, it is necessary only to prove his participation in the crime. Here the presence of paraphernalia in the apartment occupied by defendant alone, day and night for two weeks, and the current use of the telephones by outside parties, calling in to place bets, definitively connects the appellant with the commission of the crime denounced by subdivision 2. It is not our duty to retry the case and to make inferences from the facts proved. That is the function of the trial court. The duty of the appellate court is to decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found to warrant the inference of guilt. People v. Newland, 15 Cal.2d 678, 104 P.2d 778. To warrant a reversal of the judgment on the ground of the insufficiency of the evidence, we must be convinced that upon no hypothesis is there sufficient substantial evidence to support the conclusion reached by the trial court. Ibid.

[6, 7] Finally appellant offers to establish his innocence or the right to a reversal of the judgment on his statement that the deputy district attorney, on the hearing of the motion for new trial, stated to the court that in his opinion the evidence was not sufficient to sustain the judgment. The prosecutor might be commended for his frankness. But, however meritorious such opinion might have been, it was void of authority and without persuasive origin as against the finding of the trial court. The complete record of the trial, together with the inferences which the judge may fairly have drawn, embody the total of opinions and facts which we may consider.

Judgment and order are affirmed.

We concur: WOOD, J.; McCOMB, J.

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 11595.

District Court of Appeal, First District, Division 2, California.

May 27, 1941.

Hearing Granted July 24, 1941.

1. Statutes 🔑217

Committee reports and explanatory statements of members in charge, made in presenting a statute for passage, may be considered in construing the statute if its language is doubtful or obscure.

2. Statutes 🔑217

Statements made in report of the Senate committee on the judiciary relating to objectives of amendment to the Federal Employers' Liability Act, which accorded with reasonable interpretation of the amendment would be followed by the courts. Federal Employers' Liability Act as amended by Act of 1939, 45 U.S.C.A. §§ 51, 54, 56, 60.

3. Commerce 🔑58

The amendment to the Federal Employers' Liability Act providing that the act should apply to any employee of a carrier if any part of the employee's duties shall be the furtherance of interstate or foreign commerce or shall directly or closely and substantially affect such commerce is not unconstitutional when construed as applying to an employee engaged in repairing equipment used in both interstate commerce and intrastate commerce, on ground that the amendment as so construed in part covers intrastate business over which Congress has no jurisdiction. Federal Employers' Liability Act as amended by Act of 1939, 45 U.S.C.A. §§ 51, 54, 56, 60.

4. Commerce 🔑7

If and when interstate business is clearly a part of the subject to be legislated on, the fact that intrastate commerce may be interwoven therein does not prevent Congress from exercising its powers.

5. Commerce 🔑27(3)

Railroad tracks on which railroad engaged in interstate commerce operates trains are a part of "interstate commerce" and the matter of keeping the tracks clear and safe for transportation of commerce also involves interstate commerce.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

6. Workmen's compensation 🔑97

The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries sustained by employees while engaged in interstate commerce are regulated inclusively and exclusively by the Federal Employers' Liability Act and there can be no state regulation even in respect of injuries occurring without fault, as to which the federal act provides no remedy. Federal Employers' Liability Act as amended by Act of 1939, 45 U.S.C.A. §§ 51, 54, 56, 60.

7. Workmen's compensation 🔑97

The 1939 amendment to the Federal Employers' Liability Act did not have the effect of making the act nonexclusive, permissive, or optional, so as to entitle an employee subject to the act to bring an action under the state Workmen's Compensation Act. Federal Employers' Liability Act as amended by Act of 1939, 45 U.S.C.A. §§ 51, 54, 56, 60; St.Cal.1937, p. 265 et seq., § 3201 et seq.

8. Commerce 🔑27(8)
Workmen's compensation 🔑97

Railroad car repairman who sustained injury while he was repairing a combination truck and boom car used to remove from railroad tracks obstructions and obstacles interfering with both interstate and intrastate business was performing a duty in the furtherance of "interstate commerce" and his work directly, closely and substantially affected such commerce, so that action for his injuries could be brought only under the amended Federal Employers' Liability Act and the injuries were not compensable under the state Workmen's Compensation Act. Federal Employers' Liability Act as amended by Act of 1939, 45 U.S.C.A. §§ 51, 54, 56, 60; St.Cal.1937, p. 265 et seq., § 3201 et seq.

◆

Proceeding under the Workmen's Compensation Act by Frank Mistretti, claimant, opposed by the Southern Pacific Company, employer, and self-insurer. The Industrial Accident Commission entered an award granting compensation and the employer petitions for writ of review.

Award annulled.

Henly C. Booth and Burton Mason, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

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* Subsequent opinion 120 P.2d 880.

Irvin C. Ford and Lawrence G. Dorety, both of Sacramento, amici curiae for respondents.

STURTEVANT, Justice.

This is an application for a writ of review for the purpose of having annulled an award made on July 27, 1940, by the Industrial Accident Commission. The first finding on which said award was based was as follows: "Frank Mistretti, applicant, while employed as a car builder on November 8, 1939, at South San Francisco, California, by Southern Pacific Company, sustained injury arising out of and occurring in the course of his employment, as follows: He sustained injury to his left eye, subsequently requiring enucleation thereof. At said time the employer was permissibly self-insured for liability under the Workmen's Compensation Laws of the State of California, to which said laws both employer and employee were then and there subject."

Said award was made and based on the following facts:

1. Petitioner is a common carrier by railroad in interstate commerce in the respects hereinbefore more fully alleged. That part of its railroad system extending between San Francisco and Santa Barbara, California, is known as the "Coast Division". At Bayshore, a point on said Coast Division near San Francisco, petitioner maintained (as a part of said Coast Division) for exclusive railroad use its repair shops, where cars used in and already devoted to general freight service, as well as cars used in and already devoted to its railroad maintenance purposes, were repaired. New cars were not constructed at said shops. The repairs performed were of both the running-repair type, the light-repair type, and also of the heavy-repair type. The purpose of repairing freight cars is to permit their continued use by petitioner and its railroad connections in their general freight business as common carriers by railroad, including the movement of property in both interstate and intrastate commerce.

2. Applicant was employed by petitioner as a car-repairman at its said Bayshore shops, and his duties as such called on him to make repairs to the wooden portion of freight cars undergoing repair therein. Part of applicant's duties also included repairing the wooden portion of cars used by petitioner in the clearance, repair and maintenance of its tracks used as highways of interstate commerce and transportation.

3. The applicant was, at the time of the accident, engaged in making repairs to a special type of maintenance car, designed for and used as a part of a relief outfit known as the "Watsonville Junction Relief Outfit". That car was of the type known as a "combination truck and boom car", and was numbered "SPMW-7019E", "SPMW" denoting "Southern Pacific Maintenance of Way". This car had been in use in that outfit prior to the accident, and at the time of the accident was undergoing necessary repairs, for the purpose of and with the intention of restoring it to the said outfit, so that it might be continued as a unit therein and used as such. Following the accident repairs were completed, and the car returned to said relief outfit and to use as a unit in said outfit. Said relief outfit was and is used to remove obstacles from the tracks, e. g., derailed cars or engines, wrecked cars or engines, and other obstructions, all of which impede, render unsafe and prevent the flow of traffic, and thus interfere with the movement of passengers and property in interstate as well as intrastate commerce.

4. The said combination truck and boom car was sent on October 29, 1939, from Watsonville Junction on said Coast Division to the Bayshore shops, a distance of about one hundred miles from Watsonville Junction. It arrived at Bayshore on October 30, 1939, and the repair work thereon was commenced immediately by a shop crew which included applicant. That crew first stripped the super-structure of the car, leaving the trucks and the steel body frame, and then rebuilt the super-structure, completing the work of repair on November 16, 1939. On that day the car was returned to Watsonville Junction, arriving there November 17, 1939, and resuming active service with the said Watsonville Junction relief outfit on November 19, 1939.

From the date of its arrival at the shops, to the day repairs were completed and it was billed back to Watsonville Junction, the car remained on a track in the shops while the repairs were being performed, and while it was being repaired a substitute but not identical car temporarily took its place in said relief outfit.

5. On November 8, 1939, while applicant was engaged in the course of his said employment upon said car (SPMW-7019E),

at said shops, and while he and a fellow employee were engaged in removing a hinge from a door of said car, a flying piece of metal struck the applicant's left eye. Said injury resulted in the loss of the left eye, the applicant returning to work for petitioner in his usual occupation December 11, 1939, after having been fitted with an artificial eye.

In his brief the petitioner pointedly narrows the issue and states its contention as follows: "We emphasize, at the outset of this petition, that no question is here raised as to whether the injury arose out of or occurred in the course of the employment; nor is there any question as to the amount of the award, if any award at all may lawfully be made by the respondent Commission. Indeed it may be conceded, at least for purposes of argument, that if an accident similar in all respects to the one here involved had occurred prior to August 11, 1939, the Federal Employers' Liability Act as it then read would not have been applicable; and the sole remedy of the applicant would have been under the state workmen's compensation laws."

Having clearly stated the issue the petitioner proceeds to argue that the amendments of 1939 to the Federal Employers' Liability Act are so worded as to cover the instant case. Compare 35 U.S.Stat. 65, 45 U.S.C.A. § 51 et seq., and 53 U.S. Stat. 1404, 45 U.S.C.A. §§ 51, 54, 56, 60. The respondent board contends the facts in the instant case do not bring it within either of said federal statutes but that said case is governed by the provisions of sections 3201-6002 of the Labor Code of this state, St.1937, pp. 265–306. In other words the petitioner claims the remedy of Mistretti was that provided by the federal statutes and the respondent board contends his remedy was under the state statute.

[1] The amendment added in 1939 to section 1 of the original act (35 U.S.Stat. 65, 45 U.S.C.A. § 51) is as follows: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended." Its meaning is certainly not free from doubt. In Railroad Commission v. Chicago, B. & Q. R. Co., 257 U.S. 563, at page 589, 42 S.Ct. 232, at page 237, 66 L.Ed. 371, 22 A.L.R. 1086, Mr. Chief Justice Taft speaking for the court said: "Committee reports and explanatory statements of members in charge made in presenting a bill for passage have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. Duplex [Printing Press] Co. v. Deering, 254 U.S. 443, 475, 41 S.Ct. 172, 65 L.Ed. 349 [354], [16 A.L.R. 196]."

Before proceeding it will be best to state some historical facts regarding the development of the question that is here involved. Prior to the adoption of the amendments of 1939, 53 U.S.Stat. 1404, the question was brought before the courts by Bruce Shanks. While employed by the Delaware, Lackawanna and Western Railroad Company he was engaged as a machinist in removing a shaft-hanger in the defendant's machine shop. While so engaged a crane was negligently allowed to run over his hands. He brought an action to recover damages. The jury awarded him substantial damages. From the judgment the defendant appealed to the Second Department of the Appellate Division of the Supreme Court of New York. Shanks v. Delaware, Lackawanna & West. R. R. Co., 163 App.Div. 565, 148 N.Y.S. 1034. The case was well presented and the decision shows that the court carefully examined the authorities. By a divided court the judgment was reversed on the ground that the evidence did not show Shanks was engaged in interstate commerce at the time of the injury and the plaintiff was remanded to his remedy under the Workmen's Compensation Act of New Jersey, N.J.S.A. 34:15–1 et seq., that being the state where the accident occurred. Shanks appealed to the Court of Appeals. Shanks v. Delaware, L. & W. R. Co., 214 N.Y. 413, 108 N.E. 644, Ann.Cas.1916E, 467. By a divided court the judgment of the appellate division was affirmed. Thereafter Shanks sued out a writ of error in the Supreme Court of the United States. That court affirmed the judgment of the Court of Appeals. Shanks v. Delaware, Lack. & West. R. R., 239 U.S. 556, 36 S.Ct. 188, 60 L.Ed. 436, L.R.A.1916C, 797. On page 558 of 239 U. S., on page 189 of 36 S.Ct. the court stated: "Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see Swift & Co. v. United States, 196 U.S. 375, 398, 25 S.Ct. 276, 49 L.Ed. 518, 525), and that the true test of employment in such commerce in the sense intended is, Was the employe at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" It then analyzed the decided cases. Having done so it concluded as follows: "Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged, like that of the coal miner in the Yurkonis case [Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 35 S.Ct. 902, 59 L.Ed. 1397], was too remote from interstate transportation to be practically a part of it, and therefore that he was not employed in interstate commerce within the meaning of the employers' liability act."

Returning to the amendments of 1939 (53 U.S.Stat. 1404) they were embodied in Senate Bill 1708. When that bill was reported by the Committee on the Judiciary the report was printed (Report 661). It set forth the bill in full. It included the sections of the old statute (35 U.S.Stat. 65) which were amended and the amendments were set forth in italics. The amendment to section 1 was as follows: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended." Continuing the report set forth:

"Objectives of the Bill

"It is the aim of the bill to amend the Employers' Liability Act in three particulars:

"1. It broadens and clarifies the law in its application to employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce. * * *

"Amendment to Section 1

"This amendment is intended to broaden the scope of the Employers' Liability Act so as to include within its provisions employees of common carriers who, while ordinarily engaged in the transportation of interstate commerce, may be, at the time of injury, temporarily divorced therefrom and engaged in intrastate operations.

"The question whether an employee, at the time of his injury, is engaged in interstate or intrastate commerce is frequently difficult of determination. Under the rule laid down by the Supreme Court of the United States, an employee of a railroad company who may be injured must be found to have been engaged, at the time of the infliction of the injury, 'in interstate transportation, or in work so closely related to it as to be practically a part of it' (Shanks v. Delaware, L. & W. R. R., 239 U.S. 556 [36 S.Ct. 188, 189, 60 L.Ed. 436, L.R.A.1916C, 797]).

"In order to prove interstate transportation, if the question is at all obscure, it is necessary to procure the records of the carrier to show that the train, or the car upon which the employee was working, at the time of the injury, contained some commodity, which was being transported in interstate commerce, or, if the car be empty, it is necessary to prove by the records of the company that the car was then en route in an interstate movement.

"As a result of the uncertainty which exists in borderline cases, there have been many instances in which suits were commenced and prosecuted to final determination only to develop the fact that the claimant had chosen the wrong remedy, or sued in the wrong court, and during the acquirement of this information the statute of limitations ran against the claimant under the law applicable to the case and no recovery could be had.

"Railroad men are frequently injured while moving or working upon cars or engines which have been temporarily withdrawn from interstate commerce and which were, just before or just after the injury, used in such commerce. In railroad switching service particularly men may be engaged in interstate and intrastate commerce intermittently several times during a single tour of duty.

"The adoption of the proposed amendment will, to a very large extent, eliminate the necessity of determining whether an employee, at the very instant of his injury or death, was actually engaged in the movement of interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely, or substantially affected interstate or foreign commerce, the claimant would be considered entitled to the benefits of the act.

"The preponderance of service performed by railroad transportation employees is in interstate commerce. As to those who are constantly shifting from one class of service to another, the adoption of the amendment will provide uniform treatment in the event of injury or death while so employed."

[2] The statements made in that report accord with the reasonable interpretation of the paragraph added by the amendment to section 1. That being so they should be followed by the courts. 59 C.J. 1021; Hoover v. Intercity Radio Co., 52 App.D.C. 339, 286 F. 1003, 1006. Counsel have been able to find but one case in which the interpretation of the amendment was involved. That case is Ermin v. Pennsylvania R. Co., D.C., 36 F.Supp. 936. That case involved injuries to a brakeman. He was a member of a crew using engine No. 9912. They were engaged in moving both engines and cars which were, or had been, disabled to and from parking yards, repair shops, and the main lines. All such equipment had been, from time to time, engaged in both intra and interstate commerce and, after being repaired, would be so used thereafter. He was injured while so moving a dead engine with engine No. 9912. The court held he was directly, closely, and substantially furthering the transportation of interstate commerce within the meaning of 53 U.S. Stat. 1404. In construing that statute the court based its decision, in part, on the reports made by committees of the Congress.

[3, 4] But, the respondent argues, if the statute is to be so construed then it is unconstitutional. In that connection the respondent does not specify any word or words but relies on the effect of the entire amendment as so construed. In other words the respondent contends the amendment as so construed covers, in part, intrastate business, a subject over which the Congress has no jurisdiction. The point is not well taken. If and when interstate business is clearly a part of the subject to be legislated on, the fact that intrastate commerce may be interwoven therewith does not prevent the Congress from exercising its powers. Baltimore & Ohio R. R. v. Interstate Commerce Comm., 221 U.S. 612, 618, 31 S.Ct. 621, 55 L.Ed. 878; Southern Ry. Co. v. United States, 222 U.S. 20, 26, 32 S.Ct. 2, 56 L.Ed. 72; Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 42, 36 S.Ct. 482, 60 L.Ed. 874; National L. R. B. v. Jones & Laughlin S. Corp., 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352.

[5] Applying the principles to the facts in the instant case, it is settled law that the railroad tracks on which a company engaged in interstate commerce operates its trains are a part of interstate commerce. Pedersen v. Delaware, Lack. & West. R. R., 229 U.S. 146, 151, 33 S.Ct. 648, 57 L.Ed. 1125, Ann.Cas.1914C, 153. It is also settled law that the matter of keeping those tracks clear and safe for the transportation of commerce is also interstate commerce. Rader v. Baltimore & O. R. Co., 7 Cir., 108 F.2d 980, 985. A "combination truck and boom car" has no other function than clearing tracks. One who is repairing such a car is clearly performing a duty which is "* * * the furtherance of interstate or foreign commerce * * *." Moreover his work does "* * * directly or closely and substantially, affect such commerce." 53 U.S.Stat. 1404, 45 U.S.C.A. § 51.

[6, 7] In New York Central R. R. Co. v. Winfield, 244 U.S. 147, 37 S.Ct. 546, 61 L.Ed. 1045, L.R.A.1918C, 439, Ann. Cas.1917D, 1139 it was decided (quoting from the syllabus): "The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries

suffered by their employees while engaged in interstate commerce are regulated both inclusively and exclusively by the Federal Employers' Liability Act; and, Congress having thus fully covered the subject, no room exists for state regulation, even in respect of injuries occurring without fault, as to which the federal act provides no remedy." Later in Inter-Island Steam Nav. Co. v. Territory of Hawaii, 96 F.2d 412, 418, Mr. Justice Haney, speaking for the court in the Ninth Circuit, said: "The exclusive effect of congressional action is quite clear. Thus in the case last cited, it is said that 'there can be no divided authority over interstate commerce.' The states may not 'complement' the act of Congress, or prescribe 'additional regulations' or 'auxiliary provisions for the same purpose' [citing cases], nor 'supplement' such act." Amici curiae have filed a brief in which they contend that the amendments of 1939, 53 U.S.Stat. 1404, had the effect of making the Federal Employers' Liability Act non-exclusive, permissive, or optional. We have carefully read the brief. The arguments are, generally speaking, the same that were urged by Mr. Justice Brandeis regarding the scope of 35 U.S.Stat. 65. New York Central R. R. Co. v. Winfield, 244 U.S. 147, 154, 37 S.Ct. 546, 61 L.Ed. 1045, L.R.A. 1918C, 439, Ann.Cas.1917D, 1139. That was a dissenting opinion. The majority of the court ruled the other way. It held the state statute was suspended. A most careful reading of the amendments of 1939 shows they do not speak on the subject. Manifestly if the contention was not applicable to 35 U.S.Stat. 65, much less is it applicable to 53 U.S.Stat. 1404. A most casual reading of the amendatory statute discloses no intention on the part of the Congress to make such drastic changes.

[8] We conclude that, at the time of the accident, both the employer and the employee were engaged in interstate commerce and were subject to the provisions of the Federal Employers' Liability Act but that neither the employer nor the employee was subject to the Workmen's Compensation Laws of the State of California.

The award is annulled.

We concur: NOURSE, P. J.; SPENCE, J.

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 11609.

District Court of Appeal, First District, Division 2, California.

May 27, 1941.

Hearing Granted July 24, 1941.

Commerce 🔑**27(8)**
Workmen's compensation 🔑**97**

Railroad car builder who sustained injuries while he was repairing freight car which had been used in interstate commerce before it was taken to shops for repairs, and was so used immediately after it was repaired, was performing duties in the furtherance of "interstate commerce", and in a way directly, closely and substantially affecting such commerce at the time of his injury so that action for his injury could be brought only under amended Federal Employers' Liability Act and injury was not compensable under the state Workmen's Compensation Act. Federal Employers' Liability Act as amended by Act of 1939, 45 U.S.C.A. §§ 51, 54, 56, 60; St.Cal.1937, p. 265 et seq., § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

Proceeding under the Workmen's Compensation Act by Fred Wills, employee, opposed by the Southern Pacific Company, employer, and self insurer. The Industrial Accident Commission of the State of California made an award granting compensation and the employer applies for writ of review.

Award annulled.

Henly C. Booth and Burton Mason, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Irvin C. Ford and Lawrence G. Dorety, both of Sacramento, amici curiae for respondents.

STURTEVANT, Justice.

This is an application for a writ of review for the purpose of having annulled an award made September 27, 1940, by the Industrial Accident Commission. The first and third findings on which said award was based were as follows:

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* Subsequent opinion 120 P.2d 888.

"1. Fred Wills, 62 years of age, while employed as a freight car builder on February 26, 1940, at Sacramento, California, by Southern Pacific Company, sustained injury occurring in the course of and arising out of his employment, as follows: Struck in right eye by piece of steel. At said time said employer was self-insured, and both employer and employee were subject to the provisions of the workmen's compensation, insurance and safety laws of the state of California, St.1937, p. 265 et seq., § 3201 et seq.

"3. The evidence does not indicate that the applicant was engaged in interstate commerce at the time of his injury."

It is a companion case to Southern Pacific Company v. Industrial Accident Commission et al., 113 P.2d 763, Civil No. 11595, this day filed. The facts are somewhat different, but the legal principles involved are the same as those controlling in Civil No. 11595. The statement of facts as set forth by the petitioner is conceded to be substantially correct. We quote from the petition:

"1. Petitioner is a common carrier by railroad in interstate commerce in the respects hereinbefore more fully alleged. Its railroad system extends between San Francisco and Portland, Oregon; between San Francisco and Ogden, Utah, via Reno, Nevada; and between San Francisco and Yuma, Arizona, and points beyond Yuma; and includes also lines extending between Sacramento and Los Angeles, California. At Sacramento, petitioner has for many years maintained and now maintains a general repair shop, where cars owned or used by petitioner, and devoted to general freight service, in both interstate and intrastate commerce, were and are given all classes of repairs.

"2. At all times material to this cause, applicant was employed by petitioner at its said Sacramento general shop, in the capacity or classification of 'car builder'. His duties in that employment consisted in making repairs to freight cars owned or used by petitioner in its general transportation business as aforesaid. The purpose of repairing freight cars is to permit their continued use by petitioner and its connections in their general business as common carriers of property by railroad, in both interstate and intrastate commerce.

"3. The applicant was, at the time and date of the accident, causing his injury (on February 26, 1940, as hereinafter described), engaged in making repairs to a freight car identified by initials and number as 'S.P. 26949'. Said car had been used by petitioner during the period December 23, 1939, to January 3, 1940, for the transportation of a carload of box shook from Booth, Oregon, to Camarillo, California, and had been placed in the Sacramento general shop on February 12, 1940, for purposes of repair. It remained at said shop until repairs were completed, on March 4, 1940. Said car was thereafter moved empty to Hamilton, California, at which point it was, on March 11, 1940, loaded with a carload of sugar, and thereupon moved with said carload of sugar to Portland, Oregon, arriving at the latter point on March 14, 1940. One of the particular purposes of the repairs to said car, undertaken at the Sacramento shop as aforesaid during the period February 12 to March 4, 1940, was to render said car suitable for the transportation of sugar. Said car was empty, while undergoing said repairs.

"4. On February 26, 1940, while applicant was engaged, in the course of his said employment, in making repairs on said car (S.P. 26949) at said Sacramento shop, he struck an axe with a hammer, which caused a small piece of steel to be broken off; said piece of steel struck and entered applicant's right eye. Said injury resulted in loss of sight of said right eye. Applicant returned to work for petitioner in his usual occupation on May 20, 1940, after having received medical and surgical care and treatment, duly furnished by petitioner.

"5. (a) Applicant was actually engaged, at the moment of the injury hereinbefore described, in repairing an instrumentality of interstate commerce, towit: said freight car S.P. 26949, which instrumentality had previously been devoted, assigned to and used in interstate commerce, had not been withdrawn therefrom or abandoned, was being repaired for the purpose of continuing to engage in, and immediately after its repair did actually engage in, said interstate commerce.

"(b) A substantial and daily part of the duties of said applicant, on and continuously prior to the said accident to him, was the furtherance of interstate commerce by keeping the necessary instrumentalities of interstate commerce in usable condition; and his work and employment directly and closely and substantially affected interstate commerce.

"(c) At the time of said injury to applicant, both he and petitioner were engaged in interstate commerce and transportation, or in work so closely related thereto as to be in contemplation of law a part thereof."

Both parties concede that, under the facts, prior to the enactment of the amendments, 53 U.S. Stat. 1404, 45 U.S.C.A. §§ 51, 54, 56, 60, the case would not have been controlled by the basic statute. 35 U.S. Stat. 65, 45 U.S.C.A. § 51 et seq. The sole question presented by the record is whether the case is controlled by the said amendatory statute. We think it is. It will be noted that there is no conflict in the evidence. Construing the statute as we did in Civil No. 11595, we think it is clear that of the duties of the decedent it must be said they were the furtherance of interstate commerce and in a way directly, closely and substantially to affect such commerce as set forth in the amendment to section 1 of 53 U.S. Stat. 1404, 45 U.S.C.A. § 51.

It follows the award should be and it is annulled.

We concur: NOURSE, P. J.; SPENCE, J.

SOUTHERN PAC. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 11530.

District Court of Appeal, First District, Division 2, California.

May 27, 1941.

Hearing Granted July 24, 1941.

Commerce ⚿27(7)

Workmen's compensation ⚿97

A railroad switchman whose duties included the moving of both interstate and intrastate cars and whose body was found on track soon after he had been instructed to ride on string of empty cars which were being placed on a track for temporary storage in contemplation of later use in interstate transportation service, was at time of his death performing duties in furtherance of "interstate commerce", and in a way directly, closely and substantially affecting such commerce so that recovery for his death was governed by the amended Federal Employers' Liability Act and a proceeding under the state Workmen's Compensation Act could not be maintained. Federal Employers' Liability Act as amended by Act of 1939, 45 U.S.C.A. §§ 51, 54, 56, 60; St.Cal.1937, p. 265 et seq., § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

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Proceeding under the Workmen's Compensation Act by R. P. Rodgers, employee, opposed by the Southern Pacific Company, employer and self-insurer. The Industrial Accident Commission of the State of California made an award granting compensation and the employer applies for writ of review.

Award annulled.

W. I. Gilbert and W. I. Gilbert, Jr., both of Los Angeles, and Henly C. Booth and Burton Mason, both of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

Irvin C. Ford and Lawrence G. Dorety, both of Sacramento, amici curiæ, for respondents.

STURTEVANT, Justice.

This is an application for a writ of review for the purpose of having annulled an award made July 20, 1940 by the Industrial Accident Commission. The first finding on which said award was based was as follows:

"1. R. P. Rodgers, born March 28, 1896, while employed as a switchman on November 3, 1939, at Los Angeles, California, by Southern Pacific Company, a corporation, sustained injury arising out of and occurring in the course of his employment proximately resulting in his death on the same day. At the time of said injury the employer was self-insured, and both employer and employee were subject to the provisions of the Workmen's Compensation Insurance and Safety Laws of the State of California." St.1937, p. 265 et seq., § 3201 et seq.

It is a companion case to Southern Pacific Company v. Industrial Accident Commission et al., 113 P.2d 763, Civil No. 11595, this day filed. The facts are somewhat different, but the legal principles involved are the same as those controlling in Civil No. 11595. The statement of facts as set forth by the petitioner is conceded to be substantially correct. We quote from the petition:

"1. Petitioner is a common carrier by railroad in interstate commerce in the respects hereinbefore more fully alleged. Los Angeles, California, is one of the important stations and terminals upon its lines, through which petitioner handles and transports a large volume of commerce, both interstate and intrastate. Petitioner also interchanges a substantial volume of such commerce with other interstate rail carriers at Los Angeles.

"2. The petitioner's railroad freight terminal yard at Los Angeles, in which decedent was employed at the time of his death, was and is an integral and essential part of the railroad system of petitioner, continuously used by and useful to it in the conduct of its aforesaid business as a railroad common carrier. The particular yard or locality in which the accident actually occurred, resulting in decedent's death, was a subordinate yard locally known as the 'bull ring', which was an integral part of the larger railroad yard constituting petitioner's railroad freight terminal at Los Angeles.

"Said bull ring consisted of numerous switching and storage tracks; and its primary and daily use by petitioner on November 3, 1939, the date of said accident, and continuously theretofore, was for the following purposes:

"(a) As a place where main-line freight trains including cars moving in either intrastate or interstate commerce might be and were received, and 'broken up' by switching the cars therein, upon arrival at the Los Angeles terminal, or 'made up' prior to their departure, for movement out of said terminal;

"(b) As a place where cars moving in either intrastate or interstate commerce, and containing freight for delivery to consignees at Los Angeles, or empty cars intended to be placed for loading at Los Angeles, and movement in either interstate or intrastate commerce from said point, might be and were 'classified'; i. e., switched and segregated, according to the purposes for which they were intended or the districts or destinations from or to which they had moved or were about to move;

"(c) For the storage or placement of empty cars, not immediately required for the handling of freight, or which had recently been received from petition's repair facilities, or which were about to be taken to such repair facilities for purposes of necessary repair.

"3. On November 3, 1939, the date of the accident resulting in his death, and also the date of said death, the aforesaid decedent was employed by petitioner as a yardman or switchman, in said Los Angeles yard. On said November 3, 1939, and for at least 14 days immediately and continuously prior thereto, said decedent as such employe had been a member of a yard crew consisting of a yard foreman, 5 yardmen or 'helpers', including decedent, and a 'pin-puller'. Said crew was regularly assigned to duty at the aforesaid 'bull ring' yard. The particular crew of which decedent was a member worked a daily shift of 8 hours, commencing its tour of duty at 11:30 p. m. and endings the same at 7:30 a. m. Decedent, as a yardman and a member of said crew, participated in all of the switching and other work performed in said bull ring by his said crew. No other crew was regularly assigned to perform switching duties in said bull ring, during the daily 8-hour tour of duty to which decedent's said crew was assigned.

"As a yardman or 'helper', it was particularly the decedent's duty, which he duly performed each day, to assist and take part in the making up and breaking up of cuts or strings of freight cars as they were brought to or removed from the bull ring; also to assist and take part in the switching and placement of main-line freight trains, arriving at and terminating in said bull ring; also to ride single cars, or cuts or strings or cars, being shoved or switched into the various tracks of said bull ring, for the purpose of bringing them to a stop at proper places by the use of the hand brakes; also to throw switches as required; and generally to perform such other duties as might normally be required of a yardman in a freight yard at an important terminal such as petitioner's Los Angeles terminal.

"4. About 5:00 o'clock a. m. on November 3, 1939, and after decedent had been on duty for approximately five hours and thirty minutes, his body was found lying across one of the rails of one of the tracks of the bull ring. The attendant circumstances indicated that he had fallen from the platform of a freight car upon which he had been seen riding immediately prior to the time of the discovery of his body, and that he had been run over, and killed by the following freight car. No witness testified that he had actually seen the decedent fall; and apparently none of the members of his crew actually saw the accident. Some few minutes prior to the discovery of decedent's body, he had been instructed by his foreman to ride upon one of a string of three empty cars, and had actually been seen riding upon the rear platform of the first car of said string, which was then in the course of being placed upon one of the tracks of the bull ring, for temporary storage in contemplation of later use in actual intrastate transportation service. Said three cars were known as 'beet racks', and were in fact flat cars temporarily equipped at petitioner's repair shop with wooden racks suitable for the loading of sugar beets; they had been brought from the repair shops earlier during decedent's tour of duty, to be placed in the bull ring for storage as aforesaid.

"At the time of the accident said cut of three cars was rolling 'free', i. e., not attached to the engine, and down a slight grade at a speed not exceeding 5 miles per hour; it being intended that they should be stopped by decedent, by the use of the hand brakes, at a predetermined point of rest. There was no collision between said cars and any other cars or other objects at the time of or immediately prior to the accident. A careful examination by qualified employes of petitioner revealed that said cars, and particularly the brakes and other safety appliances thereon, were in good repair and without defects. In fact, said cars had come from the repair shops within a few hours immediately preceding the accident. The testimony showed without dispute that petitioner and its employes other than decedent were entirely free from any negligence which might in any way have contributed to or caused the accident, and that the accident was not in any respect due to any negligence of petitioner or any of its employes, other than possibly the decedent himself.

"5. In the course of its tour of duty which commenced at 11:30 p. m. on November 2, 1939 (the same tour of duty during which the accident occurred), the crew of which decedent was a member, and decedent himself as a member thereof, had switched or handled various cars containing interstate freight, and moving in interstate commerce, between points in California and points in other states; and said crew, and decedent as a member thereof, had also participated in the switching and placement of a main-line freight train which had originated at and moved in interstate commerce from Yuma, Arizona, and had terminated its run at Los Angeles, which said freight train contained a number of cars, together with their contents, actually moving in interstate commerce.

"On each of the 14 days immediately preceding November 3, 1939, during which decedent had been employed as a member of the aforesaid switch crew, he had performed similar duties; namely, the handling and switching of interstate freight trains and of cars moving in interstate commerce, as well as numerous cars moving in intrastate commerce.

"6. The evidence showed that 51.3 per cent of all of the loaded and empty cars handled by petitioner into, through, to and from its Los Angeles terminal during the two-weeks' period from October 19 to November 3, 1939, immediately preceding the date of the aforesaid accident, were cars moving in interstate commerce.

"7. Decedent's employment in general, as related to said interstate commerce, both on the date of his death and during the period immediately prior thereto, included the regular and daily performance of duty as a yardman (as above described), in and about the handling of trains and cars containing interstate freight, or cars moving to and from and between points in different states, including both empty and loaded cars.

"8. A substantial and daily part of decedent's duties as such yardman, during the period of his aforesaid employment by petitioner, included the furtherance of the interstate commerce, carried on in and through said 'bull ring', and directly, closely and substantially affected such interstate commerce."

Both parties concede that, under the facts, prior to the enactment of the amendments, 53 U.S.Stat. 1404, 45 U.S.C.A. §§ 51, 54, 56, 60, the case would not have been controlled by the basic statute. 35 U.S.Stat. 65, 45 U.S.C.A. § 51 et seq. The sole question presented by the record is whether the case is controlled by the said amendatory statute. We think it is. Construing the statute as we did in Civil No. 11595, we think it is clear that of the duties of the decedent it must be said they were the furtherance of interstate commerce and in a way directly, closely and substantially to affect such commerce as set forth in the amendment to section 1 of 53 U.S.Stat. 1404, 45 U.S.C.A. § 51.

It follows the award should be and it is annulled.

We concur: NOURSE, P. J.; SPENCE, J.

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45 Cal.App.2d 111

SOUTHERN CALIFORNIA TELEPHONE CO. v. LOS ANGELES COUNTY.
SAME v. CITY OF LOS ANGELES.

Civ. 6249, 6250.

District Court of Appeal, Third District, California.

May 28, 1941.

Hearing Denied July 24, 1941.

1. Taxation 🔑40(8)

The law contemplates that utility property and common property should bear the same burden of taxation in proportion to value. Const. art. 13, §§ 14, 16.

2. Taxation 🔑40(7)

A tax assessment grossly disproportionate as compared with other assessments is an "excessive assessment", since final object of assessment is to distribute tax ratably on various parcels of property subject to it.

See Words and Phrases, Permanent Edition, for all other definitions of "Excessive Assessment".

3. Taxation 🔑446

The fact that a tax assessment is excessive, even though grossly so, does not in itself make the assessment void.

4. Taxation 🔑446

The conclusion of assessing officers as to the value of property for purposes of taxation, when honestly arrived at, and not made in pursuance of some fixed rule the result of which is necessarily discriminatory and inequitable, cannot be attacked collaterally in the courts.

5. Taxation 🔑446

A taxpayer may collaterally attack an assessment made fraudulently and corruptly with the intent of discriminating against him, where discrimination results from inequality of valuation the same as from any other cause.

6. Taxation 🔑456

The findings and judgments of taxing authorities are not subject to review or revision except as prescribed by law, and they cannot be disturbed or annulled except when they proceed arbitrarily and in willful disregard of the law with evident purpose of imposing unequal burdens upon certain of the taxpayers.

7. Taxation 🔑543(9)

On appeal from judgments of dismissal entered after motions for nonsuit were granted in actions to recover money paid for taxes, reviewing court was required to take all evidence in favor of plaintiff as true and to disregard evidence in conflict therewith, every favorable inference fairly deducible from evidence was to be considered as a fact proved in favor of the plaintiff, and evidence susceptible of two constructions was to be considered most favorably to the plaintiff.

8. Taxation 🔑319(2)

The presumed validity of State Board of Equalization's assessment of telephone company's property could not be overcome by evidence, based upon county assessor's records relating to valuation of company's realty, that if county had been authorized to make assessment, telephone company's property would have been assessed at a much lower figure. Const. art. 13, § 14.

9. Taxation 🔑319(2)

Where State Board of Equalization under constitutional amendment was required to assess property of public utilities, evidence, based upon records in county assessor's office relating to value of telephone company's realty, that board's first assessment of telephone company's property under constitutional amendment was much higher than county's assessment would have been if county had been authorized to make assessment, was insufficient to establish that board's assessment was fraudulent. Const. art. 13, § 14.

10. Taxation 🔑537

To constitute "fraud" in making tax assessment, so as to permit recovery back of taxes paid, there must have been a conscious failure on part of assessing official to exercise that fair and impartial judgment which the law requires of him.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

11. Fraud ⚷58(1)
Officers ⚷119

"Fraud" being a term which imputes venality and corruption to person charged, should be clearly proved, especially where persons charged are public officers vested with discretionary power.

12. Taxation ⚷319(2)

Where constitutional amendment required State Board of Equalization to assess all public utility property, it was to be expected that the central assessment might be different from values of local assessor, and therefore board's assessment of telephone company's property could not be impeached by evidence, based upon records in county assessor's office relating to valuation of company's realty, that property would have been assessed at a much lower figure if assessment had been made by county. Const. art. 13, § 14.

13. Taxation ⚷319(2)

Where constitutional amendment required State Board of Equalization to assess all public utility property, unjust and willful discrimination upon part of board in assessment of property of telephone company could not be established by singling out an assessment made in one county only as basis for comparison, but could be established only by showing that assessment was based upon a percentage of value grossly exceeding percentage of value for which common property throughout the state was assessed for general purposes of taxation. Const. art. 13, § 14.

14. Municipal corporations ⚷977

The presentation of claim against city as required by city charter for amount of money which telephone company sought to recover from city as overpaid taxes was not a prerequisite to commencement of action against city to recover that amount. Pol.Code, § 3819.

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Appeals from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Actions by the Southern California Telephone Company, the first against the County of Los Angeles and the second against the City of Los Angeles, to recover money paid for taxes. From judgments of dismissal entered after motions for nonsuit were granted in the actions, the plaintiff appeals.

Judgments affirmed.

Alfred Sutro, of San Francisco, Oscar Lawler, of Los Angeles, Francis N. Marshall and Pillsbury, Madison & Sutro, all of San Francisco, and Lawler, Felix & Hall, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., City of Los Angeles, Frederick Von Schrader, Asst. City Atty., John W. Holmes, Public Utilities Counsel, City of Los Angeles, J. H. O'Connor, County Counsel, County of Los Angeles, S. V. O. Pritchard, Asst. County Counsel and Gordon Boller, Deputy County Counsel, all of Los Angeles, County of Los Angeles, U. S. Webb, Atty. Gen., and John J. Dailey, Deputy Atty. Gen. (Henry C. Ramsey and Louis H. Burke, both of Los Angeles, of counsel), for respondents.

Dixwell L. Pierce, of Sacramento, Secretary, State Board of Equalization, amici curiae for respondent.

Amici curiae named below are the legal representatives of cities and counties against whom such suits are now pending:

Earl Warren, Dist. Atty., Alameda; Allen L. Martin, Dist. Atty., Amador; Carlton H. Casjens, City Atty., Bell; Fred C. Hutchinson, City Atty., Berkeley; Richard C. Waltz, City Atty., Beverly Hills; A. L. Sebille, City Atty., Brawley; Virgil M. Airola, Dist. Atty., Calaveras; W. L. Hudson, City Atty., Carmel-by-the-Sea; Arthur Blank, City Atty., Coalinga; Waldo Willhoft, City Atty., Colton; Ralph K. Pierson, City Atty., Compton; Francis P. Healey, Dist. Atty., Contra Costa; M. Tellefson, City Atty., Culver City; Thos. Scott, Dist. Atty., Kern; George W. Trammell, Jr., City Atty., and Joseph B. Lamb, Deputy City Atty., Long Beach; Glenn West, City Atty., Lodi; Clyde Woodworth, City Atty., Manhattan Beach; A. E. Bagshaw, Dist. Atty., Marin; F. A. Silveira, Dist. Atty., and A. A. Henderson, Deputy Dist. Atty., Merced; Robert B. Fowler, City Atty., Modesto; Anthony Brazil, Dist. Atty., Monterey; Roy E. Lochman, City Atty., Napa; Vernon Stoll, Dist. Atty., Nevada; F. Bert Fernhoff, City Atty., Oakland; W. F. Minton, Dist. Atty., Orange; John L. Childs, Dist. Atty., Del Norte; E. S. Mitchell, City Atty., Eureka; Dan F. Conway, Dist. Atty., Fresno; Christian M. Ozias, City Atty., Fresno; Aubrey N. Irwin, City Atty., Glendale; Art Smith, City Atty., Hermosa Beach; C. W. White, City Atty., Hayward; Elmer W. Heald, Dist. Atty., Imperial; George Francis, Dist. Atty., Inyo; Eugene Best, City Atty., Riverside; Hugh

B. Bradford, City Atty., Sacramento; Russell Scott, City Atty., Salinas; Jerome K. Kavanaugh, Dist. Atty., and Albert E. Weller, Chief Deputy Dist. Atty., San Bernardino; H. F. Orr, City Atty., San Buenaventura; James B. Abbey, Dist. Atty., and Carroll H. Smith, Deputy Dist. Atty., San Diego; Dayton L. Ault, City Atty., San Diego; H. S. Farrell, City Atty., San Gabriel; Clyde R. Moody, City Atty., San Fernando; Arnold Rumwell, City Atty., Palo Alto; Harold P. Huls, City Atty., and H. Burton Noble, Asst. City Atty., Pasadena; M. C. Kerr, Dist. Atty., Plumas; W. L. Rose, City Atty., Pomona; Paul B. Wilson, City Atty., Redlands; Frank L. Perry, City Atty., Redondo Beach; Thomas M. Carlson, City Atty., Richmond; Earl Redwine, Dist. Atty., Riverside; Percy C. Heckendorf, Dist. Atty., Santa Barbara; Maxwell Nichols, City Atty., Santa Barbara; Fred L. Thomas, Dist. Atty., Santa Clara; Francis R. Hall, City Atty., Santa Cruz; Hurley T. Bailey, City Atty., Santa Maria; Cornelius W. McInerney, Jr., City Atty., Santa Monica; Glenn D. Newton, Dist. Atty., Shasta; A. J. Just, Dist. Atty., Sierra; Horace E. Vedder, City Atty., South Pasadena; Lloyd E. Hewitt, Dist. Atty., Sutter; Walter C. Haight, Dist. Atty., and John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., San Francisco; Archer Bowden, City Atty., San Jose; Albert L. Poe, City Atty., San Leandro; M. R. Van Wormer, Dist. Atty., San Luis Obispo; M. A. Fitzgerald, City Atty., San Luis Obispo; Ernest A. Wilson, City Atty., San Mateo; L. W. Blodget, City Atty., Santa Ana; Clair Engle, Dist. Atty., Tehama; Leroy McCormick, Asst. Dist. Atty., Tulare; Israel H. Ham, City Atty., Tulare; E. I. Feemster, City Atty., Visalia; A. W. Sans, City Atty., Watsonville; Thomas W. Bewley, City Atty., Whittier; C. C. McDonald, Dist. Atty., Yolo.

TUTTLE, Justice.

These actions were filed separately, but consolidated for trial and on appeal. In one, plaintiff seeks to recover the sum of $398,756.91, which amount was paid to the City of Los Angeles as taxes under an assessment levied by the state board of equalization. In the second, plaintiff seeks to recover, under a similar action, the sum of $909,039.49 against the County of Los Angeles. At the close of plaintiff's case, and in each action, the trial court granted a nonsuit. The appeals are taken from judgments of dismissal thereafter entered.

The complaints in each case, so far as the statement of the cause of action is concerned, are substantially the same. They allege the corporate character of plaintiff, and state facts showing it to be a public utility, engaged in a general telephone and telegraph business in the state of California; that the state board of equalization assessed, in Los Angeles county, for the purposes of taxation, for the fiscal year ending June 30, 1936, certain property of plaintiff for the sum of $52,097,585, of which amount the sum of $34,235,177 is claimed to be void. As to the City of Los Angeles the figures are $37,528,530 and $24,587,483, respectively; that thereafter a petition for reassessment of said property by said board was denied; that taxes in the amount above stated were paid under protest; that in making said assessments, said board acted arbitrarily and capriciously and in deliberate, wilful, and systematic disregard of assessments of other property in said county for said fiscal year, and of the method used in making of the same, and of the extent to which, and in the manner in which, other property in said county was taxed for said fiscal year; that said assessment bears no relation to the actual value of said property of plaintiff in said county; that said assessment is proportionately higher than assessments of other property of the same class or classes; that said assessment discriminates against plaintiff, and that it is "contrary to, and in violation of the rights, privileges and immunities of plaintiff under Section 13 of Article 1, and Section 14 of Article XIII of the Constitution of the State of California, and under the Fourteenth Amendment to the Constitution of the United States".

From 1911 to 1934, inclusive, the property of public utilities was taxed in California by the imposition of taxes proportionate to gross receipts. On June 27, 1933, a constitutional amendment was adopted, whereby the aforesaid "gross receipts" system of taxation was superseded by the system now embraced in the Constitution, article XIII, sections 14 and 16 and the statutes implementing these constitutional provisions. This new system went into effect in 1935. The chief features of the new system of taxing public utilities in California are as follows: The state board of equalization is required to assess, annually, all property, other than franchises, of such enterprises at its actual value. The owners of public utility property are offered opportunity to appear and apply to the board for correction of assessments made by it. Upon completion of the assessments, the board is required to transmit to the respective local taxing jurisdictions an assessment roll showing the assessments against public utility property located therein. The property so assessed is then subject to taxation locally at the rates fixed for taxation of property in the respective taxing jurisdictions. In 1935 the board made its first assessment under the revised system. Appellant complains of the assessment so made of its property in the county of Los Angeles, alleging that the assessment is $34,235,177 too high on its property in the county, and $24,587,483 too high on that part thereof located in the city.

The authority of the board of equalization for making the assessment is derived from article XIII, section 14 of the Constitution of the state of California, which provides, among other things, that the properties of public utilities shall be assessed annually by the state board of equalization at the actual cash value of such property. Said section also provides: That "all property so assessed * * * shall be subject to taxation to the same extent and in the same manner as other property."

[1] We may start with the premise that the law contemplates that utility property and common property bear the same burden of taxation in proportion to value. All parties agree that this is the correct rule in California.

As to the issues as they were defined at the trial, there was no attempt by plaintiff to prove the actual values of its properties. It therefore follows that the allegation of the complaint, based upon the fact that the assessment "bears no relation to actual value", may be disregarded. The following excerpt from the argument of counsel for appellant goes a long way toward clarifying and restricting the issues:

"Our whole complaint here, as has been repeatedly stated to your Honor, arises out of one of comparison. We claim that by a comparison of the assessment at which comparable properties would have been assessed, the State Board has assessed our properties at such figures as under the very decisions and opinions to which counsel has referred, raises a presumption of constructive fraud. * * * I think it has appeared that we are not here required to establish what the actual value was. Our problem has been by comparison to show an over-valuation, and I believe we have done that."

Summing up the matter, it appears that the real question actually litigated was whether or not, by means of comparison, the property of appellant was assessed higher than other property of the same class or classes.

It is urged by appellant that, having proven, in the action against the City, their property was assessed by the board for $37,528,250, whereas the city would have assessed it for $24,587,483 less, and as to the county, $52,097,585 and $34,235,177, respectively, the presumption arose that the assessment by the board was constructively fraudulent. It relies upon Birch v. County of Orange, 186 Cal. 736, 742, 200 P. 647, 649. There, the board of supervisors was charged with acting arbitrarily and fraudulently in respect to their act in fixing the assessed value of plaintiff's oil property. Plaintiff relied upon proof of assessments made upon surrounding oil lands almost identical in character, development, production and value. The undisputed evidence showed that plaintiff's land was assessed at a rate from ten to fifteen times that of such other surrounding properties. The court held that the facts made out a case, and that it was error to grant a nonsuit. The opinion states: "'A grossly inequitable and palpably excessive overvaluation' of property for taxation may be held constructively fraudulent." No California cases are mentioned or cited, but several cases from other states are relied upon. The rule in California upon this question is thus otherwise stated in the same California volume [198 P. 1034]:

[2, 3] "An assessment grossly disproportionate as compared with other assessments is an excessive assessment, since the final object of the assessment is to distribute the tax ratably on the various parcels of property subject to it, and an unequal assessment on one parcel as compared with others means that an excessive portion of the tax falls on that parcel. But the fact that an assessment is excessive, even though grossly so, does not itself make the assessment invalid. This is the rule generally followed in other jurisdictions, and has been declared by at least three decisions of this court, namely Los

Angeles v. Western, etc., Co., 161 Cal. 204, 118 P. 720; Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277; Miller & Lux [Inc.] v. Richardson [182 Cal. 115], 187 P. 411. In the first of these cases, the finding of the trial court was, as here, that the assessment 'was grossly excessive,' and it was held, nevertheless, that it was insufficient as a ground for invalidating the assessment." Pacific Coast S. S. Co. v. Richardson, 186 Cal. 70, at page 72, 198 P. 1034.

The latter appears to be the well-settled rule in this state. It may be observed, however, that in the Birch case the comparison was made between assessments made in the same county by the same assessing agency. In the instant case an attempt is made to make a comparison between the assessments of two distinct agencies—the state board of equalization and the County of Los Angeles (acting for the City, also), and in respect to different properties owned by plaintiff. The significance of this difference will be later pointed out.

[4, 5] The rule governing the right of appellant to bring an action of this character is stated in the case of Los Angeles G. & E. Co. v. County of Los Angeles, 162 Cal. 164–167, 168, 121 P. 384, 385, 9 A.L.R. 1277, as follows:

"It is not disputed that the conclusion of assessing officers as to the value of property for purposes of taxation, when honestly arrived at, and when not made in pursuance of some fixed rule or general system, the result of which is necessarily discriminatory and inequitable, is conclusive on the courts, however erroneous the conclusion of those officers may be. The law necessarily leaves the determination of the question of fact of value to certain officers, and when it appoints tribunals for that purpose, as in this state primarily the assessor, and, for purpose of review, the board of supervisors, acting as a county board of equalization, the conclusion of those tribunals on such a question of fact constitutes a judgment that is not collaterally assailable in the courts. This is the universal rule, and it has been so held in this state. San Jose Gas Co. v. January, 57 Cal. 614; Henne v. Los Angeles County, 129 Cal. 297, 61 P. 1081. See, also, Gray on Limitations of Taxing Power, § 1460. As put in Taylor v. Louisville, etc., R. R. Co. [6 Cir.], 88 F. 350, 31 C.C.A. 537, such an attack will not lie in the courts 'where the injury complained of arises only from the erroneous but honest judgment of the lawfully constituted tax tribunal.' But it is likewise universally held that a taxpayer may so assail an assessment in the courts, where it was 'fraudulently and corruptly made, with the intention of discriminating against him, and for the purpose of causing him to pay more than his share of the public taxes,' and it has that effect, or where there is something equivalent to fraud in the making of the assessment, producing such effect. See County of Los Angeles v. Ballerino, 99 Cal. 593, 32 P. 581, 34 P. 329; Pacific, etc., Co. v. Dalton, 119 Cal. 604, 51 P. 1072; Oregon, etc., R. Co. v. Jackson County, 38 Or. 589, 599, 64 P. 307, 65 P. 369, and cases there cited. This is as true where the injurious effect so produced is caused by inequality of valuation as by any other cause, for, as said in Judson on Taxation, at page 608: 'It is obvious that, where taxation is upon property that requires valuation, inequality of taxation is produced as surely by inequality of valuation as by inequality of the rate of tax.'"

[6] A correct statement of the law is also found in the case of Oregon & C. R. Co. v. Jackson County, 38 Or. 589, 64 P. 307, 311, 65 P. 369; 9 A.L.R. page 1286: "'It must be conceded that assessors, in fixing valuations and making assessments, and boards of equalization sitting in review of their work, act in a judicial capacity, or in the exercise of a judicial function; and when the roll is made up it stands in the nature of a judgment. * * * Hence their findings and judgments are not subject to review or revision except in the manner pointed out by law, nor can they be disturbed or annulled except when they proceed arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers. In the latter case, their acts being designedly oppressive and fraudulent, equity will interpose to prevent the consummation of such purpose, as there exists no adequate, certain, and complete remedy at law.'"

In Utah Const. Co. v. Richardson, 187 Cal. 649–654, 655, 203 P. 401, 403, it is stated: "It is a rule applicable to assessors and to boards having assessing powers that it is presumed that the assessing officers have properly performed the duties intrusted to them, and, consequently, that their assessments are both regularly and correctly made. Code Civ.Proc. § 1963, subd. 15; [Swamp Land] Reclamation Dist. v. Wilcox, 75 Cal. 443, 17 P. 241; In re Oklahoma G. & E. Co. [67 Okl. 301], 171 P. 26. * * * At any rate, the state was not required to prove that the board did, in fact, base the tax upon the value of the franchise; the burden of showing the contrary rested upon appellant, and the only evidence adduced in this connection, namely, the testimony of the secretary of the board, was too indefinite and unsubstantial to overcome the presumption that the board had properly performed its official duties."

[7] In the latter case, as here, a nonsuit was granted in an action to recover taxes paid under protest, and it was held that "the [evidence] was too indefinite and unsubstantial to overcome the presumption that the board [state board of equalization] had properly performed its official duties". That is the precise question presented upon this appeal, and we will direct our attention to the evidence produced by appellant, bearing in mind that: "All the evidence in favor of plaintiffs must be taken as true, and all the evidence in conflict therewith must be disregarded. 'Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor' of the plaintiff, and where the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. If with all these aids the evidence is in such condition that a verdict or decision in favor of plaintiff would be held by an appellate court to have sufficient legal support in the evidence, a nonsuit should not be granted." Birch v. County of Orange, supra.

[8, 9] At the outset it might be observed that, under its charter, the City of Los Angeles has adopted and uses the same system of assessing as the County of Los Angeles. Consequently, there is but one assessment for both, in respect to property within the city limits. The property here involved is situated both within and without the city.

The property assessed consists of buildings, which represent about 14 per cent of the total; motor vehicles, which represent about three-tenths of 1 per cent; and other tangible personal property, representing about 86 per cent. The fiscal year for which this assessment was made was the first year which came under the operation of article XIII, section 14 of the Constitution, and the assessor consequently had no right or authority to assess said property for said year. It follows that there could be no legal assessment by the county for said year, and thereafter. The case of appellant, as it admits, rested upon the theory of comparison alone. In lieu of producing any legal assessment for the year appellant relied upon certain figures taken from the office of the assessor, and sought to use them to prove inequality of assessment. The source of these figures appears from the testimony of the deputy county assessor, which was substantially as follows:

"Q. You have had occasion to assess the property of the Southern California Telephone Company? A. We did prior to 1935, yes.

"Q. And in assessing the property of the Southern California Telephone Company will you state whether or not you pursued identically the same method and manner that you use in assessing the property of other individuals? A. Yes, we did. We assessed them on the same method and proceeded in the same way we did in assessing buildings of other kinds then in the county, owned by other people.

"Q. In your office there are certain records or certain things—I will say called map records and supporting building slips. Are those official records in your office? A. Yes. * * *

"A. That was for building slips. They show the method of arriving at the assessed value of the building. That is shown on the building slips and those building slips are in turn copied into the assessor's map book.

"The Court: Then the information contained in the building slips is on the map books? A. The assessed value as shown on the building slip is copied on the map book; the assessor's map book shows the assessed value of that building on the map book. * * *

"Will you state, Mr. Potter, whether or not you continue to put figures on the building slips and records in your office, presenting values on the properties of the Southern California Telephone Company? A. Yes, since 1934 we have continued our building slips and kept them up just like we have building slips generally, and they do reflect the value or the figures on the building slips just as though they were being assessed by the county.

"Q. Explain to the court why you do that? A. To keep our records up to date, although we realize we are not assessing the building we are keeping our records up to date so we will have a record of the buildings as they would be if we were doing the assessing.

"Q. You have done that every year since 1934? A. Yes, done that every year since 1934. * * *

"Q. Mr. Potter, in the assessment of public utility property for 1934 state what was the purpose and what was the liability to which such assessed values were subjected? A. We assessed the buildings, as I say, just like other buildings and they were entered on the map books and of course at that time there was no tax against the building but there were special assessments covering them.

"Q. No special assessments, levies, or things of that nature? A. They were assessed and the special assessment was extended against them but not the regular taxes."

The records mentioned by the witness, over the objection of respondents, were admitted in evidence. Upon them appellant bases the over-valuation of its property in the amounts we have heretofore indicated. It might be pointed out, however, that as to tangible personal property (other than motor vehicles), there were no records whatever in the assessor's office. Consequently, that property was not covered directly by the entries testified to by the witness mentioned. Such property consisted of special telephone apparatus, telephones, wires, cables, and similar articles. The figure at which the last-mentioned property should have been assessed, according to the theory of appellant, is derived by a devious method which is, however, ultimately based upon the records testified to by the witness mentioned—that is, the building slips and maps. Thus, it appears that the comparison upon which the entire case of appellant rests, is between the actual assessment by the board of equalization, and (1) as to buildings, the figures taken from said block books and maps which may be taken as the amounts for which the County would have assessed the property if it had the right to make a legal assessment for the year in question; (2) in respect to motor vehicles, values taken from a "blue book" in the office of the assessor, and which he was accustomed to follow in assessing such property, and which was published by a local automobile dealer; and (3) in respect to other tangible personal property, by the application of a formula mentioned below, which is based, however, upon the values placed upon buildings as they appear in the block books and maps mentioned. The assessor testified that if he had assessed appellant's buildings in 1935, he would have assessed them at approximately $2,400,000. He did not testify as to the assessment he would have made in 1935 in respect to motor vehicles or any other property. Appellant's position as to asserted discriminatory assessment of appellant's tangible personal property other than vehicles may be summarized as follows: The building slips kept by the local assessor contain figures which appellant asserts are the values that would have been assigned by that officer to appellant's buildings in Los Angeles County, if he had been vested with the power of assessment thereof. The total of the building slip figures on appellant's buildings in Los Angeles County is divided by the total supposed replacement cost new less depreciation of those buildings, as calculated and estimated by appellant, and the quotient is found to be 27.4 per cent. On the theory, apparently, that replacement cost new less depreciation inheres in all property to the same extent and is a constant element of value in buildings and personal property, appellant calculates and estimates the supposed replacement cost new less depreciation of that part of its tangible personal property allocated by it to Los Angeles County, other than vehicles, and applies to it the per cent relation of building slip figures to supposed replacement cost new less depreciation of its buildings in Los Angeles County (27.4 per cent). The result is assumed to be the total maximum valid assessment of appellant's tangible personal property in Los Angeles County, other than vehicles, if personal property is assessed at the same ratio of full value as are real estate and improvements. Asserting that personal property is assessed in California at only 33.33 per cent of full value, while real estate and improvements are assessed at 46.66 per cent thereof, appellant concludes that its personal property in Los Angeles County should be assessed at only that portion of full value which 33.33 per cent bears to 46.66 per cent or 71.43 per cent. Accordingly, appellant applies to the supposed maximum assessment of its personalty, if personalty generally is assessed at the same "level" as real estate and improvements the factor of 71.43 per cent and derives what is asserted to be the maximum lawful assessment of its tangible personalty, other than vehicles, in Los Angeles County, or the figure $15,338,865. The difference between the figure so derived and the board's assessment of appellant's tangible personalty, other than vehicles, in Los Angeles County, $31,776,740, is the asserted fraudulent part of the assessment of appellant's tangible personal property other than motor vehicles. Motor vehicles represent 23 per cent of the total tangible taxable personalty in Los Angeles County. Following the above line of reasoning, appellant calculated and estimated the replacement cost less depreciation of its motor vehicles in Los Angeles County, and, applying the value figures in the "bluebook", concludes that the asserted maximum allowable assessment of its vehicles is 19.42 per cent of their supposed replacement cost new less depreciation. From the foregoing it deduces that its tangible personal property cannot lawfully be assessed in excess of 71.43 per cent of 27.4 per cent of its replacement cost less depreciation.

[10] We are of the opinion that the presumption in favor of the action of the board and the validity of the assessment could not be overcome by evidence of the character indicated. Appellant's case is predicated entirely upon a claim that the board's assessment was constructively fraudulent. In the case of Miller & Lux, Inc., v. Richardson, 182 Cal. 115-128, 187 P. 411, 416, it is stated: "In order that there be fraud, there must exist, on the part of the assessing official, a conscious failure to exercise that fair and impartial judgment which the law requires of him. This is both the general rule and the settled law of this state."

[11] There is no direct evidence of fraud, such contention being based solely upon an inference assertedly deducible from "comparative" assessed values of its buildings. This comparison is of the hypothetical, unequalized amounts the county assessor would have assessed its property for if the law cast upon him the duty of making such an assessment, which it did not. Such a showing is predicated upon a highly conjectural and speculative "yardstick" theory of comparisons, and is too unsubstantial to sustain judgment in favor of appellant. In Hannon v. Madden, 214 Cal. 251-267, 268, 5 P.2d 4, 11, it is said: "Fraud, being a term which imputes venality and corruption to the person charged, should be clearly proved and satisfactorily established, especially where the persons charged are public officers vested with wide discretionary powers. If official acts may be explained on any reasonable theory of duty honestly, even though mistakenly performed, it must be resolved in favor of the presumption, which may not be lightly ignored. This is made doubly true where no substantial evidence, as in the instant case, points to a corrupt motive or dishonest purpose on the part of the accused. A wide divergence of views, especially in matters where local taxation for public improvements is involved, frequently exists. Suspicions easily aroused and baseless charges of dishonesty hurled in the acrimony of controversy have a tendency to defeat, rather than promote, efficiency in the administration of public affairs."

It must be remembered here that no attempt was made by appellant to show that the method adopted by the board in making the assessment was not that prescribed by law, nor is there any evidence from which it can be inferred that the board was guilty of a conscious failure to exercise that fair and impartial judgment which the law requires of it.

[12] Another reason why the act of the board cannot be impeached by such evidence (assuming that the entries in the block book and the maps were the equivalent of a valid assessment) is that under the constitutional provisions mentioned above, the power to assess public utility property is placed exclusively in the hands of the board of equalization as a sole, central assessing agency. This is significant, because it is the common function of central assessing agencies to evaluate such property as a whole in order to assure the assessment of those values which cling to the entire property as a unit, and in order to assure the assessment of the same type of property at uniform value throughout the state. These are the reasons for central assessment of appellant's property as distinguished from local assessment thereof in all of the fifty-eight different counties. The law recognizes that where a central agency is given the duty to assess

public utility property while other property is assessed by local officers, the very fact of such segregation bespeaks an intention that the central assessment might be different from the values of the local assessor. In Columbus Southern R. Co. v. Wright, 1894, 151 U.S. 470, 14 S.Ct. 396, 400, 38 L. Ed. 238, 243 (quoting from the opinion in Franklin County v. Nashville, C. & St. L. Ry. Co., 12 Lea, Tenn., 521, 539): "'* * * No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all trustworthy, unless, indeed, the local assessors are furnished with the means of estimating the whole road.'"

In Union Pacific R. Co. v. Ryan, 1885, 113 U.S. 516, 5 S.Ct. 601, 28 L.Ed. 1098, the railroad corporation unsuccessfully attacked as discriminatory a unit assessment made by the state board of equalization of Wyoming and the allocation of values by that board to its property in Cheyene claiming, as does appellant herein that such method of assessment was unconstitutional in view of the method of local assessment of common property. The court explained the reason for central assessment of public utility property as follows (113 U.S. 516, 5 S.Ct. 603, 28 L.Ed. 1100, 1101): "The difficulty of assessing the value of railroad property in separate parcels, located in distinct cities and townships, is almost insuperable. A railroad cannot be regarded as mere land, like farm land or building lots; its value depends upon the whole line as a unit, to be used as a thoroughfare and means of transportation. A separate mile or two of its length is almost valueless by itself. * * * It seems hardly to admit of a doubt that the object of this scheme was to withdraw the difficult task of assessing fractional parts of a railroad and its property from the hands of local assessors, who could hardly be expected to proceed upon any uniform plan, and each of whom would naturally favor his own particular district."

In San Francisco & S. M. Electric Railway Co. v. Scott, 1903, 142 Cal. 222, 75 P. 575, the court was required to decide whether street railways fell within the category of "all railroads operated in more than one county", the property of which was required to be centrally assessed by the state board of equalization under California Constitution, article XIII, section 10, as that section then read. In discussing the reasons impelling to central assessment rather than local assessment of railroad property, this court said, 142 Cal. at pages 225, 226, 75 P. at page 580: "The general rule with respect to the manner of ascertaining the value is declared in the section here involved to be that all property shall be assessed by the local authorities of the place where it is situated. This general rule would suffice to give a uniform and just assessment of all ordinary property, but in considering the subject of the property of railroads extending from one county into another, and operated as a whole, as was the case with the greater number of the railroads, other than street railroads, then in operation in the state, it is manifest from the debates that the convention perceived that this method would cause much inequality in the valuation of the same kind of property, having substantially the same value, in the different counties, and would produce conflicts between the authorities of different counties concerning the exact location of the movable property, described as rolling stock, on the day its liability to assessment accrued, and probably some double assessments of such property in the respective counties. These were the evils which the convention sought to remedy by the provision under consideration."

A valid reason for assigning the physical property of public utilities to a state board for central assessment thus is recognized to be the need for avoiding the inequality which otherwise would mark the assessment of the same kind of property if the various local assessors were left to treat it the same as other property. Central assessment finds one of its chief merits in the uniformity of value which it assigns to like property wherever found. Central assessment insures that a mile of telephone wire in one county will receive the same assessment treatment as is accorded like property in all other counties. Appellant's view of the law wholly negatives this important reason for central assessment of its property. It is the essence of appellant's case that the state board of equalization must assess a mile of telephone wire, or a telephone building in Los Angeles County, at the same value as that which the local assessor would assess it if given the opportunity. Appellant's contention means that a mile of wire or a building in Los Angeles County will be assessed at a different value than that at which similar property is assessed in any other county where the local assessor's opinion of the value of such property happens to differ from that of the Los Angeles County assessor. Thus, a primary reason for a single, central assessment of utility property is completely ignored, and appellant advocates the very result which central assessment seeks to avoid. It follows that the jurisdiction of the board being statewide, any comparison, in proof of an overassessment, must be upon a similar basis. If the percentage of value applied by the board grossly exceeds the percentage of value for which common property throughout the state is assessed for purposes of general taxation, and if it were proved that the board acted wilfully and in disregard of the law, a cause of action would be made out. That would require proof of the value of the property of appellant. No such proof was offered here.

[13] In concluding, we might observe that the case presents some very unusual features—that is—unusual in the sense that no cases called to our attention by either side, involve the question under consideration. In the first place, it is an attempt to invalidate an assessment upon the ground of constructive fraud, and in violation of the constitutional provision mentioned above, which requires such property to be assessed by the board at its "actual cash value", but no attempt is made to establish the value of the property of appellant. In the second place, the over-valuation is sought to be proven not through the comparison with assessments by the board of the properties of others similarly situated, but by other assessments (if it be conceded that they had the dignity and official character of assessments), made upon the identical properties of appellant by another different and independent assessing agency. The method of attack in this case is far different than that adopted in Birch v. County of Orange, supra. There, plaintiff, in proving excessive valuation, introduced evidence of the assessment of the same assessor in the same county, covering the lands of several other oil companies. Recovery here, therefore, cannot be had upon the theory of an unjust and wilful discrimination upon the part of the board. That could only be proven by a comparison of other assessments made by the board itself, upon property similarly situated. In order to be discrimination, there must be two acts relating to different parties, and they must be performed by the same taxing agency. If any recovery can be had, under the pleadings here, it must rest upon the contention that the board acted in violation of the constitutional provision quoted above, relating to equality of taxation. Both parties agree that the word "taxation", as there employed, includes "assessment". But plaintiff cannot single out an assessment made in one county only as a basis for comparison It must prove that the assessment made by the board, of the property here involved, is based upon a percentage of value which grossly exceeds the percentage of value for which common property throughout the state is assessed for general purposes of taxation, by the counties thereof. This must necessarily follow, for the reason that the board has state-wide jurisdiction. The record shows that while counties vary in the percentage of value which each has applied, the ratio of value throughout the state is 46.66 per cent. Such proof was not offered here.

[14] It is also contended by respondent City that the nonsuit was properly granted, for the reason that plaintiff did not allege or prove that it had presented the claim against the City in compliance with section 376 of its charter which reads as follows: "No suit shall be brought on any claim for money or damages against the City of Los Angeles * * * until a demand for the same has been presented, as herein provided, and rejected in whole or in part."

In the case of Brill et al. v. County of Los Angeles, 16 Cal.2d 726, 108 P.2d 443, this question was decided against the contention here made. That action was brought to recover taxes paid under protest to the county for the city. It was held that section 3819 of the Political Code, providing the procedure for the recovery of taxes paid under protest was controlling, and that said charter provision was not applicable, and that under said section of the Political Code the presentation of a claim is not a prerequisite to the commencement of such an action.

Appellant having failed to produce any substantial evidence to sustain the allegations of its complaint, and having failed to prove that the state board of equalization, in making the assessment, acted arbitrarily and in wilful disregard of the law, it follows that the trial court properly denied its motion for nonsuit in each action.

The judgments are affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

18 Cal.2d 83

PARKER et al. v. RILEY.

S. F. 16519.

Supreme Court of California.

May 29, 1941.

1. States 🔑34

The statute providing for the creation of California Commission on Interstate Cooperation is not unconstitutional so far as it deals with the creation of interim committees in each of the houses of the Legislature. St.1939, p. 1710.

2. Officers 🔑30

The purpose of the constitutional provision that no Senator or member of Assembly shall during the term for which he shall have been elected hold or accept any "office, trust or employment" under the state except an office filled by election by the people was to prevent the acceptance by a legislator of any position under the state, whether an office or merely employment, which creates the opportunity for private aggrandizement, pecuniary in nature or otherwise. Const. art. 4, § 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Office, Trust or Employment".

3. Officers 🔑1

An "office" or "trust" requires the vesting in an individual of a portion of the sovereign powers of the state and the positions of members of the California Commission on Interstate Cooperation do not measure up to so high a standard but involve merely the interchange of information, the assemblying of data and the formulation of proposals to be placed before the Legislature. St.1939, p. 1710.

See Words and Phrases, Permanent Edition, for all other definitions of "Office" and "Trust".

4. Officers 🔑30

Under constitutional provision that no Senator or member of the Assembly shall during the term for which he shall have been elected hold or accept any office, trust or employment under the state except by election by the people, state legislators could be members of the California Commission on Interstate Cooperation without violation of such constitutional provision which clearly implies that the prohibition is directed at the conferring of any other office, trust or employment upon a member of the Legislature. St.1939, p. 1710; Const. art. 4, § 19.

5. Officers 🔑30

Where a statute merely makes available new machinery and new methods by which particular legislators may keep themselves informed upon specific problems, it cannot be said to have imposed upon them any new "office" or "trust" within constitutional provision against holding of any office, trust or employment under the state. Const. art. 4, § 19.

6. Officers 🔑19

The statute providing for creation of California Commission on Interstate Cooperation and providing for membership therein by state legislators is not unconstitutional as providing for any new office, trust or employment for legislative members of commission. St.1939, p. 1710; Const. art. 4, § 19.

7. Constitutional law 🔑50

The primary purpose of constitutional provision providing for "separation of powers" was to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government. Const. art 3, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Separation of Powers".

8. Constitutional law 🔑50

The "separation of powers" doctrine does not require that the court classify incidental governmental duties and limits such activity to the particular branch of the government first selected. Const. art. 3, § 1.

9. Constitutional law 🔑50

Intelligent legislation upon the complicated problems of modern society is impossible in the absence of accurate information on the part of the legislators and any procedure for securing such information is proper so far as concerns the "separation of powers" provision of the Constitution. Const. art. 3, § 1.

10. Constitutional law 🔑60

The constitutional provision providing for "separation of powers" does not prohibit the delegation of incidental and subordinate tasks, and the ascertainment of facts in its essence is not a "legislative function" but is simply ancillary to legislation and may be accomplished in divers ways. Const. art. 3, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Legislative Function".

11. Constitutional law ⚿50

The ascertainment of pertinent facts for legislation is within the power of the lawmaking department of the government. Const. art. 3, § 1.

12. Constitutional law ⚿60

When a legislative body has a right to do an act it must be allowed to select the means within reasonable bounds and it is not precluded from delegating incidental powers which it may exercise itself in aid of its primary functions. Const. art. 3, § 1.

13. Constitutional law ⚿58
States ⚿45

The statute creating the California Commission on Interstate Cooperation and providing for legislative and nonlegislative members is not unconstitutional on ground that it is contrary to constitutional provision for "separation of powers". St.1939, p. 1710; Const. art. 3, § 1.

In Bank.

Original petition by W. B. Parker, etc., and others against Harry B. Riley, etc., to compel the respondent as comptroller of the State of California to draw certain warrants in favor of petitioners who are members of the California Commission on Interstate Cooperation.

Writ directed to issue as prayed.

Charles Josef Carey and Fred B. Wood, both of San Francisco (Arthur McHenry and Martin McDonough, both of Sacramento, of counsel), for petitioners.

Earl Warren, Atty. Gen., Robert W. Harrison, Chief Asst. Atty. Gen., and Chas. W. Johnson, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

This original petition for a writ of mandate was instituted to compel the respondent Harry B. Riley, as controller of the state of California, to draw certain warrants in favor of petitioners who are members of the California Commission on Interstate Cooperation, created by statutes 1939, chapter 376, page 1710. (See, Pol. Code, secs. 332–332.6.) They seek reimbursement for sums expended by them in carrying out the duties of the commission. The petition alleges that certain expenditures were made in conducting the official business of the commission, that the expenditures were properly certified to the respondent, that sufficient funds were appropriated for the use of the commission, but that respondent has refused to draw warrants covering these expenditures. In his answer and return respondent denies that he is under any duty to draw warrants for the expenditures in question, and bases his denial solely upon the contention that the statute creating the commission is unconstitutional and wholly void.

The commission is charged with the duty of furthering the participation of the state as a member of the Council of State Governments, and is required to confer with officials of other states and of the federal government to formulate proposals for cooperation between this state and such other governments. It is instructed to organize and maintain governmental machinery for the purposes set forth, to establish committees and advisory boards, and to employ such persons as are necessary to carry out its duties. The commission is instructed to report its proposals to the legislature and to the governor within fifteen days after the convening of each regular legislative session and at such other times as it considers appropriate. The members of the commission and all committees which it may establish serve without compensation, but may receive reimbursement for necessary expenses.

The statute also creates a senate committee on interstate cooperation and an assembly committee on interstate cooperation, which are to be chosen as are other committees of each branch of the legislature and which are to function during the interim between sessions as well as during the regular sessions. The membership of the commission on interstate cooperation is made up of the five members of the senate committee, the five members of the assembly committee, and five officials of the state who are to be appointed by the governor. The members appointed by the governor hold office as members of the commission at his pleasure, and the members of the legislature hold office so long as they remain members of the committees of each house.

The commission thus created is designed to further the cooperation between the various states and between the states and the federal government. The statute creating the commission is patterned after a statute enacted in New Jersey (Laws of New Jersey 1936, ch. 21, p. 32, N.J.S.A. 52:9B-1 et seq.) and similar statutes have been adopted in a majority of the states of the

United States. The clear purpose of such legislation is to create machinery of government through which the various states can exchange information and formulate proposals for mutual action to be submitted to their individual state governments. It is contended on behalf of the respondent, however, that the particular commission here created is in violation of express provisions of the California Constitution, and that the entire plan must therefore fail.

[1] In so far as the statute deals with the creation of interim committees in each of the houses of the legislature, no successful attack can be made upon it. Indeed, the legislative committees created under this statute appear to satisfy fully the requirements enunciated in the opinions of this court in Special Assembly Interim Committee v. Southard, 13 Cal.2d 497, 90 P.2d 304, and Swing v. Riley, 13 Cal.2d 513, 90 P.2d 313.

[2] The most serious challenge to the constitutionality of this legislation is advanced under section 19 of article IV of the California Constitution. That section since 1916 has provided: "No Senator or member of Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; provided, that this provision shall not apply to any office filled by election by the people." Respondent contends that membership upon the California commission on interstate cooperation constitutes an "office, trust, or employment" under the constitutional provision, and that members of the legislature cannot lawfully be made members of such a commission. Prior to 1916 the comparable provision was far less stringent and only prohibited the acceptance by a legislator of "any civil office of profit" which was created or the emoluments of which had been increased during his term of office as a legislator. Constitutional provisions in many other states have retained the less stringent form prohibiting a "civil appointment" (Illinois Const. Smith-Hurd Stats. art. IV, sec. 15; New York Const., art. III, sec. 7) or a "civil office". Colorado Const., art. V, sec. 8; Montana Const., art. 5, sec. 7; Nevada Const., art. 4, sec. 8. Such constitutional provisions have been interpreted to permit the acceptance by a legislator during his term of office of positions which do not amount to an "office" but are mere "employment". Hudson v. Annear, 101 Colo. 551, 75 P.2d 587; State Tax Comm. v. Harrington, 126 Md. 157, 94 A. 537; State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583; State ex rel. Kendall v. Cole, 38 Nev. 215, 148 P. 551. A similar conclusion was reached in California under the older constitutional provision. Curtin v. State, 61 Cal.App. 377, 390, 214 P. 1030. After the amendment of this provision in 1916, however, it was held that such positions as that of a deputy district attorney or that of auditor of the state board of prison directors constitute the kind of "office, trust, or employment" to which a legislator may not be appointed. Satterwhite v. Garrison, 34 Cal.App. 734, 168 P. 1053; Chenoweth v. Chambers, 33 Cal.App. 104, 164 P. 428. The amended provision has been said to be far more sweeping than its predecessor and to have been designed to prevent the acquiring by members of the legislature of positions on the state pay roll which might prevent their maintaining a desirable independence of mind. Chenoweth v. Chambers, supra, 33 Cal.App. page 106, 164 P. 428. It has been indicated, however, that compensation or emolument may not be a necessary element where the position involved falls within the more important classification of an "office". See Patton v. Board of Health, 127 Cal. 388, 395, 59 P. 702, 78 Am.St.Rep. 66. It is clear, therefore, that the purpose of the constitutional provision here involved is to prevent the acceptance by a legislator of any position under the state, whether an office or merely employment, which creates the opportunity for private aggrandizement, pecuniary in nature or otherwise. See State ex rel. Barney v. Hawkins, 79 Mont. 506, 526, 257 P. 411, 53 A.L.R. 583; Gillespie v. Barrett, 368 Ill. 612, 617, 15 N.E.2d 513.

[3] The sweeping terms of the California constitutional provision thus prevent the appointment of a member of the legislature to any other position of trust or responsibility under the state. It may be noted, however, that the positions created by the statute here attacked lack certain elements usually associated with an "office" or "trust". Thus, it is generally said that an office or trust requires the vesting in an individual of a portion of the sovereign powers of the state. Patton v. Board of Health, supra, 127 Cal. pages 394, 398, 59 P. 702, 78 Am.St.Rep. 66; Curtin v. State, supra, 61 Cal.App. page 390, 214 P. 1030; Leymel v. Johnson, 105 Cal.App. 694, 699, 288 P. 858; Couts v. County of San Diego,

139 Cal.App. 706, 712, 34 P.2d 812; State ex rel. Barney v. Hawkins, supra, 79 Mont. page 520, 257 P. 411, 53 A.L.R. 583; State ex rel. Kendall v. Cole, 1928, 38 Nev. 215, 224, 148 P. 551; 53 A.L.R. 595, 602. The positions here created do not measure up to so high a standard. They involve merely the interchange of information, the assembling of data, and the formulation of proposals to be placed before the legislature. Such tasks do not require the exercise of a part of the sovereign power of the state. It may also be doubted whether the positions here conferred constitute an "employment" by the state since no compensation is provided for the members of the commission. Yet, while distinctions might thus be drawn to show that membership on the commission is not within the scope of the constitutional prohibition, we prefer to place our decision on other more fundamental grounds.

[4-6] Assuming, but not deciding, that the positions created under this statute amount to an "office, trust, or employment" under the state, we do not think the trust thus imposed upon selected members of the legislature is in violation of the constitutional prohibition. The constitutional provision clearly implies that the prohibition is directed at the conferring of any other office, trust, or employment upon a member of the legislature. A member of the legislature is already an officer holding a position of trust under the state government. Where a statute merely makes available new machinery and new methods by which particular legislators may keep themselves informed upon specific problems, it cannot be said to have imposed upon them any new office or trust. The additional duties which rest upon the legislative members of the commission are identical in purpose and kind with those which they already perform. As was said in People v. Tremaine, 252 N.Y. 27, 41, 168 N.E. 817, 821, "The duties of members of the Legislature may be enlarged without making a civil appointment or creating a new office, so long as the duties are such as may be properly attached to the legislative office * * *." We hold, therefore, that the statute here attacked did not contemplate the conferring of any new office, trust, or employment upon the legislative members of this commission. Special Assembly Interim Comm. v. Southard, supra, 13 Cal. 2d page 499, 90 P.2d 304; Mulnix v. Elliott, 62 Colo. 46, 156 P. 216; Terrell v. King, 118 Tex. 237, 248, 14 S.W.2d 786.

It must not be assumed, however, that legislative activities may be expanded indefinitely through the creation of separate agencies responsible primarily to the legislature. This sort of expansion would soon lead to a legislative usurpation of power incompatible with the proper exercise of its lawmaking function. The Constitution forbids any such assumption of duties by the legislative branch of government, and a statute conferring a nonlegislative office or trust upon members of the legislature would be clearly unconstitutional. But under the particular facts set forth, where the responsibilities imposed are merely those of gathering information and making recommendations, we think the duties must be considered incidental to the lawmaking function. The creation of a separate commission in this instance involved merely the use of new machinery in carrying out a trust already reposed in the members of the legislature. Under such circumstances the statute does not fall within the prohibition of the constitutional provision relied upon, and the contentions of respondent in this regard cannot be sustained.

The further contention is made by respondent that the statute creating the California commission on interstate cooperation is unconstitutional upon the ground that it violates section 1, article III of the California Constitution which provides: "The powers of the government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted." The duties imposed upon the commission, as we have stated, are those of investigation and consultation. The statutory plan culminates in the recommendations or proposals made by the commission from time to time. Such activity, in so far as it requires classification, may properly be described as the performance of duties which are incidental and ancillary to the ultimate performance of law-making functions by the legislature itself. It is difficult to see how the general doctrine of political theory designed to apply to the basic and fundamental powers of government can be said to prohibit the exercise of such subsidiary and incidental duties. Respondent insists, however, that all the functions of government, whatever their importance, must be clearly allocated and classified as legislative, executive, or judicial. In the present instance, it is urged that certain of the duties performed by the commission are executive in nature and it is therefore argued that the doctrine of separation of powers prevents the exercise of such functions by members of the legislative branch of the government. If the duties were classified as legislative in nature, it is apparent that the same doctrine would prevent the exercise of such functions by the executive members of the commission. Whichever category is selected, under the theory thus advanced, the same result must be reached, that is, the statute must be held unconstitutional as violating the doctrine of separation of powers.

[7] That doctrine, however, cannot be carried to such lengths. The courts have long recognized that its primary purpose is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government. See People v. Provines, 34 Cal. 520, 539; Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406, 48 S.Ct. 348, 72 L.Ed. 624; State v. Bates, 96 Minn. 110, 117, 118, 104 N.W. 709, 113 Am.St.Rep. 612; State ex rel. Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 220 N.W. 929; Story, Constitution, 5th Ed., p. 393; Green, Separation of Governmental Powers [1920], 29 Yale L.J. 369; [1938] 24 Cornell L.Q. 13, 15-56. The doctrine has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of the government, it can never be used thereafter by another. Thus, although the ascertainment of facts based upon evidence taken in the course of a formal hearing is normally associated with an exercise of the judicial power, it may be entirely proper in the exercise of legislative or executive power (Louisville & N. R. R. Co. v. Garrett, 231 U.S. 298, 307, 34 S.Ct. 48, 58 L.Ed. 229; see Brown, Administrative Commissions and the Judicial Power [1935], 19 Minn.L.Rev. 261, 275), and may be accompanied by the power to compel the attendance of witnesses and the power to punish for contempt. In re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497. Similarly, although it is normally the duty of the legislature to make the determinations of fact upon the basis of which legislation is to become effective, that duty may properly be devolved upon members of the executive branch of the government. Brock v. Superior Court, 9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127; Olive Proration, etc., Committee v. Agricultural Prorate Commission, 17 Cal.2d 204, 109 P.2d 918.

[8-13] The separation of powers doctrine does not require that we classify these incidental governmental duties, and that we thereafter limit such activity to the particular branch of the government first selected. Such subsidiary duties may properly be performed by a variety of governmental agencies. In the instant case, the duty of correlating information and making recommendations is the kind of subsidiary activity which the legislature could perform through its own members, or which it could delegate to others to perform. Intelligent legislation upon the complicated problems of modern society is impossible in the absence of accurate information on the part of the legislators, and any reasonable procedure for securing such information is proper. In re Battelle, supra; Phillips v. Riley, 6 Cal.2d 414, 57 P.2d 1308; Special Assembly Interim Comm. v. Southard, supra. Nor does the Constitution prohibit the delegation of such incidental and subordinate tasks. As the court said in Attorney-General v. Brissenden, 271 Mass. 172, 180, 171 N.E. 82, 86, where such duties were imposed upon the attorney-general, "The ascertainment of facts in its essence is not a legislative function. It is simply ancillary to legislation. It may be accomplished in divers ways. While it may be done by the Legislature itself, it is a responsibility not infrequently placed upon committees and individuals. * * * Frequent illustrations of this practice also are found respecting permanent boards or commissions. * * * The ascertainment of pertinent facts as the basis for legislation is within the power of the law-making department of government. When a legislative body has a right to do an act, it must be allowed to select the means within reasonable bounds. It is not precluded from delegating incidental powers which it may exercise itself in aid of its primary functions. * * * Familiar methods are by appropriating the

results of studies already made by itself or by others, by conducting an inquiry through a committee of its members, or by utilizing an existing commission or board to make and report the results of a research." Courts have approved the creation of legislative agencies such as the commission created by this statute. Attorney-General v. Brissenden, supra; Annenberg v. Roberts, 333 Pa. 203, 211, 2 A.2d 612; People v. Charles Schweinler Press, 214 N.Y. 395, 412, 108 N.E. 639, L.R.A. 1918A, 1124, Ann.Cas.1916D, 1059; Terrell v. King, 118 Tex. 237, 14 S.W.2d 786; Mulnix v. Elliott, supra. The statute creating the California commission on interstate cooperation does not, therefore, violate either of the constitutional provisions relied upon by respondent.

Let the writ issue as prayed.

We concur: SHENK, J.; CURTIS, J.; TRAYNOR, J.; EDMONDS, J.; CARTER, J.

45 Cal.App.2d 141

COUSINS INV. CO. v. HASTINGS CLOTHING CO.

Civ. 11475.

District Court of Appeal, First District, Division 1, California.

June 3, 1941.

Rehearing Denied July 3, 1941.

Hearing Denied July 30, 1941.

1. Contracts 🔑168

Generally, implied covenants are not favored in the law, and courts will declare them to exist only when there is a satisfactory basis in the expressed contract of the parties which makes it necessary to imply certain duties and obligations to effect purposes of the parties to the contract made.

2. Contracts 🔑168

Implied covenants can be justified only on ground of legal necessity arising from terms of contract or substance thereof and circumstances attending its execution, and implications from words must be such as will clearly authorize inference of imputation in law of creation of covenant.

3. Contracts 🔑143

A court is not at liberty to revise agreement while professing to construe it, nor does it have right to make contracts for parties, that is, contract different from that actually entered into by them.

4. Contracts 🔑168

The rules controlling exercise of judicial authority to insert implied covenants may be stated as follows: The implication must arise from language used or it must be indispensable to effectuate intention of parties; it must appear from language used that it was so clearly within contemplation of parties that they deemed it unnecessary to express it; implied covenants can only be justified on grounds of legal necessity; promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; there can be no implied covenant where subject is completely covered by contract.

5. Landlord and tenant 🔑200(1)

Where amendatory lease provided for payment as rental of 5½% of gross income of tenant's business with $4,000 monthly minimum, tenant, which moved business to another location two months and four days prior to expiration of lease, paying minimum for full term, was not liable in addition for percentage rental which landlord would have received if tenant had remained in business on premises until expiration of lease, on theory that there was "implied covenant" requiring tenant so to do. Code Civ.Proc. § 1858.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Covenant".

6. Contracts 🔑152

Where parties have entered into written engagements which industriously express obligations which each is to assume, courts should be reluctant to enlarge them by implication as to important matters; presumption being that, having expressed some, they have expressed all, of conditions by which they intended to be bound.

Appeals from Superior Court, City and County of San Francisco; Everett C. McKeage, Judge.

Action by Cousins Investment Company against Hastings Clothing Company to recover rental on real property. From a judgment for plaintiff, both parties appeal.

Reversed, with directions to enter judgment for defendant.

Oscar Samuels and Tevis Jacobs, both of San Francisco, for plaintiff.

Heller, Ehrman, White & McAuliffe, Samuel S. Stevens, and F. Whitney Tenney, all of San Francisco, for defendant.

KNIGHT, Justice.

This is an action for the recovery of rental claimed to be due for the use of real property. The trial court gave judgment for plaintiff, and each side appealed, the defendant contending that it is not liable in any amount, and plaintiff complaining that the amount of the rental awarded is inadequate. By stipulation the appeals were consolidated and are presented in one record.

The property involved is a four story building located on the northwest corner of Post and Kearney streets in San Francisco, which for twenty-two years preceding April 26, 1939, had been occupied by the defendant Hastings Clothing Company in carrying on a men's clothing and furnishing business. During the last six years of its tenancy, defendant occupied the premises under an amendatory lease, which provided for the payment as rental of 5½ per cent of the gross income of the defendant's business, with a $4,000 monthly minimum. The lease expired on June 30, 1939, and on April 26, 1939, two months and four days prior to the expiration of the lease, defendant moved its business to another location. It paid the minimum rental for the full term of the lease, and thereafter plaintiff brought this action to recover the percentage rental which it claimed it would have received if defendant had remained in business on the premises until the expiration of the lease. Plaintiff concedes that there is no express provision in the original or modified lease requiring defendant to remain in business on the premises until the expiration of the lease, and that the trial court's decision in its favor is based entirely upon the theory—and it so appears from the conclusions of law—that there was an implied covenant requiring defendant so to do, and that this implied covenant was violated. In accordance with such theory judgment was entered against defendant for $8,426 as rent, and $750 attorneys' fees, plus costs. The amount of rental was determined by computing the percentage of the average gross income for the corresponding period of the years 1934-1938, inclusive, allowing two weeks as a reasonable period for the removal by defendant of its merchandise and fixtures; that is, four days in April, all of May, and fourteen days in June of each year the percentage rental was in effect.

[1, 2] It may be stated generally that implied covenants are not favored in the law; and courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties to the contract made. Furthermore, implied covenants can be justified only upon the ground of legal necessity arising from the terms of the contract, or the substance thereof, and the circumstances attending its execution; and the implication from the words must be such as will clearly authorize the inference of an imputation in law of the creation of a covenant. 14 Am.Jur., p. 490-491.

The essential facts of the present case may be stated as follows: Defendant has been engaged in the same line of business in San Francisco for over eighty-five years; and as stated, occupied the building owned by plaintiff for twenty-two years. The rent paid from 1922 to 1924 was at the rate of $1,750 a month, without taxes; from 1924 to 1929, the rent was $2,750 per month without taxes. On December 17, 1925, the parties entered into a lease for ten years, commencing July 1, 1929, and ending June 30, 1939, at a rental of $5,500 a month, plus all taxes levied and assessed against the demised premises, which amounted to approximately $10,000 a year. Defendant continued in possession under said lease and paid the rental provided for therein, but on May 9, 1933, it wrote a letter to plaintiff, stating that it had sustained losses in its business as a result of the depression, and requested that it be relieved from the obligation contained in said lease to pay the fixed rental of $5,500 and taxes, and that it be permitted to pay a fixed monthly rental in an amount less than $5,500, a percentage of the gross receipts of its business, and the taxes. The negotiations which followed resulted in the execution of a supplementary or amendatory agreement dated October 20, 1933, but which was made effective as of July 1, 1933. This agreement provided that the rental reserved in the lease, in lieu of being paid at the rate of $5,500 on the first day of each month, should be payable as follows: "(a) $4000 shall be paid on the first day of July, 1933, for the month of

July and on the first day of each and every month thereafter to the end of the term", and shall be called the minimum rent; (b) a statement shall be submitted to the lessor on the first day of January and the first day of July of each and every year, showing the gross income of the lessee during the preceding six months, and the lessee shall pay 5½ per cent of said gross income, less the $4,000 a month minimum rental paid during said six months period. The agreement further provided that the total payments for the six months period shall not exceed $5,500 a month, except that if during any six months period the total rent paid did not equal $5,500 a month, any deficiency shall be carried forward to the succeeding six months, and any excess over $5,500 a month in a succeeding six months period shall be applied against the accumulated deficiency "until the accumulated deficiency has been entirely paid up so that a total of $5,500 per month rental has been paid for each and every month beginning July 1, 1933", but that the lessee shall not be liable for any deficiency in excess of the minimum rental except out of the 5½ per cent of the gross income. The rents so paid by defendant, up to January 1, 1939, resulted in an accumulated deficiency of $15,401.05, that is, the difference between the amount actually paid and $5,500 a month for that time. From January 1, 1939, and on the first of every month during that next six months period, that is, up to July 1, 1939, the $4,000 minimum rent was paid; but as stated, on April 26, 1939, defendant moved its business to another location, and at the end of the six months period it furnished plaintiff with a statement showing that during the time it occupied the plaintiff's premises after January 1, 1939, 5½ per cent of its gross sales amounted to $28,002.80; and a check was sent for $4,002.80, the balance over the minimum already paid.

Prior to the expiration of the lease no negotiations were had for a renewal thereof. Meanwhile plaintiff leased its property to other parties; and in April, 1938, defendant entered into a lease of premises across the street. The term of defendant's new lease began January 1, 1939, and provided for a fixed rental, but allowed defendant possession free of rental from January 1, 1939, to April 1, 1939, within which to prepare the premises for occupancy. Defendant made extensive improvements in its new location, the contracts therefor calling for completion on April 1, 1939, and April 10, 1939; and on December 26, 1938, defendant began a removal sale, which continued until the actual removal took place, on April 26, 1939. During the removal sale, as it could conveniently be done, fixtures and merchandise were moved to the new location; and on February 23, 1939, defendant received a letter from plaintiff notifying defendant that plaintiff required the surrender of the premises "promptly at the expiration time". The letter continued: "In order that you may be alive to the imperative necessity of surrendering to the undersigned the said premises at said time and the consequences which will follow in the event of your omission to do so, you are advised that the undersigned has entered into a lease of said premises for a term commencing July 1st, 1939, calling for comprehensive work of alteration and remodeling of portions of said building, and that in entering into the engagements of said new lease of said premises the undersigned has relied and relies upon conformance by you to your legal obligation to surrender said premises at the time appointed in your said lease, and that should you fail so to do the monetary damage to the undersigned, which you in turn will be responsible for unto it, will be in a very substantial amount." Upon receipt of this letter, defendant speeded up the work on its new location, and when it was ready for occupancy defendant moved therein, closing operations at the old premises on April 25, 1939, and commencing business in the new on April 27, 1939. On the day preceding the opening in the new location and on April 26, 1939, a letter was received by defendant from plaintiff demanding that defendant continue business operations "upon the demised premises in the manner and for the time required by your lease and the amendatory agreement" in order to assure plaintiff the benefit of the percentage rental for the full semi-annual period expiring June 30, 1939. Manifestly, it was impossible to comply with such demand.

[3] Many other authorities besides the one above cited are to be found showing the limitations placed upon the authority of the courts to insert implied covenants in agreement, and also demonstrating the reluctance with which courts will exercise the authority to that end. In the case of Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W.2d 1039, 1041, 60 A.L.R. 890, it was said: "The

court cannot make contracts for parties, and can declare implied covenants to exist only when there is a satisfactory basis in the express contracts of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties in the contracts made. Before a covenant will be implied in the express terms of a contract, and in some cases in view of the customs and practices of the business to which the contract relates, it must appear therefrom that it was so clearly in the contemplation of the parties as that they deemed it unnecessary to express it, and therefore omitted to do so, or that it is necessary to imply such covenant in order to give effect to and effectuate the purpose of the contract as a whole. The Supreme Court of West Virginia, in the case of Grass v. Big Creek Development Co., 75 W.Va. 719, 84 S.E. 750, L.R.A. 1915E, 1057, states the rule as follows: 'Implied covenants can only be justified upon the ground of legal necessity. Such a necessity may arise out of the terms of the contract or out of the substance thereof. One absolutely necessary to the operation of the contract and the effectuation of its purpose is necessarily implied whether inferable from any particular words or not. It is not enough to say it is necessary to make the contract fair, or that it ought to have contained a stipulation which is not found in it, or that, without such covenant, it would be improvident or unwise or would operate unjustly; for men have the right to make such contracts. Accordingly courts hesitate to read into contracts anything by way of implication, and never do it except upon grounds of obvious necessity.'" See, also, 17 C.J.S., Contracts, § 328, pp. 778-781. Moreover, as set forth in 12 American Jurisprudence, page 749: "A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties—that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed. Courts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties." And section 1858, Code of Civil Procedure, embodies this general rule: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted; * * *" The same doctrine prevails in this state, the rules upon which it is based being fully set forth and applied in Foley v. Euless, 214 Cal. 506, 6 P.2d 956, 958, wherein the court refused to insert an implied covenant in an agreement relating to the delivery of raisins. In so holding the court said: "Courts have been careful not to rewrite contracts for parties by inserting an implied provision, unless, from the language employed, such implied provision is necessary to carry out the intention of the parties. No implied condition can be inserted as against the express terms of the contract or to supply a covenant upon which it was intentionally silent. The rule is thus stated by the Court of Appeals of New York in Genet v. Delaware & Hudson Canal Co., 136 N.Y. 593, 32 N.E. 1078, 1081, 19 L.R.A. 127: 'I know very well that implied promises are to be cautiously and not hastily raised. What they are was very well stated in Scrantom v. Booth, 29 Barb., N.Y. [171], 174, in Allamon v. Albany, 43 Barb. N.Y. [33], 36; and in Booth v. Cleveland Roll. Mills Co., 6 Hun. N.Y. [591], 597. They always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where by the relations of the parties and the subject-matter of the contract a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it. In this court we have thrown some safeguards about the doctrine to secure its prudent application, and have said that a promise can be implied only where we may rightfully assume that it would have been made if attention had been drawn to it (Dermott v. State, 99 N.Y. 101, 1 N.E. 242), and that it is to be raised only to enforce a manifest equity, or to reach a result which the unequivocal acts of the parties indicate that they intended to effect (King v. Leighton, 100 N.Y. 386, 3 N.E. 594).'" The court then, after quoting from Loyalton, etc., Co. v. California, etc., Co., 22 Cal.App. 75, 133 P. 323, went on to hold: "With these rules of law in mind we cannot conclude that there was an implied obligation on the part of respondents to cause the pool members to deliver all of their raisins to appellant. The omission of such a covenant might have been intentional on the part of respondents * * *. The executed contract was clear in its terms * * *. Had appellant desired a covenant requiring a given number of tons of raisins or all of the growers' raisins to be delivered to him, he should have had such a provision inserted in the contract. We cannot rewrite the agreement for him." See, also, Loyalton, etc., Co. v. California etc., Co., supra; Cannon v. Selmser, 85 Cal.App. 783, 260 P. 332.

[4, 5] Summarized, therefore, the rules deducible from the foregoing authorities controlling the exercise of judicial authority to insert implied covenants may be stated as follows: (1) The implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract. Keeping in mind the above rules, we find nothing in the language employed in either the original lease or the modification, nor in any of the circumstances attending the execution thereof, to support the conclusion that there was an implied covenant requiring defendant to remain in business in the demised premises until the expiration of the term. An examination of the amendatory agreement shows that its terms are clear, definite, and unambiguous; that it was skillfully drawn, and executed only after full discussion and mature deliberation. It was the result of negotiations initiated by the letter written by defendant to plaintiff embodying a financial statement showing severe business losses for the years 1930, 1931, 1932, and up to the date of the letter in 1933, and stating in effect that unless a modification were made, on a percentage basis with a fixed minimum, defendant would be unable to continue its business under the lease.

Nor is there anything in the nature of the transaction to justify a finding that the implied covenant was indispensable to effectuate the intention of the parties, nor can it be supported on the grounds of legal necessity. On the contrary, as defendant argues, it would seem that the covenant to pay the minimum rental was inserted in the lease as a substitute for an express covenant requiring the continuous operation of the demised premises; that when the rental reserved in a lease is based upon a percentage of the gross receipts of the business, with a substantial adequate minimum, there is no implied covenant that the lessee will operate its business in the demised premises throughout the term of the lease. In this regard defendant relies on the case of Jenkins v. Rose's 5, 10, and 25¢ Stores, 213 N.C. 606, 197 S.E. 174, 175, which supports its contention. In that case the lease, which was for the year 1933 and was renewed for 1934, 1935 and 1936, provided for a percentage rental of 5 per cent of the gross sales, with a guaranteed minimum of $2,400 a year, payable $200 monthly, "said minimum rental of $2400 to cover the rental of 5% on the first $48,000 of sales", and if upon the expiration of the year the sales exceeded $48,000, the lessees were to pay 5 per cent on any sales in excess of $48,000. The lessee paid amounts over the minimum for the years 1933, 1934 and 1935; but during 1936 it did not operate any store or business in the demised premises. It paid the $2,400 minimum, and contended on appeal that this amount was in full settlement of all rent due the lessor for said year. The lessor contended, as here, that "under the lease the defendant was bound to conduct, with reasonable diligence, a store in the demised premises during the existence of the lease, and its failure to do so was a breach of the contract of lease, whereby 'the plaintiffs were deprived from receiving the rents and profits that would arise and accrue from the reasonable occupancy of the premises by the defendant for the purpose for which it was leased * * *.'" And in reversing the lower court it was said: "An examination of the lease fails to show any stipulation or agreement requiring the defendant to operate a store in the demised premises. The lease shows that the plaintiffs very completely protected their interests in any contingency by requiring a fixed minimum rental of $200.00 per month. Whether the defendant operated a store in the building or whether it operated one successfully was no concern of the plaintiffs unless and until there were sales made on the premises in excess of $48,000.00 during the rental year. If the defendant operated at a loss it must continue to pay the $200.00 per month. The plaintiffs in their brief admit that 'there is no express covenant in the lease that the store will be operated,' but contend that such covenant is 'implied in the very terms of the contract and the nature of the lease.' Such does not seem to be the rule. The rule applicable to the duty of a tenant to occupy or use the premises is thus stated in the annotations of 46 A.L.R. at page 1134: 'Apart from the question of liability for waste, it seems that the tenant is under no obligation, in the absence of specific provision therefor, to occupy or use, or continue to use, the leased premises, even though one of the parties, or both, expected and intended that they would be used for the particular purpose to which they seemed to be adapted or constructed.' Authorities are cited to sustain the rule as here stated. In the absence of any specific provision in the contract of lease that the defendant was to occupy the demised premises and was to operate a store therein during the life of the lease, we are constrained to hold that the $2400.00 paid and received was a full settlement of the rent due for the year 1936 * * *."

Plaintiff concedes that in the Jenkins case it was held that "there was no implied covenant to operate a store, despite the fact that the lease called for a percentage rental with a minimum"; but in a detailed analysis of the case attempts to show that the decision therein is unsound. We do not agree with plaintiff's argument in this regard; nor do we find, as plaintiff states, that with the exception of the Jenkins case the authorities are unanimous in holding that where there is a percentage lease with a minimum rental, there is an implied covenant for the lessee to continue the operation of its business for the term of the lease. The cases so cited by plaintiff in support of this statement are: Genet v. Delaware & Hudson Canal Co., 136 N.Y. 593, 32 N.E. 1078, 19 L.R.A. 127; Goldberg, 168-05 Corporation v. Levy, 170 Misc. 292, 9 N.Y.S.2d 304, and Id., 256 App.Div. 1086, 11 N.Y.S.2d 315; Freeport Sulphur Co. v. American Sulphur Royalty Co., supra; Sinclair Refining Co. v. Davis, 47 Ga.App. 601, 171 S.E. 150, and Sinclair Refining Co. v. Giddens, 54 Ga.App. 69, 187 S.E. 201.

An examination of those cases shows, however, that there were factual and legal elements present therein which differentiate them from the present case. Moreover, the Genet and Freeport Sulphur cases involved mining leases, as to which special considerations are applicable. The former case has already been referred to, supra, in the quotation from Foley v. Euless, supra; and apparently the decision therein was based fundamentally on two points: that the minimum royalty to be paid was not a "substantial" minimum rental, and that the lessee had wilfully and negligently incapacitated itself from continuing the operation of the mine. It cannot be so said of the present case. In the Freeport Sulphur case the issue was whether there was an implied covenant to operate one or five plants, and under the particular facts there shown it was held that while the provisions of the contract carried the necessary implication for the continued operation of one plant, no implied covenant existed for the full and general development of the property which would require the operation of more than one plant; and that this was so because the provision relating to the erection and operation of one plant constituted an express provision for the development of the property, negativing the existence of any implied covenant for development. In the two Goldberg cases (the second is an appeal from the first), the lease provided that if the gross sales should not equal $101,000 a year, the tenant had the right to cancel the lease; and the lessee deliberately mismanaged the business and wilfully diverted it to another store owned by it, so that the gross sales amounted to less than $101,000 a year; and therefore the lessee cancelled the lease. The court held that such conduct was in direct violation of the covenant of good faith which exists in every contract. This again is a vastly different situation from the present case, where the lessee, after being notified that it will be liable for damages in a very substantial amount if it does not surrender the premises on the day the lease expires, moves out four days and two months ahead of that day. And in the two Sinclair cases, by the terms of the lease the lessee was to pay $10 per month and a certain sum on each gallon of gasoline sold, but he failed to operate a gasoline station; and the court held the lessor was entitled to cancel the lease. It is quite obvious, as defendant points out, that the minimum rent there was nominal, rather than in itself a substantial and adequate rental for the demised premises. It may be noted also that here no cancellation of the lease is involved.

[6] Plaintiff also seeks to uphold the judgment on the ground that the facts of the case compel the conclusion that there is an implied covenant to remain in business in the demised premises until the end of the lease. But we find nothing in the arguments advanced in this behalf to warrant such conclusion. In this regard plaintiff points out that as shown by the terms of the amendatory agreement the percentage and minimum rental provided for therein was "in lieu" of the fixed rental called for by the original lease, and that the negotiations which resulted in the amendatory agreement were initiated by a letter written by defendant in which it was stated, among other things, that such a modification of the lease would permit it to "operate with a fair degree of certainty of a moderate return" and put plaintiff in a position to profit by a general upturn in business and an increase in the volume of sales by defendant; also that the amendatory agreement provided that at the end of each six months during the term of the lease defendant should submit a statement showing its gross income during the preceding six months, and in connection with the above plaintiff says: "The test has been frequently stated to be whether or not the court can assume that the covenant would have been made if the attention of the parties had been drawn to it or if the unequivocal acts of the parties indicated that they intended to effect the result which would be accomplished by the inclusion of an express covenant in the agreement." It is apparent, however, that the present case does not meet the requirements of this test. As said in Loyalton, etc., Co. v. California, etc., Co., supra [22 Cal.App. 75, 133 P. 324]: "Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters. The presumption is that, having expressed some, they have expressed all, of the conditions by which they intended to be bound. Arthur v. Baron de Hirsch Fund, 2 Cir., 121 F. 791." Citing numerous other cases. And in the present case it is manifest that if it had been the intention of the parties to require defendant to operate its business in the demised premises for the balance of the term of the lease, such an intention, in a skillfully drawn agreement such as we have here, could and would have been expressed by a plain covenant to that effect. Therefore, the fact that under the circumstances stated there is an absence of such an express covenant clearly demonstrates that it was intentionally omitted; and that being so, under the legal principles above stated, it cannot be judicially inserted by implication.

The conclusion we have reached on the above determinative issue makes it unnecessary to consider or decide the other points raised by the respective appeals.

The judgment is reversed with directions to reenter the same in favor of defendant.

We concur: PETERS, P.J.; WARD, J.

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45 Cal.App.2d 246

VAUGHAN et al. v. ROBERTS et al.

Civ. 6584.

District Court of Appeal, Third District.
California.

June 9, 1941.

1. Appeal and error 🔑907(2)

Where evidence was not before appellate court, it was required to assume the evidence adequately supported all of the facts found by the trial court to be true.

2. Venue 🔑16½

The superior court of county in which defendants resided had jurisdiction of action to cancel note and deed of trust and to quiet title to real property located in another county where the principal cause of action was the cancellation of the note and deed of trust, and the complaint contained separate cause of action for rescission of contract, for personal damages and for declaratory relief, since under the circumstances the action was a "transitory action". Code Civ.Proc. § 392; Const. art. 6, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Transitory Action".

3. Venue 🔑5(2, 3)

Courts in counties in which real estate is situated have exclusive jurisdiction of actions instituted for sole purpose of recovering possession, quieting title or enforcing liens thereon, since such actions are not "transitory actions." Code Civ.Proc. § 392; Const. art. 6, § 5.

4. Appeal and error 🔑185(1)

An objection to the jurisdiction of court may be raised for first time on appeal.

5. Courts 🔑23

Jurisdiction of a court cannot be conferred contrary to statute even by stipulation of the parties. Code Civ.Proc. § 434.

6. Venue 🔑16½

Where a transitory action is joined with a suit involving real property and it appears from the pleadings as a whole that the principal cause stated in the complaint is transitory, the action involving real property being merely incidental thereto, the court of the county where the defendants reside has jurisdiction to try the case. Code Civ. Proc. § 392; Const. art. 6, § 5.

7. Venue 🔑4, 15

An action does not arise from any injury to real property, but is transitory if it seeks to compel surrender for cancellation of a note and real estate mortgage securing it, and generally if the right to land is incident to an action personal, it may be tried in the county in which the defendants or some of them reside. Code Civ.Proc. § 392; Const. art. 6, § 5.

8. Venue 🔑4

The test applied to determine whether a cause is a "transitory action," where two or more causes of action are united in one complaint, is to ascertain from the pleading the character of judgment which may be rendered if the defendant fails to appear or answer the pleading, and if allegations intended to support a judgment in the nature of a personal obligation are merely incidental to the principal cause of action, the entire proceeding is deemed to be a "local action."

> See Words and Phrases, Permanent Edition, for all other definitions of "Local Action".

9. Venue 🔑4

If complaint sufficiently states a separate cause of action based on a personal obligation, even though it is joined with a local action, the entire proceeding is deemed to involve a "transitory action" and may be tried in the county where the defendant resides.

10. Action 🔑43

The joining of several causes of action is authorized by statute under specified circumstances. Code Civ.Proc. § 427.

11. Venue 🔑16½

Where several transitory causes were united with suit, instituted in county in which defendants resided, to cancel note and mortgage and to quiet title to real property located in another county, and one of those causes, which was adequately stated, was the demand for an accounting to determine whether plaintiffs were personally indebted to defendants, such transitory cause of action would be sufficient to confer jurisdiction even though the other causes might be inadequately stated. Code Civ.Proc. § 392; Const. art. 6, § 5.

12. Action 🔑6
Mortgages 🔑76

Where defendants as agents for English finance company agreed to finance proposed marble quarry and advanced money to plaintiffs to pay expense of trip to England to consummate the loan, and note and trust deed executed in blank were left with trustee so that when loan was procured the amounts could be entered in the instruments, but when proposed loan failed defendants arbitrarily entered in the instruments principal sum of $17,500 and recorded the trust deed, complaint based upon the transaction stated a good cause of action to cancel note and trust deed and for declaratory relief in construing the agreement.

13. Account 🔑17(1)

Complaint alleging that defendants advanced to plaintiffs money as costs of trip to England with understanding that it would be defendants' loss if loan was not consummated, that entire sum advanced was consumed as expenses, that plaintiffs failed to procure the loan on account of the default of defendants, and that plaintiffs owed defendants nothing, stated a good cause of action for an accounting to determine whether plaintiffs were indebted to defendants.

14. Torts 🔑11

Complaint alleging that note and trust deed were executed, with amount of consideration left blank, and delivered to trustee with understanding that instruments were to be completed only in event that loan was procured, that loan was never procured on account of defendants' failure to fulfill their agreement, that contrary to their understanding defendants wrongfully and arbitrarily inserted in note and trust deed the sum of $17,500 and recorded the instruments, clouding title to the real property and preventing plaintiffs from procuring loan stated a good cause of action for damages for willfully and wrongfully clouding plaintiffs' title.

15. Damages ⚷108

The measure of damages for willfully and wrongfully clouding title of plaintiffs' real property would be amount of loss sustained which plaintiffs were able to prove on account of the wrongful clouding of their title.

16. Venue ⚷16½

In determining whether court of county in which defendants resided had jurisdiction of action to quiet title to land located in another county, it was immaterial that upon trial the court found against plaintiffs on their cause of action for damages for willfully and wrongfully clouding their title, where court could not determine that such cause was not stated in good faith. Code Civ.Proc. § 392; Const. art. 6, § 5.

17. Cancellation of Instruments ⚷37(4)

Where complaint alleged that defendants advanced $2,850 to plaintiffs as costs of trip to England with understanding that it would be defendants' loss if loan was not consummated, that plaintiffs failed to procure the loan, that note and trust deed with amount of consideration left blank had been delivered with understanding that instruments were to be completed only in event that loan was procured, and that defendants wrongfully completed and recorded the instruments, the complaint stated a cause of action for rescission, although plaintiffs did not offer to restore the $2,850, especially where tender on part of plaintiffs would have been refused. Civ.Code, § 1691.

18. Cancellation of Instruments ⚷24(1)

One who seeks to cancel an instrument is not required to restore, as a "condition precedent" to the maintenance of the action, that which in any event he would be entitled to retain. Civ.Code, § 1691.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

19. Tender ⚷16(1)

A tender is not necessary when the conduct of the defendant is such as to indicate that it would be unavailing.

20. Action ⚷6

Quieting title ⚷47(2), 52

In action for cancellation of note and trust deed, for declaratory relief in construing contract, for damages for wrongfully clouding title of real property and for an accounting to determine whether plaintiffs were indebted to defendants on account of money advanced, the findings were not uncertain or irreconcilable and were sufficiently definite to support judgment cancelling the note and trust deed and quieting title to real property in plaintiffs and determining that plaintiffs were not indebted to defendants.

21. Trial ⚷393(1)

Where court adopted separate findings with respect to designated paragraphs of each particular count of amended complaint declaring that all the allegations therein contained were true and court also referred to designated paragraphs of answer and found that statements therein contained which were in conflict with allegations of the complaint were untrue, the form of adopting general findings was sufficient.

22. Trial ⚷404(1)

Findings should be construed to reconcile them, if reasonably possible, in support of judgment.

23. Trial ⚷397(5)

The trial court need not adopt findings on immaterial issues.

24. Appeal and error ⚷1071(6)

One may not complain of a failure of the trial court to adopt findings which, in view of the determined facts and the judgment, would necessarily be adverse to him.

25. Appeal and error ⚷907(2)

In suit to cancel note and trust deed executed by husband but not wife, finding that the real property covered by the trust deed was community property was conclusive, where evidence was not before the appellate court.

26. Appeal and error ⚷1071(5)

In suit to cancel note and trust deed executed by husband but not wife, where court found that land involved was community property, it was immaterial that court elsewhere stated that the husband acquired the land by placer location, or what source of title was.

27. Husband and wife ⚷267(1)

In suit to cancel note and trust deed covering community property, determination that the instruments which affected title to real property were void because neither was signed nor authorized to be signed by the wife was proper. Civ.Code, § 172a.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Arthur C. Vaughan and others against Minnie Roberts and others to cancel note and deed of trust, to quiet title to real property and to recover damages. From a judgment cancelling trust deed and note, quieting title to the real property in plaintiffs and determining that plaintiffs were not indebted to defendants, defendants appeal.

Affirmed.

Paul M. Joseph, of Los Angeles, for appellants.

W. W. Comstock, of Los Angeles, and Arthur C. Vaughan in pro. per., for respondents.

THOMPSON, Justice.

The defendants Minnie Roberts and L. B. Miller, as trustee, have appealed from a judgment cancelling a trust deed and note secured thereby on the grounds that the instruments were neither properly executed nor delivered. The judgment quiets title to the real property in plaintiffs and determines upon an accounting that plaintiffs are not indebted to the defendants. It was also held that no damages accrued to plaintiffs on account of the transaction. The appeal is presented on the judgment roll only. The evidence is not before this court.

The suit grew out of a written contract with the defendants, as agents for United Kingdom Mercantile & Finance Corporation, Limited, of London, to finance a proposed marble quarry enterprise in connection with real property in San Bernardino county, belonging to plaintiffs. The suit was brought in Los Angeles, where the defendants reside. The corporation agreed to loan the quarry company $750,000 by the sale of 7,500 debenture bonds bearing 4½ per cent interest, of the par value of $100 each, to mature in sixty years. The corporation was to receive 5 per cent on the par value of the bonds as promotion fees, and the additional sum of $3,750 as an advance premium for the loan. The defendants separately agreed to advance plaintiffs the sum of $3,000 to pay the expenses of Arthur C. Vaughan on a trip to England to consummate the loan. They actually paid plaintiffs $2,850 for that purpose, agreeing that if the negotiation for the loan failed the expenses would be defrayed by the defendants. Arthur C. Vaughan went to England and expended the entire sum of $2,850 in expenses therefor. He failed to obtain the loan from the corporation. It is alleged he discovered that the corporation officers were "racketeers and fakers" and that they "had been convicted of a conspiracy to swindle and defraud" investors.

The plaintiffs own the real estate in San Bernardino county, which is involved in this action, as community property. Before leaving for England, Mr. Vaughan signed a promissory note, dated March 8, 1938, payable to Minnie Roberts in four months therefrom, at 7 per cent interest per annum, and also executed a trust deed on the real property in question, as security therefor. Mrs. Vaughan neither signed the note and trust deed nor authorized her signature to be attached to those instruments. Her name does not appear on either of the documents. The amount for which the note was to be executed was left blank in both the note and the deed of trust. The note and deed were left with L. B. Miller, who was named as trustee thereof, with the agreement that they were not to be delivered or recorded, but on the contrary, that when the loan was procured in England the aggregate sum of the ascertained advanced premium plus the money advanced to Mr. Vaughan as expenses was to be entered in the note and deed of trust, and that the instruments should then be held in escrow by Mr. Miller. Mr. Vaughan did obtain an offer from another English financing company called the General Accident Fire and Life Assurance Corporation of Perth and London, for a similar loan, based on an advanced premium therefor of the sum of $6,100. He promptly notified the defendants by cablegram that their proposed loan had failed but that he had procured another loan on his own initiative. The defendants then arbitrarily entered in the note and deed of trust, contrary to their agreement, the principal sum of $17,500, without the authorization or knowledge of the plaintiffs, and thereupon recorded the deed. The recording of the deed purported to create a lien on the real property, and prevent plaintiffs from consummating their loan from the last-mentioned assurance corporation.

Upon the return of Mr. Vaughan from England he promptly demanded of the defendants a cancellation of the note and trust deed and a reconveyance of the property, which were refused. Notice of rescission of the contract was also given. This suit was then commenced.

Defendants moved to dismiss the action under article VI, section 5, of the California Constitution, and section 392 of the Code of Civil Procedure, on the ground that the Los Angeles court was without jurisdiction to try the cause involving the quieting of title to real property in San Bernardino county. The motion was denied.

The amended complaint is couched in five counts. In effect, the first cause of action is a suit to cancel the note and deed of trust and incidentally to quiet title to the real property affected thereby on the grounds that the consideration therefor failed and that the instruments are void because they were neither properly executed nor delivered. That cause also appears to seek rescission of the contract for financing the marble quarry enterprise, an accounting and determination that plaintiffs owe defendants nothing, and for declaratory relief with regard to the rights of the respective parties under the contract, note and trust deed. The second count seeks damages on account of the breach of contract in the sum of $200 a day, aggregating $19,200, and also asks for judgment to the effect that plaintiffs owe defendants nothing on account of the $2,850 advanced to them as expenses of the trip to England. The third count seeks further damages in the sum of $11,600 because of the wrongful insertion of the sum of $17,500 in the note and trust deed and for clouding the title to the real property by recording the deed. The fourth count seeks cancellation of the note on the ground that the amount of $17,500, wrongfully inserted therein by the defendants, constitutes usurious interest which renders it void. The fifth cause seeks to cancel the note and deed of trust under section 172a of the Civil Code on the ground that Mrs. Vaughan did not sign or authorize her signature to be attached to either the note or trust deed on the community real property. The prayer of the amended complaint is in accordance with the foregoing statement of issues. It also asks for further relief.

The trial court adopted findings favorable to the plaintiffs on all of the material issues. As conclusions of law the court found that plaintiffs were entitled to declaratory relief under section 1060 of the Code of Civil Procedure; that the real estate is the community property of plaintiffs and neither the note nor trust deed was signed or authorized to be signed by Mrs. Vaughan; that neither the note nor trust deeed was completed or delivered by plaintiffs; that both the note and trust deed are void; that the note provided for usurious interest; that none of the defendants has any right, title or interest in the real property and should be enjoined from claiming any such interest, and that plaintiffs are not indebted to the defendants or any of them in any sum whatever. Judgment was rendered accordingly. From that judgment this appeal was perfected.

The appellants contend that the Los Angeles court was without jurisdiction to try or determine the cause of action as provided by article VI, section 5, of the California Constitution because the amended complaint seeks to quiet title to real property in San Bernardino county; that the complaint fails to state a cause of action; that the findings are irreconcilably conflicting and indefinite; that the real estate is the separate property of Arthur C. Vaughan and that the failure of his wife to join in the execution of the note and deed of trust furnishes no right to set them aside on that account.

[1] Since the evidence is not before this court we must assume it adequately supports all of the facts found by the court to be true.

[2] The motion to dismiss the action for lack of jurisdition was properly denied. Considering the pleadings as a whole, it appears that the principal cause of action is a suit to cancel the note and deed of trust as void for the reason that there was a failure of consideration and because they were never properly executed or delivered. The decree quieting title to the real property was merely incidental to the chief issue of the validity of the instruments. The real question at issue in this case is, Do the plaintiffs owe the purported debt represented by the promissory note? If they do not, then the trust deed could not create a lien on the real property to secure its payment and a decree quieting title would be needless. The question regarding the debt represented by the note involves a purely

personal obligation. Moreover, the complaint contains a separate cause for rescission of the contract, another count for personal damages for breach of the contract, and for clouding the title to real property and a cause for declaratory relief. Under such circumstances the action must be deemed to be transitory and properly maintainable in the county where the defendants reside.

Article VI, section 5, of the Constitution, limiting the jurisdiction of courts under specified circumstances to the counties in which the real estate involved is situated, reads in part: "All actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated."

Pursuant to the foregoing constitutional provision, section 392 of the Code of Civil Procedure similarly confers jurisdiction upon courts in the county in which the real property, which is the subject of the action, is situated, in partition suits, foreclosure of mortgages and other liens on real property, and in suits to recover possession of the property or an interest therein, to determine, in any form, the rights or interests in such property and for injuries thereto.

[3-5] It has been held that courts in counties in which the real property is situated, have exclusive jurisdiction of actions instituted for the sole purpose of recovering possession, quieting title or enforcing liens thereon, and that such suits which have been commenced in the wrong county may not be transferred to another county, but must be dismissed. Such actions are not transitory. Urton v. Woolsey, 87 Cal. 38, 25 P. 154; State v. Royal Consolidated Mining Co., 187 Cal. 343, 202 P. 133; Fritts v. Camp, 94 Cal. 393, 29 P. 867; Rogers v. Cady, 104 Cal. 288, 38 P. 81, 43 Am.St.Rep. 100; 27 R.C.L. 792, sec. 14; 27 Cal.Law Rev. 469. An objection to the jurisdiction of the court may be raised for the first time on appeal. The jurisdiction of a court cannot be conferred contrary to the statute even by stipulation of the parties. Sec. 434, Code Civ.Proc.; Emery v. Pacific Employers Ins. Co., 8 Cal.2d 663, 67 P.2d 1046. In the present case the appellants moved the trial court to dismiss the action on the ground of lack of jurisdiction.

[6, 7] In construing article VI, section 5, of the Constitution and section 392 of the Code of Civil Procedure, the reviewing courts of California have frequently determined that an action is transitory and that the court of the county where the defendants, or some of them reside, has jurisdiction to try the cause when the suit for possession of real property, or to quiet title thereto, or to enforce liens thereon, is joined in good faith with another cause involving personal obligations. Turlock Theatre Co. v. Laws, 12 Cal.2d 573, 86 P.2d 345, 120 A.L.R. 786; Howe v. Tucker, 219 Cal. 193, 25 P.2d 832; Bardwell v. Turner, 219 Cal. 228, 25 P.2d 978; Brown v. Happy Valley Fruit Growers, Inc., 206 Cal. 515, 523, 274 P. 977; Sheeley v. Jones, 192 Cal. 256, 219 P. 744; Stesel v. Santa Ana R. Water Co., 35 Cal.App.2d 117, 94 P.2d 1052; 27 Cal.Law Rev. 468; 120 A.L.R. 790, note. When a transitory action is joined with a suit involving real property, and it appears, from a consideration of the pleadings as a whole, that the principal cause stated in the complaint is transitory, the action involving real property being merely incidental thereto, the court of the county where the defendants reside has jurisdiction to try the case. Blackman v. Sherman, 41 Cal.App.2d 20, 105 P.2d 1000; 22 Cal.Jur. 140, sec. 24; 27 R.C.L. 794, sec. 14. In the text last cited it is said: "An action * * * does not arise from any injury to real property, but is transitory, * * * [if it seeks] to compel surrender for cancellation of a note and real estate mortgage securing it. In fact, it may be said generally that if the right to land is an incident in an action personal, it may be tried" in the county in which the defendants or some of them reside.

The following California cases in which interests in real property were involved, coupled with other separate causes of action, support the preceding statement of the prevailing rule with respect to the proper place of trial under such circumstances: The case of Smith v. Smith, 88 Cal. 572, 26 P. 356, was a suit to rescind a deed of conveyance absolute on its face, which was joined with an action for an accounting. White v. Adler, 5 Cal.Unrep. 215, 42 P. 1070, was a suit to recover the balance of the purchase price of land, coupled with an action for reconveyance of the land. Warner v. Warner, 100 Cal. 11, 34 P. 523, was a suit to set aside a fraudulent conveyance of land, united with an action for divorce and a demand for a division of community property. Turlock Theatre Co. v. Laws, supra, was a suit for accounting for unpaid rent joined with an action for possession and a prayer for quieting title to land. Taaffe v. Bloch, 127 Cal.App. 678, 16 P.2d 303, was a suit to foreclose a mechanic's lien, joined with an action for the reasonable value of work and materials furnished. In that case the second cause of action was dismissed, and the court therefore reversed the judgment. In the case of Howe v. Tucker, supra, suit was brought to cancel a note secured by a trust deed, on the ground of fraud and undue influence, joined with an action to terminate a trust. The suit was brought in Del Norte county, where the land was situated. The defendant, who resided in Los Angeles, moved for a change of venue to the county in which he lived, which was refused. On the authority of Jacobs v. C. H. Smith Lumber Co., 206 Cal. 128, 273 P. 571, the Supreme Court held that the Howe case was transitory, and reversed the judgment. In the present case the situation is reversed, but the principle is the same.

The case of Urton v. Woolsey, supra, upon which the appellants rely, was a suit to foreclose a vendor's lien on real property. No other cause of action was joined with that sole issue. The case of Fritts v. Camp, 94 Cal. 393, 29 P. 867, was essentially a suit to quiet title to real property. It sought, to enjoin defendants from dumping débris upon the land of plaintiff under an alleged adverse claim to an easement, which right was dependent on the title to the land. The suit of Rogers v. Cady, 104 Cal. 288, 38 P. 81, 43 Am.St.Rep. 100, was a suit to foreclose a mortgage. No other cause was united in that suit. The complaint erroneously alleged that the land was situated in a county other than the one in which it was actually located. The court merely held that the county in which the land was actually located was the proper place of trial. In Booker v. Aitken, 140 Cal. 471, 74 P. 11, a suit was brought to enforce a trust in real property. The only relief sought was to cancel a deed from a deceased person to the defendant on the ground that it was obtained by fraud and undue influence. The question of services claimed to have been performed by the defendant was held to be merely incidental to the issue of the validity of the deed. In the case of Eckstrand v. Wilshusen, 217 Cal. 380, 18 P.2d 931, 933, the only relief sought by the complaint was to cancel a deed to real property on the ground of fraud. The motion for a change of venue was based solely on the prayer for general relief. The court said in that regard: "The principal basis for making the point is the prayer for general relief. But under the allegations of the complaint, and in view of the particular relief sought, we cannot give the prayer for general relief the significance sought to be accorded to it by the defendant." The case of State v. Royal Consolidated Mining Co., supra, was a suit to recover possession of real property, under a deed to the state, after the property had been sold to the state for delinquent taxes. It also asked for judgment for rental collected by the former owner. The Supreme Court held that the amount of rental due was merely incidental to the right of possession. These cases are readily distinguishable from the previously cited ones in which it is held that when an action involving an interest in real property is joined in good faith with another cause which is transitory in its nature, the suit may be tried in the county where the defendant resides.

[8-10] The test applied to determine whether a cause is transitory, where two or more are united in one complaint, is to ascertain from the pleading the character of judgment which may be rendered if the defendant fails to appear or answer the pleading. Eckstrand v. Wilshusen, supra. If the allegations intended to support a judgment in the nature of a personal obligation are merely incidental to the principal cause of action the entire proceeding is deemed to be local. But if the complaint sufficiently states a separate cause based on a personal obligation, even though it be joined with a local action, the entire proceeding is deemed to be transitory and may be tried in the county where the defendant resides. Numerous counts united in one complaint often give the impression of a weakness of the cause of action or uncertainty on the part of the pleader, but the Code authorizes the joining of several causes of action under specified circumstances. Sec. 427, Code Civ.Proc. It is our duty to determine whether a separate transitory cause has been sufficiently stated to confer jurisdiction on the Los Angeles court where this cause was filed.

[11] In the present case it appears that several transitory causes were united with the suit to cancel the note and mortgage and to quiet title to the real property. One of those causes, which is adequately alleged, is the demand for an accounting to determine

whether plaintiffs are personally indebted to the defendants because of the $2,850 advanced to them for expenses on the journey to England. Upon that issue the court specifically found that plaintiffs are not indebted to the defendants on that account or otherwise. That one transitory cause of action would be sufficient to confer jurisdiction on the Los Angeles court, even though other causes may be deemed to be inadequately stated.

[12] We are of the opinion the complaint states good causes of action: (1) To cancel the note and trust deed, (2) For declaratory relief in construing the contract for financing the quarry enterprise, (3) For damages for wrongfully clouding the title of the real property by arbitrarily inserting in the note and trust deed a sum of money not authorized by plaintiffs, and, (4) For an accounting to determine whether plaintiffs are indebted to the defendant on account of the money advanced as expenses to England, or otherwise. It would be an idle and arduous task to analyze the very lengthy and complicated complaint to demonstrate the sufficiency of the allegations of the several separate causes of action, but we are satisfied it contains statements adequate to support the foregoing causes.

[13] Regarding the issue as to whether plaintiffs are indebted to defendants in the sum of $2,850, furnished as expenses to England, it is alleged the defendants agreed to and did advance to plaintiffs that sum of money as costs of the trip with the understanding that "it would be their loss, and not the loss of said plaintiffs" if the loan was not consummated; that the entire sum was consumed as expenses; that the plaintiffs failed to procure the loan on account of the default of defendants, and that plaintiffs therefore owe defendants nothing on that account.

[14-16] With respect to the separate cause of action for damages for wrongfully inserting in the note and trust deed the alleged consideration therefor, and recording the same, contrary to the express agreement of the parties, it is alleged the note and trust deed were signed by Arthur C. Vaughan and handed to Mr. Miller with the amount of consideration left blank; that the aggregate sum of the advance premium, together with the expense money received by plaintiff, was to be inserted in the instruments only in the event that the loan was procured, and not otherwise; that the loan was never procured on account of the failure of defendants to fulfill their agreement; that under no circumstances was the deed to be recorded, but that, contrary to their agreement, the defendants, nevertheless, wrongfully and arbitrarily inserted in the note and trust deed the sum of $17,500 and promptly recorded the instrument, clouding the title to the real property and thus preventing plaintiffs from procuring the loan which they had independently negotiated from another party, to the damage of plaintiffs in the sum of $17,500. That count seems to state a good cause of action for damages for wilfully and wrongfully clouding the title of plaintiffs' real property. It is immaterial that they alleged damages on that account in the exact sum which was inserted in the note and trust deed. The measure of damages on that account would be the amount of loss sustained which plaintiffs were able to prove on account of the wrongful clouding of the title of their real property. It is unimportant, so far as jurisdiction is concerned, that upon the trial, the court found the plaintiffs were not damaged in the manner alleged. We may not say that cause was not stated in good faith.

[17-19] There is no merit in appellants' contention that the complaint fails to state a cause of action for rescission of the note because plaintiffs did not offer to restore the $2,850 received as expenses to England, which was a part of the consideration for the note. The complaint does allege that the expense money was to be contributed by defendants in the event the loan was not procured from the United Kingdom Mercantile & Finance Corporation. It was also alleged the application for the loan failed through the fault of defendants, and that the expense money therefore became no valid part of the consideration for the note. The court so found. There was therefore nothing for plaintiffs to restore. The authorities are uniform to the effect that one who seeks to cancel an instrument is not required, under section 1691 of the Civil Code, to restore, as a condition precedent to the maintenance of the action, that which in any event he would be entitled to retain. Matteson v. Wagoner, 147 Cal. 739, 744, 82 P. 436; 4 Cal.Jur. 768, sec. 9. Moreover, a tender is not necessary when the conduct of the defendant is such as to indicate that it would be unavailing. Hoppin v. Munsey, 185 Cal. 678, 685, 198 P. 398; 4 Cal.Jur. 769, sec. 9. It is quite evident in the pres-

ent case that a tender on the part of plaintiffs would have been refused.

In view of our foregoing conclusions it is not necessary to pass upon the sufficiency of the allegations of other counts in the complaint.

[20-24] The findings are not uncertain or irreconcilable. We are of the opinion they are sufficiently definite to support the judgment. Many specific findings of particular facts were adopted. Usually the court adopted separate findings with respect to designated paragraphs of each particular count of the amended complaint declaring that all of the allegations therein contained "are true". In a similar manner the court also referred to designated paragraphs of the answer, finding that the statements therein contained which are in conflict with the allegations of the complaint "are untrue". This form of adopting general findings has been held to be sufficient. Ferguson v. Koch, 204 Cal. 342, 348, 268 P. 342, 58 A.L.R. 1176; Platnauer v. Forni, 131 Cal. App. 393, 398, 21 P.2d 638; 64 C.J. 1253, sec. 1100. It is a well-settled rule that findings should be construed to reconcile them, if reasonably possible, in support of the judgment. We find no difficulty in reconciling the findings in the present case. It is not necessary to adopt findings on immaterial issues. One may not complain of a failure to adopt findings which, in view of the determined facts and the judgment, would necessarily be adverse to him. 24 Cal.Jur. 942, secs. 187, 188.

[25] The court specifically found that the real estate which is involved in this suit is the community property of the plaintiffs, who are husband and wife. That finding is conclusive of that fact, since the evidence is not before this court. We must assume that finding is abundantly supported by the evidence.

[26] Since the court found as a conclusion of law that the land in question "was at all times material herein, and is now, the community property of Arthur C. Vaughan and Libbie L. Vaughan", it is immaterial that it is elsewhere said that Mr. Vaughan acquired it "by placer location", or what the source of their title was. There is nothing to support appellants' contention that it was the separate property of Mr. Vaughan.

[27] The court also found that the note and trust deed were neither signed nor authorized to be signed by Mrs. Vaughan, and that the instruments which affect the title to real property were therefore void. We are of the opinion that is a correct conclusion of law under the circumstances of this case. Section 172a of the Civil Code provides in part: "The wife, either personally or by duly authorized agent, must join with him [the husband] in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered."

It has been held that a conveyance of community real property by the husband, without the authorization of his wife, contrary to the provisions of section 172a of the Civil Code, is at least voidable in a suit by the wife during the marriage. Britton v. Hammell, 4 Cal.2d 690, 52 P.2d 221; Witkin's Summary of Cal.Law, p. 692.

For the foregoing reasons the judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

45 Cal.App.2d 212

SMITH v. SMITH.

Civ. 12821.

District Court of Appeal, Second District, Division 2, California.

June 4, 1941.

1. Appeal and error 🔑123

An appeal does not lie from a minute entry or other memorandum, clear intent of which is that trial court has merely authorized issuance of a written order or judgment.

2. Appeal and error 🔑123

Where it appeared that first entry by trial judge in minutes of Superior Court was mere notation that in opinion of trial judge writ of execution upon alimony judgment should be issued and that, upon presentation of a proper written order for issuance of it, he would sign it, and that a later entry was merely an indication that trial judge had not come to different conclusion from opinion indicated in previous entry, neither minute entry constituted a "final order" from which an appeal would lie.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Pearl B. Smith against Dalton L. Smith. From a purported order denying a motion to quash a purported order under Code Civil Procedure, § 685, authorizing the issuance of a writ of execution, the defendant appeals.

Appeal dismissed.

See, also, 108 P.2d 47.

Earl S. Patterson, of Los Angeles, for appellant.

Joseph Schecter, of Los Angeles, for respondent.

McCOMB, Justice.

From a purported order denying a motion to quash a purported order authorizing the issuance of a writ of execution upon an alimony judgment after more than five years from the rendition thereof, defendant appeals.

The record discloses the following minute entries, sometimes denominated minute orders, of the trial court:

"July 18, 1940 Department 35
Present: Hon. Thomas C. Gould, Presiding Judge.

Pearl B. Smith,
Plaintiff,
vs.
Dalton L. Smith,
Defendant.
No. D 41130

"Motion of plaintiff for issuance of execution comes on for hearing, Joseph Schecter appearing as attorney for plaintiff and C. Fetterly appearing as amicus curiae; said motion is granted."

"August 2, 1940 Department 35
Present: Hon. Thomas C. Gould, Presiding Judge.

Pearl B. Smith,
Plaintiff,
vs.
Dalton L. Smith,
Defendant.
No. D 41130

"Motion of defendant to quash and recall execution comes on for hearing, Joseph Schecter appearing as attorney for plaintiff and E. S. Patterson for defendant; said motion is denied."

Also the notice of appeal, which reads thus:

"To the Plaintiff, Pearl B. Smith, and to Joseph Schecter, her Attorney:

"You and Each of You will please take notice that the defendant herein, Dalton L. Smith, does hereby appeal to the District Court of Appeal of the State of California, Second Appellate District, from the Order and Judgment of the Court herein made and given on the 2nd day of August, 1940, wherein and whereby said Court denied the Motion of Defendant to quash and recall execution theretofore ordered issued in favor of the plaintiff and against the defendant in this action.

"Dated this 9th day of August, 1940.
"Dalton L. Smith, Defendant,
"By Earl S. Patterson
"His Attorney."

This is the sole question necessary for us to determine:

Was the clerk's minute entry of August 2, 1940, an appealable order?

[1] This question must be answered in the negative. The law is established in California that an appeal does not lie from a minute entry or other memorandum, the clear intent of which is that the court has merely authorized the issuance of a written order or judgment (In re Estate of Yale, 208 Cal. 102, 104, 280 P. 358; Kindig v. Palos Verdes Homes Ass'n, 33 Cal.App. 2d 349, 354, 91 P.2d 645; see, also, 4 Cor. Jur. sec. (1937), Appeal and Error, p. 330, § 153).

[2] Applying the foregoing rule to the facts of the instant case, it is evident that the entry of July 18, 1940, in the records of the superior court was a mere notation that in the opinion of the trial judge the writ of execution should be issued and that upon presentation of a proper, written order for the issuance of the same he would sign it. Likewise, the entry in the minutes of the trial court on August 2, 1940, was merely an indication that the trial judge had not come to a different conclusion from that indicated in the previous minute entry. Neither minute entry constituted a final order. After either minute entry had been made, the trial judge could have declined to sign an order carrying into effect the substance of the minute entry, on the ground that he had changed his mind and

would in fact sign an order making opposite disposition of the motion before him. The minute entries were merely preliminary entries authorizing subsequent written orders.

As the record now stands, the purported appeal is from a nonappealable minute entry and is therefore dismissed, and the writ of supersedeas heretofore issued by this court is vacated and set aside.

MOORE, P. J., concurred.

WOOD, J., having signed the original final decree in the above-entitled case while Presiding Judge of the Superior Court, does not participate in the foregoing decision.

45 Cal.App.2d 179

CATHCART v. GREGORY et al.

Civ. 2493.

District Court of Appeal, Fourth District, California.

June 3, 1941.

Hearing Denied July 30, 1941.

1. Appeal and error 🔑920(1)

A trial judge denying plaintiff's motion to be relieved from stipulation of her attorneys, thereby resolved in favor of defendants all conflicts in the evidence contained in affidavits filed in support of and in opposition to the motion, and on appeal from judgment based on stipulation, District Court of Appeal summarized only that portion of the affidavits supporting order denying motion, and disregarded conflicts in affidavits.

2. Stipulations 🔑13

A plaintiff against whom judgment on stipulation was entered could not complain that she did not know of provision in stipulation relating to payment of $500 by plaintiff as a part of expenses of the litigation and that she did not authorize her attorneys to consent to such provision, or that judgment was a money judgment against plaintiff, where plaintiff was in court when stipulation was entered into, and plaintiff did not object to terms thereof for several months, and her attorneys informed her of terms during the negotiations, and judgment required payment of $500 only in the event that plaintiff should redeem certain land from a trust.

3. Stipulations 🔑13

A plaintiff against whom judgment on stipulation was entered could not complain that judgment departed from provision in stipulation relating to water rights to be conveyed to plaintiff, where stipulation provided that defendant would convey to plaintiff an unconditional release as to her right to water from certain springs, and would grant to plaintiff an easement for pipe line from spring to plaintiff's house, and judgment was more favorable, in that defendant was ordered to convey to plaintiff the land on which springs were located, and such easement.

4. Waters and water courses 🔑156(2)

A conveyance to plaintiff by quitclaim deed of land on which certain springs are located, and an easement for pipe lines from springs to plaintiff's dwelling house, would convey to plaintiff the ownership of all water produced and to be produced from the springs.

5. Stipulations 🔑19

A stipulation between parties made in open court constitutes not only an agreement between the parties but between the parties and the court, and the court is bound to enforce the agreement for the benefit of the party interested and for the protection of the court's own dignity. Code Civ.Proc. § 283.

6. Stipulations 🔑9

The statute providing that attorney can bind client in any of steps of action or proceeding by agreement filed with clerk, or entered upon minutes of court, and not otherwise, does not militate against binding effect of stipulation entered into and executed by parties in open court and duly reported in the proceedings of the trial. Code Civ.Proc. § 283.

7. Attorney and client 🔑86

The purpose of statute providing that attorney can bind client in any of steps of action or proceeding by agreement filed with clerk, or entered upon minutes of court, and not otherwise, is to require such a record of agreement as to preclude any question concerning character or effect thereof, and is not to enlarge or abridge authority of attorney, but only to prescribe manner of exercise of such authority. Code Civ.Proc. § 283.

8. Attorney and client 🔑86

The statute providing that attorney can bind client in any of steps of action or proceeding by agreement filed with clerk, or entered upon minutes of court, and not otherwise, does not mean that in no instance shall an agreement which attorney may make in behalf of client be binding unless entered in minutes of court or filed with clerk, and statute has reference to executory agreements, and not to those which have been wholly or in part executed. Code Civ. Proc. § 283.

9. Stipulations 🔑13

The denial of plaintiff's motion to be relieved from stipulation, and entry of judgment on stipulation, was not abuse of discretion, notwithstanding that stipulation was not entered on minutes of court and that no agreement was filed with clerk of court, where there was no question of exact terms, character and effect of stipulation, and it was acted on by trial court and plaintiff and defendants, and to such extent became an "executed contract" and not an "executory contract." Code Civ.Proc. § 283.

See Words and Phrases, Permanent Edition, for all other definitions of "Executed Contract" and "Executory Contract".

◆

Appeal from Superior Court, San Bernardino County; J. T. B. Warne, Judge.

Action by Bessie L. Cathcart against A. Gregory and others to have plaintiff's rights under certain contracts declared, and to have a certain indebtedness declared paid, and to have certain conveyances cancelled for alleged fraud, and to recover damages for timber allegedly taken from plaintiff's land. From the judgment, the plaintiff appeals.

Affirmed.

Guthrie & Curtis, of San Bernardino, for appellant.

King & King, of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal from a judgment entered on a stipulation of counsel for the respective parties made in open court in the presence of their clients and taken down by the court reporter, but not reduced to writing and filed with the clerk nor entered at length on the minutes of the court.

Plaintiff was a widow who lived at Houston Flats, in the mountains about twenty miles northerly from San Bernardino, on a tract of land containing about 280 acres, in which she owned a three-fourths undivided interest, and the Redlands Security Company a one-fourth undivided interest. A. Gregory was the president and principal stockholder of the corporation. He also owned a similar sized tract of land in the same vicinity.

Plaintiff became indebted to A. Gregory and the Redlands Security Company in the sum of $18,000. About April 20, 1931, she executed a deed of trust to secure the loan on her interest in the 280 acres of land with the Redlands Security Company as beneficiary.

In 1935, the Crest Forest County Water District was organized with A. Gregory and members of his family and his business associates acting as leaders in the movement. Plaintiff and the Redlands Security Company conveyed land to the trustees who subsequently conveyed it, with reservations, to the district on which a dam was to be built which would create a lake behind it. They also conveyed a strip of land 175 feet wide surrounding the lake. For a time plaintiff and A. Gregory were members of the board of the district. The dam was built largely by use of federal funds and the lake was formed.

A controversy arose between plaintiff, the district, Redlands Security Company, A. Gregory and others over the use of the lake, the boat landings on it, the shore rights and other questions.

Plaintiff brought this action on May 13, 1938. She sought, among other things, to have her rights under her contracts declared; to have the indebtedness to the Redlands Security Company declared paid because of benefits accruing to it from her conveyances; to have other conveyances canceled because of the alleged fraud of A. Gregory and others, and to recover damages for timber alleged to have been taken from her land.

The trial opened on the morning of July 7, 1938. Plaintiff was in court and was represented by three able and reputable attorneys. Evidence was taken until about noon on the following day. When the court reconvened in the afternoon it was suggested that a compromise of the action might be effected if the trial could be delayed. It was delayed and counsel went into immediate conference in a room adjoining the courtroom. Plaintiff did not attend the conference (except perhaps for a brief time) but sat in the courtroom during the time it lasted. It is admitted that one or more of plaintiff's counsel frequently consulted her during the conference on questions settled there. The conference was continued on the morning of July 9 under similar circumstances. Just before noon the attorneys returned into court and in the presence of their clients announced a settlement of the case had been agreed upon.

One of the attorneys for plaintiff then addressed the court as follows:

"Mr. Parsons: If Your Honor please, after considerable negotiations we are ready to proceed in this manner; the plaintiff will now rest her case. We are about to rest, preparatory to entering into a stipulation.

"The plaintiff now rests.

"Mr. James King: All the defendants likewise rest.

"Mr. Parsons: May the record show that the plaintiff, Mrs. Cathcart, is personally here in court, and that the defendant, Mr. Gregory, is also personally present in court.

"Now, we would like to stipulate that a judgment be entered in this matter, and do stipulate that a judgment be entered in this matter in favor of the defendants, and that findings be prepared and a judgment be prepared in accordance with the understanding which we are about to state."

Then followed a clear and complete statement of the details of the settlement, after which the following occurred:

"Mr. James King: That stipulation as generally outlined, is stipulated and agreeable to all of the defendants, and findings and judgment will be prepared in accordance therewith, this being merely in the nature of a memorandum.

"Mr. Parsons: We are willing to stipulate that in the absence of the judge now presiding, that any one of the judges of this court may find the judgment.

"Mr. King: We stipulate to that.

"Mr. Hunsaker: In case the parties are unable to agree upon a trustee, will it be stipulated that the Court—meaning any judge thereof—shall name the trustee?

"Mr. James King: Yes."

The minutes of the court for that day show the following, after the title of the court and cause:

"This being the time heretofore continued to for further trial in the above entitled action, plaintiff is present with her attorneys R. E. Parsons, Howell W. Richardson, Daniel M. Hunsaker, defendant A. Gregory being present with his attorneys James L. King and Harold King, all other defendants excepting the Security Title Insurance and Guarantee Co., being present by their attorneys, the said James L. King and Harold King. The official reporter J. E. Rich is directed to take down the proceedings and the testimony herein.

"Plaintiff rests. All defendants present rest.

"Counsel for the respective parties offer to the court a stipulated judgment in favor of defendants with findings of fact and judgment to be entered in accordance with oral stipulations as presented herein in open court.

"Judgment as stipulated for defendants is ordered by the court."

About August 1, 1938, one of the attorneys for defendants reduced the oral stipulation for judgment to writing and delivered it to one of plaintiff's attorneys for plaintiff's signature. One acre of land containing plaintiff's dwelling, the springs from which she obtained her water, and a right of way for pipe lines conducting the water to the dwelling were to be released from the deed of trust and conveyed to plaintiff. These descriptions were left blank in the written agreement as plaintiff was to have the right to designate the exact descriptions of the properties she was to receive. The form of the agreement was approved by plaintiff's counsel but plaintiff neither furnished the descriptions nor signed the agreement.

At various times counsel for defendants attempted to get these descriptions from counsel for plaintiff and with the consent of her attorneys finally telephoned her in October, 1938. An affidavit recites that "plaintiff herself replied to affiant in said conversation that the surveys had been made and the descriptions had been completed and had been delivered to Mr. George McDonald, for the purpose of having Mr. McDonald deliver the same to affiant, and plaintiff expressed surprise that they had not already been delivered to affiant, and further suggested that affiant call Mr. McDonald personally upon the telephone, giving affiant McDonald's telephone number".

Defendants' counsel further stated in his affidavit that he made repeated unavailing efforts to get the descriptions, and in November, 1938, defendant A. Gregory employed a licensed surveyor to make the surveys and "that said surveyor made a survey thereof during the month of November, and delivered to affiant descriptions covering said property, together with a map showing the location thereof in accordance with the said descriptions. That said surveyor informed affiant that the survey had been made and the descriptions prepared in accordance with the desires of the plaintiff, who was present at the time the same were made." Plaintiff raises no question of the correctness of these descriptions.

Counsel for defendants then prepared findings of fact and conclusions of law in accordance with the stipulation, served them on counsel for plaintiff and delivered them to a judge of the superior court of San Bernardino County.

About January 16, 1939, defendants' counsel was informed that plaintiff had discharged her prior attorneys and had engaged the counsel now representing her on this appeal.

About January 28, 1939, plaintiff served a notice of motion to be relieved from the stipulation of her attorneys made on July 9, 1938. An amended notice of motion was served about February 15, 1939. The trial judge denied the motion.

Findings of fact and conclusions of law and judgment were filed on April 5, 1939, and this appeal followed.

[1] A number of conflicting affidavits were filed in support of and in opposition to the motion. As the trial judge denied the motion he resolved all conflicts in the evidence in favor of defendants so we have only summarized a portion of those affidavits supporting the order and have disregarded conflicts in them.

Plaintiff argues that the findings and judgment are contrary to the stipulation in two particulars. The first point of alleged departure concerns a payment of $500 from plaintiff to the Redlands Security Company under certain conditions, and the second point of alleged departure relates to the water rights to be conveyed to her.

The stipulation provides that plaintiff and the Redlands Security Company will convey the land owned by them as tenants in common, excepting the one acre, the springs and the pipeline right of way, to a trustee; that within nine months plaintiff or her nominee may obtain full title to the property by paying the indebtedness evidenced by the note secured by the deed of trust together with accrued interest and taxes, the payment of $250 per acre for approximately fifty-five acres representing the one-quarter interest of the Redlands Security Company and $500 as a portion of the expenses of that company in connection with this litigation. The findings and judgment give exact force to this portion of the stipulation.

[2] Plaintiff urges that she did not know of this provision in the stipulation requiring her to pay the $500 to the Redlands Security Company and did not authorize her attorneys to make it. We find the following in the affidavit of one of the counsel who represented plaintiff on July 9, 1938: "That affiant, together with other counsel representing plaintiff, informed her from time to time as to all matters that had been agreed upon or were in dispute with defendants and their counsel, and fully informed plaintiff as to all the terms and conditions of such stipulation prior to the time the same was entered into on July 9, 1938." It should be remembered also that plaintiff was in court when the stipulation was entered into and made no objection to any of its terms for several months.

Plaintiff argues that there is a judgment of $500 against her and that under it defendants can levy upon and sell her home and water rights. The judgment supports no such construction. Plaintiff will be required to pay the $500 only in case she or her nominee redeems the property from the trust. In case there be no redemption she will not have to pay this sum but the property will be sold, excepting the homesite, the springs and the pipeline right of way, to satisfy the note secured by the deed of trust. No money judgment was rendered against her.

[3, 4] As to the water right, the stipulation contains the following: "The Redlands Security Company will convey * * (by) an unconditional release as to the water right, and by now I mean the water which is now developed from a spring, and which water has been developed and is now actually conveyed by means of a pipeline to the house of the plaintiff, and in addition

thereto, there shall be granted to the plaintiff an easement for her pipeline through whatever land it is necessary over which to pass to reach from the spring, the source of water, to her home, so that the water may be delivered as it is now being done and has been for some time past."

The judgment is much more favorable to plaintiff in this respect than the stipulation. It orders the Redlands Security Company to convey by quitclaim deed a described .341 of an acre of land on which the springs from which plaintiff obtains her water are located, together with a described easement for her pipelines. This of course would convey the ownership of all water produced and to be produced from the springs.

Plaintiff contends that the trial judge committed prejudicial error in refusing to relieve her from the stipulation of her counsel and in entering judgment on that stipulation because section 283 of the Code of Civil Procedure provides that "An attorney and counselor shall have authority: 1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise; * * *". She argues that the oral stipulation made in court was not intended to represent the final agreement of the parties; that it was only intended to serve as a memorandum to be used in drawing a final agreement settling the controversy and was intended to be subject to modifications; that as there was no agreement filed with the clerk of the court and as the stipulation was not entered on the minutes of the court it was not binding upon her and could not be enforced.

Defendants argue that the stipulation was complete in every particular and meticulously set forth every detail of the compromise of the case according to the exact agreement of the parties; that it was taken down in shorthand by the court reporter who later transcribed his notes; that it was referred to in the minutes of the court and thereby virtually incorporated in those minutes; that it was acted upon by the trial judge and by the parties and therefore became a binding and enforceable agreement.

The quoted portion of the section of the Code of Civil Procedure has been construed by numerous cases, among which we cite the following: Borkheim v. North British & M. Ins. Co., 38 Cal. 623; Preston v. Hill, 50 Cal. 43, 19 Am.Rep. 647; Merritt v. Wilcox, 52 Cal. 238; Smith v. Whittier, 95 Cal. 279, 30 P. 529; McLaughlin v. Clausen, 116 Cal. 487, 48 P. 487; Webster v. Webster, 216 Cal. 485, 14 P.2d 522; McClellan v. State, 119 Cal.App. 535, 6 P.2d 994; Jones v. Noble, 3 Cal.App.2d 316, 39 P.2d 486; Skoglund v. Moore Dry-Dock Co., 11 Cal.App.2d 287, 53 P.2d 1001; Price v. McComish, 22 Cal.App.2d 92, 70 P.2d 978; Beckett v. City of Paris Dry Goods Co., 26 Cal.App.2d 295, 79 P.2d 178; Fresno City H. S. Dist. v. Dillon, 34 Cal. App.2d 636, 94 P.2d 86.

The earlier cases seem to construe the quoted provisions of the section with considerable strictness. However, there are well-established exceptions to the rule recognized in the later cases.

[5-8] In Webster v. Webster, supra [216 Cal. 485, 14 P.2d 523], the Supreme Court said:

"Such a stipulation made in open court constitutes 'not only agreements between the parties, but between them and the Court, which the latter is bound to enforce, not only for the benefit of the party interested, * * * but for the protection of its own honor and dignity.' Meagher v. Gagliardo, 35 Cal. 602; 23 Cal.Jur. 811, § 2. Nothing in section 283 of the Code of Civil Procedure militates against the binding effect of a stipulation entered into and executed by the parties in open court and duly reported in the proceedings of the trial. [Citing cases.] In Smith v. Whittier, supra, it is stated:

"'The evident object of this section (sec. 283, Code Civ.Proc.) is that, whenever the attorney shall enter into an agreement for the purpose of binding his client, there shall be such a record thereof as will preclude any question concerning its character or effect, and that the extent of the agreement may be ascertained by the record, if oral, that it shall be entered in the minutes, and, if written, that it shall be filed with the clerk. "It is not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise." Preston v. Hill, 50 Cal. 53 (19 Am.Rep. 647). The section does not require a construction that in no instance shall an agreement which the attorney may make in behalf of his client be binding unless entered in the minutes of the court or filed with the clerk. Its provisions have reference to executory agreements, and not to those which have been wholly or in part executed, and it was with reference to oral agreements of this character that the court said in its opinion in Borkheim v. [North] British & M. Ins. Co., 38 Cal. 628 (relied on by plaintiff herein): "Of such agreements, therefore, there can be no specific performance."'"

[9] We believe the facts of the instant case clearly bring it within the rule thus announced. There can be no question that the stipulation was actually entered into by counsel in open court. There can be no question of its exact terms, character and effect because it was taken down by the reporter who transcribed his notes. It was acted on by the court and the parties, and to this extent became an executed and not an executory contract. Under these circumstances and the authorities cited we cannot conclude there was any abuse of discretion on the part of the trial judge in denying plaintiff's motion to be relieved from the stipulation and in entering judgment upon it.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

45 Cal.App.2d 226

HAMMOND v. McDONALD et al.

Civ. 13086.

District Court of Appeal, Second District, Division 1, California.

June 6, 1941.

1. Appeal and error 🔑477

A writ of supersedeas may be issued by an appellate court pursuant to its inherent power to secure to the appellants the fruits of a successful appeal if it can be done without depriving the respondent of a substantial right.

2. Appeal and error 🔑840(3)

Appeal from judgment enjoining appellants from serving intoxicating liquors without meals at a cafe and lunch counter maintained by them presented question of interpretation of constitutional and statutory provisions regarding sale and disposition of intoxicating liquors for consumption on premises in a cafe or restaurant. St.1915, p. 236; St.1935, pp. 1125, 1148, §§ 2(m), 53, as amended by St.1937, pp. 2129, 2169; Const. art. 20, § 22.

3. Appeal and error 🔑479(1)

Where judgment enjoining appellants from serving intoxicating liquors without meals at a cafe and lunch counter was rendered in a test case brought for purpose of determining whether hotels and restaurants serving liquor without meals were violating constitutional and statutory provisions, appellants were granted a writ of supersedeas without which, if they were successful on appeal from the judgment, they would have been injured to extent of total destruction of their business. St.1915, p. 236; St. 1935, pp. 1125, 1148, §§ 2(m), 53, as amended by St.1937, pp. 2129, 2169; Const. art. 20, § 22.

Appeal from Superior Court, Los Angeles County; Lucius P. Green, Judge.

Proceeding by George Y. Hammond against Vernon McDonald and others to abate a business. From a judgment granting an injunction, defendant appeals. On application for writ of supersedeas.

Writ of supersedeas granted.

See, also, 32 Cal.App.2d 187, 89 P.2d 407.

Hanna & Morton, of Los Angeles, for appellants.

Newby & Newby, of Los Angeles, for respondent.

WHITE, Justice.

This is an application by the appellants for a writ of supersedeas to restrain the enforcement of a judgment of the superior court enjoining said appellants from serving intoxicating liquors without meals at a cafe and lunch counter maintained by them, and further ordering the summary abatement of such business should appellants fail to observe the requirements of such injunction.

The proceeding below was instituted by plaintiff (a private citizen) against defendants under the provisions of the Liquor Abatement Act (Stats.1915, ch. 132, p. 236) to abate the business operated by defendants by reason of the alleged unlawful sale of intoxicating liquors. Following trial, the court found that defendants were conducting in good faith in a brick building on said described premises a cafe and lunch counter business; that upon said premises defendants were also engaged in the business of serving to the public intoxicating liquors. In connection with the operation of the restaurant business, the court found that the defendants served all kinds of foods; employed two chefs and a corps of waitresses; that a food menu was provided for customers, and that the amount of money invested in the premises by the defendants was between thirty and thirty-five thousand dollars. The court further found that alcoholic beverages of all types were sold by the drink in the building at tables or over the counter, pursuant to a license or permit from the State Board of Equalization; that such liquors were consumed by the purchasers in said building and were served without meals when meals were not requested. The court further found that the defendants' monthly expenditures for meats approximated $200, for vegetables $100, and for milk from $60 to $70. The findings also determined that patrons had never been refused service of meals when such service was requested.

The court found that while defendants had complied with all applicable laws of the government of the United States and had obtained the aforesaid license from the state of California, the conduct of their business nevertheless amounted to the maintenance of a saloon and barroom, contrary to law and in direct violation of section 22 of article XX of the Constitution of this state, and contrary to subdivision "m" of section 2 and section 53 of the Alcoholic Beverage Control Act of California (Stats. 1935, p. 1123; Stats. 1937, pp. 1934, 2126). Pursuant to such findings the judgment hereinabove referred to was made and entered. Following the entry of judgment and the denial of their motion for a new trial, appellants prosecuted an appeal to this court, and their opening brief is now on file.

[1, 2] The writ of supersedeas may be issued by an appellate court pursuant to its "inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right". Luckenbach v. Krempel, 188 Cal. 175, 177, 204 P. 591, 592. The appeal is this case squarely presents a question of interpretation of constitutional and statutory provisions involving the sale and disposition of intoxicating liquors for consumption on the premises in a cafe or restaurant such as the one conducted by appellants, and which the court found they had "been conducting in good faith * * * as a cafe and lunch counter business", when the service of such intoxicating liquors is made without furnishing therewith a meal, whether or not such meal be requested.

[3] The appeal here in question will soon come on for a hearing and the validity of the superior court judgment will then be determined. We think this is a case in which the writ may well be issued, and that it is to the interest of all parties to have the action below suspended until this decision can be made. If this is not done and the appellants are successful in the end, they will have been injured to the extent of the total destruction of their business by reason of the summary abatement thereof provided for in the judgment. It is conceded by all parties that the proceeding here in question is a test case, and for the purpose in the main of determining whether the several thousand hotels, restaurants, cafes, dining cars and clubs, operating in the state of California in the identical manner as appellants have always operated and conducted their business, are violating existing constitutional and statutory provisions.

It is ordered that a writ of supersedeas issue, staying all proceedings in the court below and directing that all proceedings to enforce said judgment be suspended pending final hearing and determination of the appeal therefrom, upon the execution and filing in this court of a good and sufficient undertaking in the sum of $1,500 indemnifying the people of the state of California and plaintiff and respondent George Y. Hammond jointly in the event that any damages or costs be sustained by said parties by reason of the foregoing, such bond to be approved by any judge of the superior court of the state of California, in and for the county of Los Angeles.

We concur: YORK, P. J.; DORAN, J.

45 Cal.App.2d 233

PEOPLE v. JOFFE et al.

Cr. 3461.

District Court of Appeal, Second District, Division 2, California.

June 6, 1941.

1. Criminal law ⟹1159(2)

It is function of trial judge as trier of facts to determine what facts are established by evidence, and, before reviewing court can interfere with judgment of trial court, it must clearly appear that upon no hypothesis was there sufficient substantial evidence to support the conclusion reached.

2. Gaming ⟹98(5)

Evidence warranted conviction for keeping and occupying a flat building with paraphernalia for the purpose of recording wagers on horse races. Pen.Code, § 337a, subd. 2.

3. Gaming ⟹97(1)

In prosecution for keeping and occupying a flat building with paraphernalia for purpose of recording wagers on horse races, evidence of telephone conversations between officers who entered flat building and persons calling up flat building was admissible as tending to establish the fact that the building was occupied for purpose of recording wagers on horse races. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

James Joffe and others were convicted for keeping and occupying a flat building with paraphernalia for the purpose of recording wagers on horse races, and they appeal.

Affirmed.

Leland E. Zeman, of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendants were accused by information of the violation of section 337a, subdivision 2, of the Penal Code in that they kept and occupied a "flat building" with paraphernalia for the purpose of recording wagers on horse races. They were convicted by the court sitting without a jury and have appealed from the judgment of conviction.

The main contention of defendants is that the evidence is insufficient to justify the conviction. Two police officers went on January 4, 1941, to the upper apartment of a four-family flat building at 2721½ Van Buren place, in the city of Los Angeles. One of the officers looked through the keyhole of the door of the apartment and saw defendant Shaheen sitting at a flat top desk and talking on the telephone. They heard him say: "439, one to win and one to place; 447, one to win and one to place". The officers knocked on the door and defendant Joffe unlocked the door and admitted them. They found a telephone and a chair on each side of the desk. On the desk they found a "scratch sheet" of the date of the day of the arrest containing a list of horses racing at the various race tracks throughout the United States and showing the approximate post time, the names of the horses and various data used by those making wagers on horse races. Other scratch sheets bearing earlier dates were found in the apartment. On the desk they also found a number of "betting markers", which were shown to be customarily used in recording wagers on horse races. A key found on the person of defendant Joffe fitted the lock on the door of the apartment. The officers answered several telephone calls from individuals whose conversations indicated that they desired to place bets on horse races. One man calling up gave the name of Casey and asked, "Jimmie?" One of the officers answered, "Yes", and the party calling then said: "151, one to win and one to show; 181, one to win and one to place; 457, one to win". The numbers 181 and 457 corresponded to the numbers of certain horses listed on the scratch sheet found upon the desk. Defendants were not sworn as witnesses and they presented no evidence in their behalf.

[1, 2] It was the function of the trial judge as a trier of fact to determine what facts were established by the evidence. Before a reviewing court can interfere with the judgment of a trial court it must clearly appear that upon no hypothesis whatever was there sufficient substantial evidence to support the conclusion reached. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. In the case

under review the evidence is ample to sustain the conviction.

[3] Defendants contend that the evidence of the telephone conversations between the officers and persons calling up the establishment should not have been received. The court did not err in admitting the evidence, as it tended to establish the fact that the premises were occupied for the purpose of recording wagers on horse races.

The appeal is devoid of merit. The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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45 Cal.App.2d 208

SCHWINDT v. BILLIWHACK STOCK FARMS, LIMITED, et al.

No. 12896.

District Court of Appeal, Second District, Division 2, California.

June 4, 1941.

Rehearing Denied June 26, 1941.

Hearing Denied July 30, 1941.

1. Account, action on 🔑3

A "mutual, open, and current account" arises whenever during course of dealings reciprocal demands exist which would give to each party thereto an offset against the other in an action by either party, providing that items other than cash appear as credits upon the account.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutal, Open and Current Account".

2. Account, action on 🔑3

It is not necessary that account be kept in any particular form to establish a "mutual, open and current account", and it is immaterial which party keeps the account, nor is it necessary that there be any written entry of the various charges on the account.

3. Account, action on 🔑3

A "mutual, open and current account" may arise from existing debits on one side for wages and credits for merchandise furnished on the other, or vice versa.

4. Account, action on 🔑3

The offsetting demands in a "mutual, open and current account" need not accrue simultaneously.

5. Account, action on 🔑7

Evidence that dairy company charged its employee for merchandise sold him and credited him with sums due him on account of his salary, showed existence of a "mutual, open and current account", upon which employee could maintain an action to recover sum allegedly due.

6. Limitation of actions 🔑29(1)

The four-year, and not the two-year, statute of limitations is applicable to actions on a mutual, open and current account. Code Civ.Proc. § 337, subd. 2; § 339.

7. Limitation of actions 🔑54(3)

Where action on mutual, open and current account was filed October 2, 1939, and last item proved in defendants' ledger account was dated September 30, 1938, action was not barred by four-year statute of limitations. Code Civ.Proc. § 337, subd. 2.

◆

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Action by W. G. Schwindt against the Billiwhack Stock Farms, Limited, and others to recover a sum allegedly due upon a mutual, open, and current account. From a judgment for plaintiff, the defendants appeal.

Affirmed.

E. Neal Ames, of Los Angeles, for appellants.

Henderson & Churchill, of Ventura, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover a sum due upon a mutual, open, and current account, defendants appeal.

The evidence being viewed most favorably to plaintiff (respondent), the essential facts are:

Plaintiff had been employed by the Valley Dairy Company in Los Angeles for a number of years at a salary of $275 per month. Defendant Fratkin was an officer of the Valley Dairy Company. The latter part of 1932 or the first part of 1933 plaintiff had a conversation with defendant

Fratkin, president of defendant corporation, in which conversation Mr. Fratkin asked plaintiff if he would be willing to go to work for the defendant corporation in Ventura County. Plaintiff replied that he would, provided that he receive $275 per month salary, to which defendant Fratkin agreed. Thereafter plaintiff went to Ventura County and became the manager of defendant corporation.

On the first pay day defendant Fratkin handed plaintiff a check for $100 and stated, "We are a little short of cash just now and I would like to just give you $200.00 a month for the time being and I will give you the rest of it once in a while, the same as I did at the Valley Dairy." This procedure was followed, plaintiff, while he was in charge of the payroll checkbook of defendant company, making appropriate entries on the check stubs indicating that the $200 a month was being advanced on account of his salary. During the period of plaintiff's employment by defendants he purchased pigs, a saddle, lumber, tires, and milk from defendant corporation. A record was kept by defendant corporation of the milk which it furnished to plaintiff, appropriate entries being made in a record kept by defendant corporation, and from time to time there were entries made in the account by defendant corporation purporting to write it off. The last entry in defendant corporation's ledger account with plaintiff was dated September 30, 1938.

After plaintiff severed his connection with defendant corporation, he filed, October 2, 1939, the present action to recover the balance he claims to be due him on account of unpaid salary on a mutual, open, and current account.

Defendants urge for reversal of the judgment these propositions:

First: There is no substantial evidence to sustain the trial court's finding that there was a mutual, open, and current account between plaintiff and defendants.

Second: Plaintiff's cause of action is barred by the statute of limitations (Code Civ.Proc., sec. 339).

Defendants' first proposition is untenable and is governed by the following pertinent rules of law:

[1] (1) A mutual, open, and current account arises whenever through a course of dealings reciprocal demands exist which would give to each party thereto an offset against the other in an action by either party, providing that items other than cash appear as credits upon the account (Gould v. Wood, 205 Cal. 141, 143, 270 P. 183; Furlow P. B. Co. v. Balboa L. & W. Co., 186 Cal. 754, 763, 200 P. 625; see, also, 1 Cal.Jur. (1921) 147, sec. 8).

[2] (2) For a mutual, open, and current account it is not necessary that the account be kept in any particular form, and it is immaterial which party keeps the account (Carter v. Canty, 181 Cal. 749, 754, 186 P. 346), nor is it necessary that there be any written entry of the various charges on the account (Millet v. Bradbury, 109 Cal. 170, 173, 41 P. 865).

[3] (3) A mutual, open, and current account may arise from existing debits on the one side for wages and credits for merchandise furnished on the other, or vice versa (Arocena v. Sawyer, 60 Cal. App. 581, 589, 213 P. 523).

[4] (4) The offsetting demands in a mutual, open, and current account need not accrue simultaneously (Arocena v. Sawyer, supra, 60 Cal.App. at page 583, 213 P. 523).

[5] We find from an examination of the record that there is substantial evidence to sustain each and every fact set forth above. For example, plaintiff testified as to the facts pertaining to the amount of his salary and how it was to be paid. Written exhibits introduced in evidence contained entries showing that defendants charged plaintiff for merchandise sold him and credited him with sums due him on account of his salary. Hence, applying the above-stated rules of law to the facts of the instant case, we find that a mutual, open, and current account existed between the parties, because through a course of dealings between them reciprocal demands existed which gave to each an offset against the claim of the other, money entries pertaining to the account having been made by defendant corporation in its records showing that defendants' offset consisted of sums due for merchandise sold to plaintiff, while plaintiff's testimony disclosed that his demand was his unpaid wages.

[6, 7] Defendants' second proposition is likewise without merit. Actions on a mutual, open, and current account may be brought within four years from the time of the last item proved in the account on either side and section 337, subdivision 2 of the Code of Civil Procedure is applicable to such actions and not section 339

of the same code (Norton v. Larco, 30 Cal. 126, 129, 89 Am.Dec. 70; Furlow P. B. Co. v. Balboa L. & W. Co., supra, 186 Cal. at page 763, 200 P. 625). Hence, since the last item proved in the instant case in defendants' ledger account was dated September 30, 1938, and the present action was filed October 2, 1939, the statute of limitations had not run upon the alleged cause of action.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and WOOD, J., concurred.

45 Cal.App.2d 802

PEOPLE v. DODSON.

Cr. No. 542.

District Court of Appeal, Fourth District, California.

June 5, 1941.

Criminal law 🔑1182

Where after clerk's and reporter's transcripts had been filed in appellate court, appellant's attorney secured an extension of time to file opening brief, the case was placed on the calendar of May 27, and no appearance was made for appellant and no brief in his behalf filed, judgment was affirmed. Pen.Code, § 1253.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Proceeding between the People and George Dodson. From an adverse judgment, George Dodson appeals.

Judgment affirmed.

Harry L. Meyers, of Fresno, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

MARKS, Justice.

The attorney-general has moved to affirm the judgment under the provisions of section 1253 of the Penal Code.

The clerk's and reporter's transcripts were filed here on April 14, 1941. On April 23, 1941, the attorney for defendant secured an order extending his time to file his opening brief to May 5, 1941. The case was placed on the calendar of May 27, 1941. No appearance was made for defendant and no brief in his behalf has been filed, so the motion must be granted.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

45 Cal.App.2d 205

PEOPLE v. IRVINE et al.

Cr. 3435.

District Court of Appeal, Second District, Division 2, California.

June 4, 1941.

1. Criminal law 🔑1144(13)

On appeal from conviction of violating statute relating to book selling and bookmaking, and keeping record of bets, and of conspiracy to violate the statute, the evidence was viewed most favorably to the people. Pen.Code, § 337a, subds. 1, 2.

2. Gaming 🔑98(3)

Evidence corroborating testimony of defendants' accomplices was sufficient to connect defendants with crimes with which they were charged so as to sustain conviction for violating statute relating to book selling and bookmaking and keeping record of bets, and of conspiracy to violate the statute. Pen.Code, § 337a, subds. 1, 2.

3. Criminal law 🔑507(1), 780(2)

Where uncontradicted evidence disclosed that a certain witness, when approached by a defendant to join with him and another in operating a bookmaking establishment, refused to do so, the witness was not an "accomplice" and trial court did not err in refusing to instruct the jury that he was. Pen. Code, § 337a, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

Appeals from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Patrick E. Irvine and others were convicted of violating statute relating to bookselling and bookmaking, and keeping record of bets, and of conspiracy to violate the statute, and they appeal.

Affirmed.

A. H. McConnell, of Long Beach, for appellants.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From judgments of (1) guilty of a conspiracy to violate section 337a of the Penal Code; (2) guilty of five counts of violating subsection 1, section 337a of the Penal Code; and (3) guilty on eleven counts of violating subsection 2, section 337a of the Penal Code, defendants appeal. There are also appeals from orders denying their motions for a new trial.

[1] The evidence being viewed most favorably to the people (respondent), the essential facts are:

Defendant Suter, in May, September, and October of 1939, operated a house in Lakewood Village, California, for the purpose of receiving and placing bets and wagers on horse races. In November, 1939, defendants Irvine and Suter opened a place in the city of Long Beach for the purpose of receiving and placing bets and wagers on horse races. This place they maintained until it was raided by the police, January 5, 1940.

Defendants rely for reversal of the judgments on these propositions:

First: There is no substantial corroboration of the testimony of defendants' accomplices to show defendants' participation in or connection with any of the crimes of which they were convicted.

Second: The trial court committed prejudicial error in not instructing the jury at defendants' request that John W. Bent, a witness, was a coconspirator and accomplice of defendants.

[2] Defendants' first proposition is untenable. An examination of the record discloses substantial evidence considered in connection with the inferences which the jury may have reasonably drawn therefrom to sustain each and every material finding of fact upon which the judgments were necessarily predicated, including the necessary corroboration of the testimony of defendants' accomplices. For example, witness Blasdel testified that defendants Suter and Irvine came into his place of business and asked him if he was taking bets, to which he replied that he was not any more, and that said defendants told him that they would like to have him continue to take bets, to which he replied that he was not interested. Witness Bent, a former partner of defendant Suter's, testified that about October 17, 1939, defendant Suter asked him to put up money in connection with bookmaking operations, but that he declined to do so. Witness Morath, a representative of the telephone company, identified defendant Irvine as the man who had requested the installation of a number of telephones in the houses in Long Beach and Lakewood Village, which were being operated as bookmaking establishments, and testified that said defendant requested the service under the name of Roy Stuart. Witness Vogel, who installed certain telephones in one of the Lakewood Village houses, testified that he saw defendant Irvine at one of the houses and that at the time bookmaking papers similar to those which had been received in evidence were in the place. Witness Bozarth testified that he sold to defendant Irvine lumber which was used in the reconstruction of the Long Beach bookmaking establishment.

All of the foregoing testimony independent of the evidence of accomplices tended to connect defendants with the crimes of which they were convicted and fully meets the evidentiary requirements for sustaining a conviction of violating section 337a of the Penal Code as set forth by our Supreme Court in the case of People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

[3] Defendants' second proposition is likewise untenable. In view of the fact that the uncontradicted evidence disclosed that the witness Bent when approached by defendant Suter to join with him and defendant Irvine in operating a bookmaking establishment refused to do so, he therefore obviously was not an accomplice and the trial court did not err in refusing to instruct the jury that he was.

For the foregoing reasons the judgments and orders appealed from are and each is affirmed.

MOORE, P. J., and WOOD, J., concurred.

45 Cal.App.2d 215

NATIONAL HOLDING CO. et al. v. TITLE INS. & TRUST CO.

Civ. 12377.

District Court of Appeal, Second District, Division 1, California.

June 5, 1941.

1. Appeal and error ⚷863, 917(1)

On appeal from a judgment for defendant entered after the sustaining of a general demurrer to plaintiffs' complaint as amended, without leave to amend further, the truth of the facts as alleged in the complaint must be presumed, and the sole question presented is whether those facts as stated constitute a cause of action against defendant.

2. Appeal and error ⚷917(1)

On appeal from judgment for defendant entered after the sustaining of a general demurrer to plaintiff's complaint as amended, without leave to amend further, in an action on a title policy to recover money expended by plaintiffs in the extinguishment of a certain tax lien, the reviewing court was required to accept as true allegations that official records of Los Angeles county showed that taxes had been paid under protest.

3. Insurance ⚷426½

Where official records of Los Angeles county showed that certain taxes were paid under protest, insurer, when it issued title policy, was put on notice that payment of taxes was at best contingent and subject to a later proceeding to recover taxes paid, which, if successful, would result in a subsequent reassessment and levy occurring after insured had taken title to property and at a time when insured would necessarily be liable to pay any taxes thereon, and, if insurer had intended to avoid liability in event of such a reassessment, it should have expressed that limitation in unambiguous terms in the policy.

4. Insurance ⚷426½

A title policy which did not insure against any liens or incumbrances not shown by the official records of Los Angeles county should not be construed so as to enable insurer to avoid liability for a tax lien which was shown by the public records before policy was issued.

5. Insurance ⚷426½

Where official records of Los Angeles county showed at time of issuance of title policy that first half of 1935–36 taxes had been paid under protest, lien of those taxes was extant as shown of record when policy was issued, payment thereof under protest did not extinguish lien, and reassessment of taxes after issuance of policy related back to time of first assessment, and hence policy which did not insure against liens not shown by official county records but did insure against obligation to pay first half of 1935–36 taxes and against lien on property for that half covered contingency of reassessment. Pol.Code, §§ 3649, 3681a, 3716, 3718, 3804a, 3819.

6. Insurance ⚷146(3)

An ambiguity in a title policy must be resolved in favor of the insured.

7. Insurance ⚷146(3)

An exception to the general provisions of a title policy must be construed strictly as against the insurer.

8. Insurance ⚷426½

Where title policy insured only against lien of first half of 1935–36 taxes, and compromise settlement was made to extinguish entire lien of taxes for that year, insurer was liable on policy only for loss occasioned by necessity of extinguishing lien for first half of taxes.

9. Insurance ⚷426½

Where title policy insured only against lien of first half of 1935–36 taxes and imposed no obligation on insurer to reimburse insured parties for any payments made for second half of taxes for that year, fact that owner of property recovered from county second half of taxes, which were paid by insured parties, had no bearing on insurer's liability under terms of policy.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by the National Holding Company and others against the Title Insurance & Trust Company, on a policy of title insurance to recover a sum of money expended by plaintiffs in the extinguishment of a certain tax lien. From a judgment for defendant entered after the sustaining of a general demurrer to plaintiffs' complaint as amended, without leave to amend further, plaintiffs appeal.

Reversed.

Loewenthal & Elias, of Los Angeles, for appellants.

Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondent.

DORAN, Justice.

Plaintiffs appeal from a judgment in favor of respondent after the sustaining of a general demurrer to plaintiffs' complaint as amended, without leave to amend further.

[1] The action is one brought upon a policy of title insurance to recover a sum of money expended by appellants in the extinguishment of a certain tax lien. Upon this appeal from a judgment after demurrer the truth of the facts as alleged in the complaint must be presumed, and the sole question presented is whether those facts as stated constitute a cause of action against respondent as defendant.

The complaint as amended alleges that one Frank A. Bouelle is the owner of a certain piece of real property, subject to a leasehold for a term of ninety-nine years, which said leasehold has been acquired by appellant National Holding Company at a sale of the lessee's interest under foreclosure; and that the said appellant has agreed to be bound by the lessee's covenants and agreements. That by the terms of the lease, the lessee was required to pay all taxes imposed on the property in question and all such payments were to be made in the name of the lessor. That the said appellant acquired the leasehold on or about January 24, 1936; and that prior to that date the county assessor assessed the said property for general city and county tax purposes for the fiscal year 1935-1936, and the county levied a tax for such purposes upon the property in the sum of $14,282.40. That the first instalment of said taxes, in the sum of $7,141.20, was paid by appellant's predecessor in interest on or about December 5, 1935, and that the said payment was made "under a valid and proper written protest contesting and protesting the validity of said entire assessment and of said entire tax"; and that on the date the said appellant acquired the leasehold the official records of the county assessor's office and the tax collector's office showed that the 1935–1936 taxes upon the property had been paid under protest. That on the date the said appellant acquired the said leasehold, to-wit: January 24, 1936, appellant National Holding Company became indebted to appellant Bank of America, and to secure that indebtedness the National Holding Company executed a deed of trust covering its interest in the property in question. That on or about January 25, 1936, respondent issued its policy of title insurance covering the said leasehold interest. That on or about April 13, 1936, Frank A. Bouelle and appellants' predecessor in interest commenced an action for the recovery of the taxes paid under protest. That on or about April 17, 1936, appellant National Holding Company paid the second installment of the taxes in question. That on or about June 30, 1936, the said Bouelle and appellants' predecessor recovered judgment against the county for the full amount of the taxes for 1935-1936, being the sum of $14,282.40, with costs, and the taxes so assessed were set aside and declared void in their entirety. That appellants were not parties to the action to recover the said taxes. That thereafter and on or about July 7, 1938, the county assessor caused a reassessment of the said property to be made on the 1935-1936 tax rolls and fixed the tax upon the property at the sum of $13,698.07, all pursuant to the provisions of sections 3681a and 3649 of the Political Code; and the county contended that the reassessment was a valid assessment for the taxable year 1935-1936 and constituted a valid and sufficient tax lien which related back to the time of the entry of the original assessment. "That on or about November 26, 1938, plaintiffs (appellants) caused to be served upon defendant (respondent) a request for defendant's approval of a proposed compromise of the controversy with the County of Los Angeles over said reassessment", a copy of the request being attached to the complaint; and thereafter defendant gave its written approval of the proposed compromise. The approval, also attached as an exhibit, shows that it was made with the understanding that it did not constitute any admission of liability under the policy of title insurance in question. The compromise involved the payment of the sum of $6,000 in full settlement of the taxes assessed, as appears by the exhibits. The complaint prays judgment against respondent for $6,000, for attorneys' fees and costs.

The policy of title insurance is attached to the complaint as an exhibit, and insures appellants against loss or damage, not exceeding a specified sum, which the insured shall sustain "by reason of any defect in, or lien or encumbrance affecting said leasehold * * * other than defects, liens, encumbrances and other matters shown in Schedule B * * * all subject, however, to the exceptions and conditions hereto annexed, which exceptions and conditions together with Schedules A and B are hereby made a part of this Policy". The pertinent portions of Schedule B are as follows: "(I) Defects, liens, encumbrances and other matters affecting the title to the land described in Schedule A, which are superior to the leasehold: 1. Second installment General and Special County and City taxes 1935-1936, Assessment 69858. Amount $7141.20." Among the exceptions in the policy is found the following provision: "The Company does not, by this Policy, insure against: (1) Any facts which a correct survey and inspection of said land would show; water rights; mining claims; rights or claims of parties in possession of any part of said land, easements, liens or encumbrances which are not shown by the official records of (a) the County of Los Angeles; (b) the Federal Offices at Los Angeles; (c) any City in which, or adjacent to which, said land is located."

Appellants contend that the reassessment of the 1935-1936 taxes, which occurred after the title insurance policy was issued, was merely a step in the enforcement of a tax lien which had attached to the property prior to the date of the policy, and the policy of title insurance should therefore be construed so as to cover the extra tax burden which appellants were required to discharge by virtue of the reassessment; and that appellants' complaint consequently stated a cause of action against respondent upon the policy for the extra taxes appellants were compelled to pay. Respondent, on the other hand, argues that the policy of title insurance insured only against taxes shown by the official records of the county at the date of the issuance of the policy, and that the reassessed taxes for 1935-36, here sought to be recovered, were not a lien or encumbrance shown by the official records when the policy of insurance was issued.

Respondent concedes that real property taxes are a lien, and are included within the term "encumbrances" as used in the policy of title insurance sued upon, that the lien of such taxes attaches as of March 1st of the year for which it is levied, as provided by section 3718 of the Political Code, and that the subsequent fixing of the amount of the taxes, through levy and assessment is a step to enforce the already established lien. However, respondent contends that determination of the amount of the tax through such levy and assessment is a necessary step to show the lien of record, and, furthermore, that when the taxes were paid as originally assessed, the lien thereof was extinguished, notwithstanding the fact that the taxes were so paid under protest, and the subsequent reassessment created a new lien which did not arise until the reassessment was made.

As correctly pointed out by respondent, the policy did not insure against the lien of taxes set forth in Schedule B, namely, the second installment of the 1935-1936 taxes, whether such taxes were a matter of record or not; nor did the policy insure against any liens not shown by the official records of the county. Therefore, as may already be seen from the gist of the argument above set forth, the pivotal question here is: "Were the reassessed and relevied taxes for 1935-1936 a lien or encumbrance shown by the official records of Los Angeles County on January 25, 1936", the date of the issuance of the policy of title insurance?

[2, 3] The policy as drawn clearly protected appellants from the lien of the first installment of 1935-1936 taxes, as originally assessed, and which had been paid under protest at the time of the issuance of the policy. It should be borne in mind, however, that according to the allegations of the complaint the record showed that the payment had been made under protest. Accepting such allegation as true, as this court is required to do under the circumstances, it thus appears that respondent was put upon notice at the time it issued its policy that the payment of the taxes was at best contingent and subject to a later proceeding to recover the taxes paid, which, if successful, would necessarily result in a subsequent reassessment and levy against the property, occurring after the insured had taken title thereto and at a time when the insured would necessarily be liable to pay any taxes thereon. Under the circumstances, if respondent had intended to avoid liability in the event of such a reassessment

sound reason and justice should require respondent to have expressed this limitation in plain and unambiguous terms in the policy.

In an analogous case recently decided by this court, it was held that the title insurance company would not be permitted to avoid liability under a similar "Exceptions" clause. In Coast Mutual Building-Loan Association v. Security Title Insurance & Guarantee Company, 14 Cal.App.2d 225, 57 P.2d 1392, 1393, the insurance company excepted liability for "Rights or claims of parties in possession, or based upon overlapping improvements, or upon adverse possession of all or any portion of said property, which rights or claims are not shown by said public records." The interest of the insured in the property was defeated by the claim of one Katherine Mintener who had record title to the property and was in possession thereof. There was, however, on the record a forged deed purporting to deed away the interest in the property involved of said Katherine Mintener. The insurance company contended that it was not liable to its insured for the claim of said Katherine Mintener because from an examination of the records it appeared that she no longer had any interest in the property. This court, however, held that the insurance company was liable and said 14 Cal.App.2d at page 229, 57 P.2d at page 1393:

"The entire case turns upon the construction to be placed upon said exception in the policy. Katherine Mintener's title was, and long had been, of record. Did it cease to be shown of record, within the meaning of the policy, upon the recording of a forged deed purporting to convey the title to another? In the decision of this question we are to be guided by well-established rules relating to the construction of insurance policies. Not only the provisions of the policy as a whole, but also the exceptions to the liability of the insurer, must be construed so as to give the insured the protection which he reasonably had a right to expect, and to that end doubts, ambiguities, and uncertainties arising out of the language used in the policy must be resolved in his favor.

"'The courts have also announced a rule * * * to the effect that when the language employed in an insurance contract is ambiguous, or when a doubt arises in respect to the application, exceptions to, or limitations of, liability thereunder, they should be interpreted most favorably to the insured, or to the beneficiary or mortgagee to whom the loss is payable as his interest may appear. Such contracts are to be interpreted in the light of the fact that they are drawn by the insurer, and are rarely understood by the insured, to whom every rational indulgence should be given, and in whose favor the policy should be liberally construed. Where the language and terms of a policy are framed and formulated by the insurer, every ambiguity and uncertainty therein should be resolved in favor of the insured.' 14 Cal.Jur. p. 445.

"The rule thus stated is supported by an unbroken line of authorities, a few of which are the following: [Authorities cited.]

"What is meant by the phrase 'shown by said public records'? Under the construction urged by defendant, it means that, when a forged deed is recorded which purports to convey away the title of the record owner, such title or such rights and claims as the true owner may have are no longer shown by the records. We cannot give it that construction. The rights and claims of Katherine Mintener were founded upon a complete record title. They existed and were shown of record after as well as before the recordation of the forged deed. Her title was clouded, it is true, but it was otherwise unaffected, and she had an absolute right, based upon her ownership, shown of record, to have the cloud removed. [Authorities cited.]"

[4] It is not too difficult to draw an analogy between a forged deed and a payment of taxes under protest, in so far as the effect upon official records is concerned. In the case of the deed, as held in the decision just quoted at length, the previous record is not extinguished; and in the case of a tax payment under protest, it would seem that the record of the tax lien should not be extinguished thereby, particularly when, as here alleged, the protest is on record. As stated by appellant, it would thus seem that the words "liens or encumbrances which are not shown by the official records of the County of Los Angeles" should not be construed so as to enable the respondent insurance company to avoid liability for a tax lien which was certainly "shown by the public records" prior to the time when the policy was issued.

Respondent has cited no authority which supports its contention that the payment of taxes under protest extinguishes the lien thereof. Hayes v. County of Los Angeles, 99 Cal. 74, 33 P. 766, was a case where property had been assessed twice, in error, for the same tax. It was there held that, where by accident, oversight, or mistake, the same property has been twice assessed, and the taxes twice collected, the moneys collected by mistake must be refunded. The payment of the taxes in that case was unconditional, and it is clear that an unconditional payment of a tax extinguishes the lien and the tax may not again be collected. Such a case is distinctly different from that in which there has been a tax refund and subsequent reassessment. Jones v. Sturzenberg, 59 Cal.App. 350, 210 P. 835, holds that a person seeking to redeem property sold for taxes is entitled to rely on the county auditor's estimate of the amount due, and where the auditor makes an error in his calculations it does not affect the redemption, notwithstanding the fact that the auditor may have overlooked an item. In other words, the county is bound by the mistake of its auditor and the property may be redeemed by payment of the amount mistakenly estimated. Neither of these cases cited by respondent has any bearing upon the question here involved.

It is appellants' contention that payment of taxes under protest does not serve to extinguish the underlying tax lien unless and until all steps in connection with such protest and payment have been finally taken and the county's right to retain the moneys paid has become final and absolute. The argument advanced by appellants in support of their contention is cogent and sound and merits quotation herein with approval, as follows:

"* * * the lien is imposed by the provisions of Political Code, section 3718, which provides that such liens attach as of the first Monday in March.

"The duration of such liens is covered by Political Code, section 3716, which provides that the lien is not removed until the taxes are paid or the property sold for payment thereof.

"Various other provisions of the Political Code provide for the assessment of property and the levy and collection of taxes thereon as the usual and proper steps to be taken in the enforcement of the statutory lien.

"Political Code, section 3819, provides for the payment of taxes under protest when the taxpayer desires to challenge the validity or amount of any assessment. This section further provides for the maintenance of an action by the taxpayer on account of taxes paid under protest at any time within six months after payment. This section also provides that in the event the county is compelled to refund any taxes paid under protest, that the county in such event can get back from the state any portion of such taxes which have been paid over into the state treasury.

"Political Code, section 3804a, provides for the cancellation of invalid or excessive tax assessments upon order of the Board of Supervisors with the consent of the District Attorney or other legal advisor of the board.

"Political Code, section 3681a, provides for reassessment, levy, equalization and collection in enforcement of the statutory tax lien where the original assessment, levy or collection of the tax has for any reason been adjudged invalid.

"An examination of these statutes seems to indicate a clear legislative intention to maintain the existence of the statutory real property tax lien until the same has been *finally* paid, or until the same has been foreclosed and the property acquired by the state for delinquent taxes. In fact, it is only by maintaining the existence of the underlying lien imposed by Political Code, section 3718, that the state can be assured of collecting its taxes. If the payment of a particular assessment under protest or the cancellation of a particular assessment by the Board of Supervisors or by the courts could operate to extinguish the lien imposed by Political Code, section 3718, then the state would be entirely without any remedy for the collection of taxes in such instances. Once the underlying lien is extinguished, the reassessment and the relevying of taxes under Political Code, section 3681a, would be idle acts because such reassessment and relevy would be merely an attempt to enforce a non-existent lien. The California Supreme Court has in fact held that an assessment cannot legally be made where no valid statutory lien had attached to the property in question on the first Monday in March. East Bay Municipal Utility District v. Garrison, 191 Cal. 680, 218 P. 43.

"We must remember in considering this question that there is no personal liability on the owner of real estate with respect to these taxes and that the sole method for the collection thereof lies in the enforcement of the statutory lien therefor. It thus seems clear that it was not the intention of the legislature to permit the underlying tax lien to be extinguished by a payment of the assessment under protest, and that on the contrary the statutes clearly contemplate that the tax lien is to remain in force until the moneys paid upon the assessment become finally and absolutely the property of the state and its political subdivisions. Any other construction of the statutes would seriously impair the ability of the taxing authorities to collect taxes and would completely nullify the remedial reassessment statute. * * *"

"Respondent erroneously assumes that Political Code, section 3681a, imposes a new lien when in fact this section is not in any wise concerned with the creation of a new lien, but by its very terms purports only to provide for a new assessment and levy. As has been repeatedly held by our courts, assessment and levy are mere stops in the enforcement of a pre-existing tax lien." (Citing City of Santa Monica v. Los Angeles County, 15 Cal.App. 710, 115 P. 945; Couts v. Cornell, 147 Cal. 560, 82 P. 194, 109 Am.St.Rep. 168; County of San Diego v. County of Riverside, 125 Cal. 495, 58 P. 81, and one other.)

[5] The cases support appellants' views and the argument advanced is conclusive. It must be held, therefore, that the lien of the 1935-1936 taxes was extant and shown of record at the time of the issuance of the policy of title insurance in question, and that the payment of the taxes under protest did not extinguish the said lien. Since the policy clearly insured appellants against the obligation to pay the first half of the taxes for that fiscal year and against the lien upon the property for that half of the taxes, and since the reassessment related back to the time of the first assessment, the only fair and reasonable construction to be placed upon the terms of the policy is that it insured appellants against the contingency of such a reassessment. It follows that the complaint as amended states a valid cause of action against respondent upon the policy of title insurance and that the court erred in sustaining respondent's general demurrer thereto and in granting judgment against appellants.

[6, 7] It should be noted that the policy contains an additional exception, not referred to by either of the parties herein, but which appears to be nonetheless involved. This exception provides that the insurance company under the policy does not insure against: "(2) Assessments, taxes or obligations levied or created for any public or district improvement or purpose, unless at the date hereof the amount of such assessment, tax or obligation has been fixed, is payable and is shown as a lien by the official records of (a) the County of Los Angeles; or (b) any City in which said land is located." It might be argued that since the reassessment had not been fixed at the date the policy was issued, appellants were not insured against it. However, this latter exception, when read in connection with the former quoted above and with the other provisions of the policy, creates an ambiguity, which, of course, under the well-settled rule, must be resolved in favor of the insured. Moreover, as an exception to the general provisions of the policy it must, according to the equally well-settled rule in such cases, be construed strictly as against the insurer. It is thus manifest that this last exception would avail respondent nothing, even if it had been relied upon.

[8, 9] It should also be noted, that by the terms of the policy appellants were insured only against the lien of the first half of the 1935-1936 taxes, and that the compromise settlement appears from the complaint to have been made in order to extinguish the entire lien of the taxes for that year. Under the circumstances, it would appear that respondent is liable only for the loss occasioned by the necessity of extinguishing the lien for the first half of the taxes; and since the sum of $6,000 is alleged to have been paid in settlement of both halves of the taxes as reassessed respondent should properly be required to reimburse appellants for but one half of the sum in question. This point, however, may be raised through a partial affirmative defense to that effect. The fact that the owner of the property appears to have recovered from the county the second half of the taxes, which were paid by appellants, manifestly has no bearing upon respondent's liability under the terms of the policy of title insurance. If appellants have been placed in the position of having to pay the second half of the taxes twice, obviously they may recover the first payment from the owner of the property, who received it as a re-

fund from the county. No obligation is placed on respondent to reimburse appellants for any payment made for the second half of the taxes.

For the foregoing reasons the judgment appealed from is reversed.

We concur: YORK, P. J.; WHITE, J.

45 Cal.App.2d 229

PEOPLE v. GIOVANNI.

Cr. 3446.

District Court of Appeal, Second District, Division 2, California.

June 6, 1941.

Hearing Denied June 30, 1941.

1. Homicide 🔑244(2)

In murder prosecution arising out of a brawl, jurors were not bound to accept as true the version of brawl given by defendant and his witness, indicating that defendant acted in self-defense, but could properly consider other facts tending to establish defendant's guilt.

2. Criminal law 🔑1159(2)

A reviewing court cannot set aside a jury verdict unless it clearly appears that upon no hypothesis is there sufficient substantial evidence to support verdict.

3. Homicide 🔑250

Evidence relating to stabbing of deceased in connection with a brawl involving two groups of young colored men and to defendant's departure from the state immediately thereafter sustained conviction of manslaughter. Pen.Code, § 192.

4. Criminal law 🔑829(5)

In murder prosecution, refusal to give defendant's self-defense instruction was not error, where point was fairly presented by another of defendant's instructions and jury was instructed on subject of presumption of innocence and reasonable doubt. Pen.Code, § 1096.

5. Homicide 🔑300(3)

In murder prosecution, where jury was instructed that person acting in self-defense may pursue his adversary until he has secured himself from danger, court properly refused to add to instruction additional statement that right of pursuit existed though assailant had withdrawn from combat, if defendant had reasonable ground to apprehend that he would return and renew the assault.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Milton Giovanni was convicted of manslaughter, and he appeals.

Judgment affirmed.

Walter L. Gordon, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was accused by information of the crime of murder in that on or about February 9, 1940, he murdered one Walter Peniger. A jury found him guilty of manslaughter and he has appealed from the judgment of conviction. Defendant contends that the evidence establishes that the killing was done in self defense and that it is insufficient to sustain the verdict of guilty of manslaughter.

At about 9:30 p. m. on February 9, 1940, two groups of young men, all colored, engaged in a brawl at the corner of Central avenue and 22nd street in the city of Los Angeles. There were about five or six in each group. To establish the circumstances of the affair the prosecution presented as a witness police officer Corsini, who testified that on November 4, 1940, he had a conversation with defendant in which defendant stated that during the brawl he stabbed Peniger with a knife, causing his death, and that William Wells, one of the group with Peniger, was shot by one of defendant's group. After the stabbing and shooting defendant ran down an alley, throwing the knife with which he had stabbed Peniger "back of the Lincoln theater". Thereafter defendant and two other boys went to the Southern Pacific depot, "bummed a ride" and left the state of California. Defendant returned about the first of November and gave as his reason for returning that he would have to "register with the government" and that he might as well come back and give himself up. Defendant also told officer Corsini that Ernest Waters, one of defendant's group, had at the time of the affray a large knife in his hand and said that he "intended to stab a fellow * * * who got away just about that time"; that Waters was trying to get a "gun" from one of the other group. Police officers searched the premises where the stabbing took place but could find no knife. The body of Peniger was taken to the morgue but no knife was found among his effects.

The only witnesses who testified concerning the circumstances of the affray were, in addition to the police officers, defendant and Ernest Waters. One of the officers testified that they had tried to find other participants in the affray but were unable to do so. According to the testimony of defendant, Peniger and his group had ordered defendant and his companions to stay away from the neighborhood of Central avenue and 22nd street; defendant and his friends left the intersection for a few minutes and, upon observing that the others had left the scene, were returning with the intention of getting some "chili beans"; at that time several members of Peniger's group came from behind an automobile with knives; defendant and his companions ran about 25 or 40 feet and were met by Peniger and several others; Peniger lunged at defendant with a knife; after Peniger came at him the second time, cutting through his coat sleeve, defendant stabbed him; one of Peniger's group stabbed Edward Wallace, one of defendant's group.

[1-3] Manslaughter is defined in section 192 of the Penal Code as "the unlawful killing of a human being, without malice * * * upon a sudden quarrel or heat of passion". The jurors were not bound to accept as true the version of the affair given by defendant and the witness Waters. They could properly take into consideration the fact that one of the Peniger group was shot by one of defendant's companions; that the knife claimed to have been used by Peniger was not found on the premises or among his effects and that defendant left the state immediately after the stabbing. The jurors could draw reasonable inferences from the facts shown in evidence. Before a reviewing court can set aside a jury's verdict "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below". People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. We are satisfied that the circumstances shown in evidence are sufficient to reasonably justify the verdict of the jury.

[4] Defendant contends that the court erred in refusing to give to the jury instructions requested on the subject of self defense and on the right of one attacked to pursue his adversary until he has secured himself from danger. Complaint is made of the refusal of the court to give defendant's instruction No. 8, which reads as follows: "You are instructed that the defendant has introduced evidence tending to prove that he acted in self defense. I instruct you that he is only bound to produce such evidence of self defense as will create in your minds a reasonable doubt of his guilt of the offense charged. If after a consideration of all the evidence in this case you are unable to determine whether he did or did not act in self defense, he is entitled to an acquittal at your hands." The point covered by this instruction was fairly presented to the jury in defendant's instruction No. 7, as follows: "If you believe from the evidence here that defendant Milton Giovanni acted in self defense from real and honest conviction as to the character of the danger induced by the existence of reasonable circumstances, or if you have a reasonable doubt as to whether he did or did not, then it will be your duty to find that his said act was justifiable even though you might further believe from the evidence that he was mistaken as to the extent of the danger." Moreover, the court gave to the jury the usual instruction on the subject of the presumption of innocence and reasonable doubt in the language of section 1096 of the Penal Code, and further instructed them: "If the evidence relating to any or all the circumstances in this case is, in view of all the evidence, susceptible of two reasonable interpretations, one of which would point to the defendant's guilt and the other would admit of his innocence, then it is your duty in considering such evidence to adopt that interpretation which will admit of defendant's innocence and reject that which would point to his guilt."

[5] The court gave the jury the following instruction: "The court instructs the jury that a person in the exercise of his right of self defense not only has a right

to stand his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger." It was not error for the court to refuse to add to this instruction the additional element requested by defendant: "And he may pursue him in like manner, though the assailant has withdrawn from the combat, when he has reasonable ground to apprehend that the assailant will presently return and renew the assault." No authority is cited to justify an extension of the rule of the right of pursuit to the extent indicated by the requested instruction. The rule should not be enlarged to permit pursuit of an assailant who has in fact withdrawn from the combat.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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45 Cal.App.2d 802

PEOPLE v. FERNANDEZ.

Cr. 609.

District Court of Appeal, Fourth District, California.

June 5, 1941.

Criminal law 🔑1182

Where clerk's transcript was filed February 24, reporter's transcript was filed April 11, case was placed on calendar of May 27 for argument, but no argument was made and no brief filed on behalf of accused, judgment and order denying new trial were affirmed. Pen.Code, § 1253.

◆

Appeal from Superior Court, Riverside County; Franklin G. West, Judge.

Proceeding in the matter of the prosecution of Arnold Fernandez. From the judgment, and the order denying a new trial, accused appeals.

Affirmed.

Albert D. Trujillo, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This case comes before us on a motion to affirm the judgment under the provisions of section 1253 of the Penal Code.

The clerk's transcript was filed on February 24, 1941, and the reporter's transcript on April 11, 1941. The case was placed on the calendar of May 27, 1941, for argument. No argument was made and no brief has been filed on behalf of appellant. The motion must be granted.

The judgment and the order denying the new trial are affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

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45 Cal.App.2d 243

RISCO v. REUSS et al.

Civ. 12363.

District Court of Appeal, Second District, Division 1, California.

June 7, 1941.

1. Trespass 🔑40(2)

In action for wrongful trespass, mere allegation that plaintiff was owner of lease on premises and had operated a garage thereon for eight years, and had built up a good will, and that defendants wilfully and maliciously, intending to injure plaintiff, cut lock from door and placed one of defendants there with a revolver who excluded plaintiff therefrom, and deprived him of his right of possession, leasehold interest and business, did not state a cause of action.

2. Pleading 🔑34(1)

A complaint on general demurrer will be liberally construed with a view to substantial justice, yet such rule should not be so applied as to allow an unmeritorious cause of action to be assailed by a subterfuge of loose and equivocal statements.

3. Pleading 🔑225(1)

Where judgment of dismissal on demurrer was entered on June 6, 1939, and three days later plaintiff filed notice of motion for leave to file a third amended complaint without stating grounds of motion, and plaintiff had made no previous application for leave to amend after demurrer was sustained, and had not even offered a new verified complaint after the ruling on the demurrer, the motion was properly denied, since only under section 473 of the Code of Civil Procedure can an application for leave to amend be made after judgment. Code Civ. Proc. § 473.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Matt L. Risco against William K. Reuss and others for wrongful ouster from possession of premises. From a judgment dismissing the complaint, the plaintiff appeals.

Judgment affirmed.

Barry Sullivan, of Los Angeles, for appellant.

Hansen & Sweeney, of Los Angeles, for respondents.

DORAN, Justice.

Plaintiff appeals from a judgment dismissing the action herein after a demurrer to plaintiff's second amended complaint was sustained without leave to amend further.

The material allegations of the complaint in question are as follows: "That on or about the 31st day of January, 1939, the plaintiff was the owner of a lease on and in possession of, the premises known as 7908 South Vermont Avenue, Los Angeles, California, used and operated as a general garage and that plaintiff had operated said business on said premises for eight years and had builded a good will of business in connection with the general garage; that on or about the 31st day of January, 1939, the defendants willfully and maliciously, intending to injure the plaintiff, cut the lock off from the door of said premises, entered and ousted the plaintiff therefrom and stationed the defendant Roy C. McGinn at the door of said premises with a revolver; that as a direct and proximate result of the willful and malicious acts on the part of the defendants, as hereinbefore alleged the plaintiff was deprived of his right of possession, leasehold interest and business." To this complaint defendants demurred both generally and specially. The general demurrer only need be considered here.

[1] The complaint in question, as a statement of a cause of action in trespass, is fatally defective in that it fails to show a lawful possession of the premises by plaintiff at the time of the alleged trespass by defendants. Plaintiff's sole claim to possession of the premises is through a lease, no other right to possession is shown. But plaintiff merely alleges that on or about the date in question he "was the owner of a lease" on the premises. There is nothing to show that the lease was valid and in effect on the approximate date alleged. From all that appears, the lease may have expired some time previous to the approximate date of the alleged trespass. Nor does the allegation that for eight years the plaintiff "had" operated a business on the said premises throw any light on plaintiff's right to possession of the premises on the date alleged. It fails to allege when the eight years started or ended. Moreover, as to the alleged acts claimed to constitute the trespass, there is nothing to show that those acts were in themselves wrongful unless plaintiff were shown to have been rightfully in possession of the premises. From all that appears, defendants may have been exercising a right of ownership in the premises which was superior to plaintiff's possession. The elements requisite to plaintiff's cause of action are not necessarily implied from the facts alleged. As already pointed out, the facts as stated are subject to more than one interpretation.

[2] While upon a general demurrer a complaint will be liberally construed with a view to substantial justice (21 Cal.Jur. 54), yet such a rule should not be so applied as to allow an unmeritorious cause of action to be veiled by a subterfuge of loose and equivocal statements. Substantial justice requires that the essential facts appear at least by necessary implication from the allegations set forth. Such is not the case with the instant complaint, and the general demurrer thereto was properly sustained.

[3] The judgment of dismissal was entered herein on June 6, 1939. Three days later plaintiff filed a notice of motion for leave to file a third amended complaint. The grounds of the motion were not stated. Plaintiff had made no previous application for leave to amend after the demurrer was sustained and had not even offered a new verified complaint after the ruling on the

demurrer. The motion was denied, and properly so. It is well settled that only under the relief afforded by section 473 of the Code of Civil Procedure can an application for leave to amend be made after judgment. Reilly v. Richardson, 18 Cal.App.2d 352, 63 P.2d 1180; Keller v. Keller, 132 Cal.App. 343, 22 P.2d 798; Herz v. Hereford, 88 Cal.App. 290, 263 P. 382; Dent v. Superior Court, 7 Cal.App. 683, 684, 95 P. 672; Watterson v. Owens River Canal Co., 190 Cal. 88, 96, 210 P. 625.

The judgment is affirmed.

We concur: YORK, P. J.; WHITE, J.

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45 Cal.App.2d 188

RICHARDSON v. MICHEL et al.

Civ. 2648.

District Court of Appeal, Fourth District, California.

June 3, 1941.

Rehearing Denied July 1, 1941.

Hearing Denied July 30, 1941.

1. Fraud 🔑58(1)

Where direct proof of fraudulent intent is impossible, proof must come by inference from circumstances surrounding transaction, the relationship and interests of parties.

2. Fraudulent conveyances 🔑295(1)

Evidence relating to defendant bank president's knowledge of unsatisfactory condition of bank throughout year 1931 in which new bank stockholders' liability act became effective, and to the transfer by defendant, while in debt and only a few months before closing of bank, of all of his real and personal property with exception of bank stock to a newly incorporated investment company for stock of company which he transferred without consideration to his wife and children, established fraudulent nature of the transfer of property. St.1931, p. 338.

3. Evidence 🔑333(1)

The fact that a bank examiners' report of condition of bank included certain conclusions of the examiners did not make the document inadmissible.

4. Evidence 🔑333(1)

A bank examiners' report of condition of bank was not inadmissible because only one of two examiners was called as a witness and the other thereby became unavailable for cross-examination.

5. Appeal and error 🔑1054(1)

In action to set aside fraudulent transfers of property by defendant against whom judgment was thereafter obtained for amount of assessment against him as a bank stockholder, error, if any, in admission of letters written by defendant in connection with disaffirmance of purchase of certain stock in bank made while he was a minor was not prejudicial where case was tried without a jury.

6. Limitation of actions 🔑37(4)

Where complaint in action to set aside fraudulent transfers of property was based entirely upon fraud, the action came within provision of Code of Civil Procedure requiring an action for relief on ground of fraud to be brought within three years. Code Civ. Proc. § 338, subd. 4.

7. Fraudulent conveyances 🔑230, 233, 237(2)

A creditor seeking to reach property fraudulently transferred generally may either levy upon property fraudulently conveyed after having obtained a judgment upon his claim, bring action in equity to set aside fraudulent conveyance and subject property to satisfaction of his judgment or bring action in nature of a creditor's bill to subject property transferred to payment of his judgment.

8. Fraudulent conveyances 🔑230
Limitation of actions 🔑37(2)

Where creditor claiming that debtor fraudulently transferred property obtains judgment, levies upon property fraudulently conveyed and then purchases it, he may then bring an action to remove the cloud on his title, and in such case, rules governing quiet title actions are controlling and three-year statute of limitations applying to fraud actions is inapplicable. Code Civ.Proc. § 338, subd. 4.

9. Fraudulent conveyances 🔑241(5)

A creditor seeking to reach property fraudulently transferred is ordinarily required to exhaust legal remedy by issue of an execution and its return unsatisfied before maintaining a creditor's suit, but if relief is sought by an action to set aside conveyance, execution and return of nulla bona is unnecessary.

10. Fraudulent conveyances ⊂⊃241(5)
Limitation of actions ⊂⊃65(2)

In action to set aside fraudulent transfers, it was unnecessary as prerequisite to maintenance of action to levy an execution and have it returned unsatisfied, and therefore the delay in issuing the execution did not extend time at which statute of limitations began to run. Code Civ.Proc. § 338, subd. 4; Civ.Code, § 3439.

11. Limitation of actions ⊂⊃100(10, 11)

Under provision of Code of Civil Procedure requiring action for relief on ground of fraud to be brought within three years, time when period of limitations began to run depended upon whether judgment creditor had knowledge of material facts with respect to fraud at time of entry of judgment or, if he did not, it then depended upon when such facts were discovered or should have been discovered. Code Civ.Proc. § 338, subd. 4.

12. Limitation of actions ⊂⊃193

In action to set aside fraudulent transfers by creditor whose judgment was secured more than three years before filing of action, it is necessary to allege and prove when he first discovered fraud or times and circumstances under which facts in that connection came to his knowledge. Code Civ. Proc. § 338, subd. 4.

13. Limitation of actions ⊂⊃195(5)

Where defense of statute of limitations is properly presented in action to set aside fraudulent conveyance, facts and circumstances surrounding discovery of fraud must be shown in order that court may decide whether they furnish justification for the apparent delay.

14. Limitation of actions ⊂⊃193

In action to set aside fraudulent conveyances where defendants alleged that action was barred by limitations, the burden was on plaintiff to allege and prove necessary facts to show that action was not barred. Code Civ.Proc. § 338, subd. 4.

15. Appeal and error ⊂⊃1178(6)

Where defendants in judgment creditor's action to set aside fraudulent conveyances had alleged that action was barred by limitations, but neither party introduced any evidence on issue of whether judgment creditor had knowledge of fraud at time judgment was entered or concerning time and circumstances of his discovery of fraud, reversal of judgment and remandment of cause for retrial on that issue was required. Code Civ.Proc. § 338, subd. 4.

16. Appeal and error ⊂⊃1178(8)

Where trial court had made finding on issue of whether judgment creditor's action to set aside fraudulent conveyances was barred by limitations without having required introduction of evidence relating to that issue, and remandment of cause for retrial on that issue was required, judgment creditor was entitled, if he so desired, to amend his complaint. Code Civ.Proc. § 338, subd. 4.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Friend W. Richardson, etc., against Herman Michel and others to set aside certain allegedly fraudulent transfers of property. Judgment for plaintiff, and the named defendant and some of the other defendants appeal.

Judgment reversed and cause remanded with directions.

Ivan G. McDaniel, of Los Angeles (George C. Lyon, of Los Angeles, of counsel), for appellants.

John Gee Clark, of Long Beach (Clyde Doyle and Walter Desmond, Jr., both of Long Beach, of counsel), for respondent.

BARNARD, Presiding Justice.

This is an action to set aside certain allegedly fraudulent transfers of property. In 1931, the defendant Herman Michel owned some 780 shares of stock in the Marine Bank of Santa Monica. He was then 56 years of age, was president of the Marine Bank, president of the Santa Monica Dairy Co., an officer of the Imperial Ice Co., and was mayor of the city of Santa Monica. He also owned certain other real and personal property.

On August 28, 1931, Michel caused to be incorporated the Michel Investment Co., Inc., and a few days later he transferred all of his real and personal property, with the exception of his stock in the Marine Bank, to that corporation in exchange for 922 shares of its stock. The assets thus transferred to the corporation were reported to the Corporation Commissioner as having a cost value of $299,179.58. These 922 shares were issued to him and on September 16, 1931, he gave all of them, without consideration, to his wife and children, transferring varying numbers of shares to each. On October 1, 1931, under his direction, his wife and children created a voting trust exchanging their shares of stock for certificates of beneficial interest in the voting trust. Herman Michel was appointed trustee to vote the stock, and the control of the voting trust was placed in the hands of a beneficiaries committee appointed by the certificate holders.

On December 1, 1931, Herman Michel was defeated in his campaign for reelection as mayor. Shortly thereafter, he attempted to secure from another bank a loan of $100,000 for the Marine Bank, to be secured by mortgages having a face value of $250,000. On the day this loan was refused he requested the Superintendent of Banks to take charge of the Marine Bank and on December 18, 1931, that bank was closed. In February, 1932, the Superintendent of Banks levied an assessment upon the stockholders of that bank, including Herman Michel. His assessment not being paid, the same was reduced to judgment on August 11, 1933, which judgment has become final. Rainey v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148. The present action was begun June 8, 1937, some three years and ten months after the other judgment was entered and some thirteen months after the appeal in that case was decided. The court found in all respects in favor of the plaintiff herein and a part of the defendants have appealed.

The appellants first contend that the court's findings to the effect that the transfers were made with fraudulent intent are entirely unsupported. The evidence is rather voluminous and it would serve no useful purpose to completely review it here. In general, appellants argue that the evidence discloses that Michel had begun to plan to make these transfers as early as the fall of 1930; that he believed the bank to be in good condition at the time the transfers were made; that the condition of the bank had been improving for some months before that time; that it continued to improve for a month or two thereafter; that the closing of the bank in December was brought about by heavy withdrawals for the payment of taxes at that season, and also by the loss of a large number of deposits brought about by his defeat for reelection as mayor; and that nothing appears except a natural desire on the part of Michel to turn over a large part of his property so that his children might learn to manage it, while he kept for himself the bank business in which he was most interested. Portions of the evidence are cited in support of these views and it is argued that they justify and compel inferences contrary to those drawn by the trial court, with the result that the court's findings are not sustained by the evidence.

[1] From the nature of such a case as this it is usually impossible to produce direct proof of fraudulent intent. In this connection the court said, in Fross v. Wotton, 3 Cal.2d 384, 44 P.2d 350, 354: "For this reason and because the real intent of the parties and the facts of the transactions are peculiarly within the knowledge of those sought to be charged with the fraud, proof indicative of fraud must come by inference from the circumstances surrounding the transaction, the relationship and interests of the parties."

[2] The Marine Bank has paid no dividends since 1928, the paying of dividends having been stopped by the Superintendent of Banks because of the bank's condition. Herman Michel had received no salary as president of the bank since 1928. It appears that the condition of the bank had been criticised in examiners' reports for at least a year or two before these transfers were made and a large number of bad loans had been charged off. In an examiners' report, made after an examination in December, 1930, and January, 1931, it was stated that dividends had been postponed by the Superintendent of Banks on account of bad and doubtful notes; that the current examination showed losses amounting to $36,789.45, which would eliminate the undivided profits account and reduce the surplus from $24,000 to $10,000; that the savings department showed an unsatisfactory ratio of loans to deposits with practically no reserve; that the bank's bond investment showed a shrinkage of $22,730; that an annual depreciation on fixtures must be charged, and a large number of the bank's loans were severely criticised. A number of letters between officials of the bank and the Superintendent of Banks were written during the next several months, in which the Superintendent of Banks insisted that various things be done to correct the condition of the bank and in which the officials apologized for being unable to show more progress, but claimed that every effort was being made in that direction. Among these letters is one written to the Superintendent

of Banks on June 29, 1931, in which the banker says:

> "We are aware that we have not fully complied with your request in regard to charging off loans, and setting up a reserve for bond depreciation and depreciating our Furniture and Fixture account. Our reason for not complying fully with your request is that, under the present trying conditions, it is necessary that we make as strong a statement as possible, and, if we had charged off all the items you requested, it would have been necessary to charge a portion to Surplus, and this might have caused unfavorable comment by our customers and might have caused us to lose a considerable number of accounts."

The Superintendent of Banks wrote to the Marine Bank under date of July 30, 1931, "We realize that you do not wish to show too weak a statement to the public, but nevertheless, cannot permit you to continue to report a condition which is not substantially correct." And also, "We wish to cooperate with you fully, but feel that there is nothing to be gained by failing to face the situation just as it is and to have a definite program which will put your bank in condition within a reasonable period of time." Herman Michel, when asked to trace the matter of the deposits of the bank "as they existed down to the year 1931", testified: "Well, the deposits kept on declining for some time, and finally we made a change of manager (this was in March, 1931) and brought in Mr. Kibbe and the bank deposits began to pick up. They stayed up until about October, then, they began dropping again." On August 11, 1931, the new manager of the bank wrote to the Superintendent of Banks that they realized "that the depreciation of our bonds is a very serious matter", and that it was their intention to cut down expenses and build up earnings to cover their losses. There is evidence that the bank was in an unsatisfactory condition before and throughout the year 1931, that it had many unsatisfactory loans, that it suffered considerable losses, that its condition was severely criticised by the Superintendent of Banks on a number of occasions with suggestions as to what must be done, and that the bank officials were unable to fully comply with these suggestions. There is also evidence that these reports and letters were brought to the attention of Herman Michel, that he was in the bank practically every day, and that he had full knowledge of the situation that existed.

While the bank's affairs were in this condition Michel gave away all of his other property, keeping only this bank stock which was neither paying dividends nor leading to a salary. Shortly before the transfer this bank stock had been subjected to a new double liability under the Bank Stockholders Liability Act, which was approved by the governor on April 24, 1931, and became effective on August 14, 1931. Stats.1931, p. 338. At the time he made these transfers he owed $11,000 to another bank and $25,000 to two individuals. The only asset he had remaining, aside from the bank stock, was life insurance with a surrender value of $13,000. The first thing the Michel Investment Company did, after the transaction was completed, was to borrow money from another bank with which to pay the $11,000 debt owed by Herman Michel. Shortly thereafter, when the two persons to whom he owed $25,000 threatened to proceed to set aside these transfers the Michel Investment Company indorsed Herman Michel's note for $25,000 and assumed responsibility for that debt. After the transfers were completed Herman Michel continued to manage the properties, both real and personal, which he had transferred to his wife and children and continued to draw salaries as president of the dairy company and president of the ice company amounting to $15,000 a year, these salaries being paid to the Michel Investment Company.

Without going any further into details it must be held that the evidence in its entirety, with the reasonable inferences therefrom, sufficiently sustains the court's findings with reference to the fraudulent nature of the transfers which are here attacked.

[3-5] Appellants make two assignments of error in connection with the admission of evidence. It is first contended that the report of the bank examiners of the examination made of the Marine Bank in the latter part of December, 1930, and the early part of January, 1931, was inadmissible. It is argued that portions of the report are the conclusions of the examiners and that since only one of the two examiners was called as a witness the other examiner was not available for cross-examination. The document is sufficiently connected up through the testimony of one of the examiners.

The fact that it included certain conclusions of the examiners did not make the document inadmissible and even those matters had a bearing as being things which were called to the attention of Michel. If any of the purported facts set forth in the document were not within the knowledge of the examiner who testified, that fact could have been developed in the cross-examination of that witness. The second objection to the evidence is to the admission of three letters written by appellant Walter J. Michel and his attorney, in connection with Walter's disaffirmance of his purchase of certain stock in this bank made while he was a minor. The matter does not seem to be very material, although it had some bearing in connection with another matter which it is unnecessary to discuss in this opinion because of our decision on the main issues. There was no jury and any possible error to which our attention is called in connection with the admission of evidence could not be deemed sufficiently prejudicial to have affected the result or to justify a reversal.

Appellants' fourth and fifth points are sufficiently answered by the reasoning and holdings in Rainey v. Michel, supra, and by the fact that a setting aside of these transfers, through this action, is effective not only as to Michel but as to the other appellants as well.

The appellants contend that this action was barred by the provisions of section 338, subdivision 4 of the Code of Civil Procedure, which provides that an action for relief on the ground of fraud must be brought within three years. The respondent, on the other hand, argues that section 343 of that code is controlling here. That section applies only to actions not covered in the preceding sections.

[6] As conceded by both parties this action is based upon section 3439 of the Civil Code, which provides that every transfer of property with intent to delay or defraud any creditor or any person is void against all creditors and their successors in interest. The complaint in this action was based entirely upon fraud. It was alleged and found that certain property was transferred with intent to defraud the plaintiff, and the judgment declared the transfers fraudulent and void. The gist of the action is fraud, relief is sought on that ground, and the action comes directly within the provisions of section 338, subdivision 4.

[7] The respondent contends, however, that even though this statute is applicable the action was not barred because the period of limitation would not begin to run until execution was issued with a return of nulla bona. The real question in this connection is whether the other assets of the debtor must first be exhausted before this action could be maintained. Whether such other assets must first be exhausted depends, usually, on the form of the action which is brought. The general rule as to the remedies available to a creditor seeking to reach property fraudulently transferred is set forth in 12 California Jurisprudence page 1029, and approved in Pedro v. Soares, 18 Cal.App.2d 600, 64 P.2d 776, 780, as follows:

"'A creditor has generally an election of one of three remedies by which he may reach property fraudulently transferred; (1) having obtained a judgment upon his claim he may levy upon the property fraudulently conveyed, since the conveyance, so far as he is concerned, leaves the legal title and ownership in the fraudulent grantor; or, (2) he may bring an action in equity to set aside the fraudulent conveyance and subject the property to the satisfaction of his judgment lien in which case the action is not one on the judgment but is an equitable one for relief against the obstruction caused by the fraudulent transfer which hinders him in satisfying his claim by the ordinary process of law; or (3) he may bring an action in the nature of a creditor's bill for the purpose of subjecting to the payment of his judgment, the money or property transferred or concealed in fraud of his rights.'"

[8] In the first of these where a creditor has sold the transferred property on execution and purchased the same, he may then bring an action to remove the cloud on his title. In such a case the gist of the action is not fraud and the purpose of the action is not to set aside a transfer. The plaintiff is suing as an owner, and not as a creditor, for the purpose of quieting his title as against a cloud thereon, and the rules governing quiet title actions are controlling and the three-year statute of limitations does not apply. Hager v. Shindler, 29 Cal. 47; Stewart v. Thompson, 32 Cal. 260; Scholle v. Finnell, 166 Cal. 546, 137 P. 241.

[9] The second and third remedies above referred to cover different situations where the creditor desires to bring one of

the two equitable actions, without first selling the property on execution. The distinction between these two forms of action is pointed out in Wadsworth v. Schisselbauer, 32 Minn. 84, 19 N.W. 390, as follows:

"There are two classes of cases both commonly called creditors' suits, which, although closely allied, are clearly distinguishable. The first, a creditor's suit, strictly so called, is where the creditor seeks to satisfy his judgment out of the equitable assets of the debtor which could not be reached on execution. The general rule is that such an action cannot be brought until the creditor has exhausted his remedy at law by the issue of an execution and its return unsatisfied. * * *

"The second class of cases is where property legally liable to execution has been fraudulently conveyed or incumbered by the debtor, and the creditor brings the action to set aside the conveyance or incumbrance as an obstruction to the enforcement of his lien; for, though the property might be sold on execution notwithstanding the fraudulent conveyance, the creditor will not be required to sell a doubtful or obstructed title. In the latter class of cases the prevailing doctrine is that it is not necessary to allege that an execution has been returned unsatisfied, or that the debtor has no other property out of which the judgment can be satisfied; * * *."

While some confusion as between these two forms of action appears in some of the language used in some of the decisions in this state, the distinction above noted has been quite generally followed to the extent that issuance of execution and return of nulla bona thereon has been required, except in cases where it appears that it would have been useless, in actions in the nature of a creditor's bill, while such a showing has not been required in actions to set aside a conveyance. In some of the earlier cases language was used to the effect that a creditor could not attack a fraudulent transfer until he had exhausted his remedy by judgment, execution and return of nulla bona. Heyneman v. Dannenberg, 6 Cal. 376, 65 Am.Dec. 519; Bickerstaff v. Doub, 19 Cal. 109, 79 Am.Dec. 204; Castle v. Bader, 23 Cal. 75. In the later cases, a distinction is made in accordance with the form of the action.

Some of the cases involving a creditor's bill may first be noted. Pedro v. Soares, supra, was such an action to reach the proceeds of cattle which had been sold pursuant to the foreclosure of a mortgage given to defeat creditors. After pointing out that this was "not an action to set aside a fraudulent conveyance", but that it was "a suit to compel the application of trust funds" to the payment of a creditor's claim which would otherwise be defeated, the court said it was necessary to take out execution and attempt to levy it before the action could be maintained. In Herrlich v. Kaufmann, 99 Cal. 271, 33 P. 857, 37 Am. St.Rep. 50, an attempt was made to reach money in the hands of an assignee for the benefit of creditors. The action was one in the nature of a creditor's bill and no fraudulent conveyance or attempt to set the same aside were involved. While the case was reversed for other reasons, the court remarked that in a case of a creditor's bill for the purpose of reaching assets which were not subject to execution at law it was necessary to allege that an execution had been issued and returned unsatisfied. Sherman v. S. K. D. Oil Co., 185 Cal. 534, 197 P. 799, was an action by a creditor against the stockholders of a defunct corporation on their liability in equity as holders of watered stock in the debtor corporation. The court stated that this was an equitable action in the nature of a creditor's bill and held that it was necessary to have a judgment against the corporation with return of nulla bona, or to otherwise show the insolvency of the corporation. It was also held that the applicable statute of limitations was section 343 of the Code of Civil Procedure and not section 338, subdivision 4.

Turning then to cases involving actions to set aside conveyances: In Jenner v. Murphy, 6 Cal.App. 434, 92 P. 405, 408, a wife sued to have certain transfers made by her former husband declared void as to her, she having obtained a judgment against the husband. The trial court had found that she had a judgment "upon which she was entitled to an execution". The judgment was affirmed, the court saying: "We have never before heard of a rule that one must be a judgment creditor, and also have gone through the form of a levy and sale under execution, before he could maintain an action to set aside a fraudulent conveyance. The contention is not worthy of further discussion." Sewell v. Price, 164 Cal. 265, 128 P. 407, 409, was an action to set aside fraudulent transfers although the court in one place speaks of it as an action "of the kind commonly known as a creditor's bill". A judgment in favor of the plaintiff was affirmed and in speaking of such an action the court said: "It is really an action for equitable relief against the obstruction caused by a transfer, which hinders him in satisfying his claim by the ordinary process of law; that is to say, by an execution. If, then, he has put himself in a position to levy execution, he has done everything necessary to enable him to attack the transfer which hinders his enjoyment of his right."

In Title Ins., etc., Co. v. California Dev. Co., 171 Cal. 173, 152 P. 542, 559, the court said: "A transfer made with intent to delay or defraud any creditor of his demands is void against all creditors of the debtor. Civ.Code, § 3439. 'The question of fraudulent intent is one of fact and not of law.' Civ.Code, § 3442. If that intent was made out, it is not necessary to show that the debtor was insolvent at the time." Rossen v. Villanueva, 175 Cal. 632, 166 P. 1004, was an action to set aside a transfer as having been made with the intent to defraud the plaintiff. While in that case an execution had been issued and returned unsatisfied, the court cited two earlier cases to the effect that when such a plaintiff has put himself in a position to levy execution he may attack the transfer which hinders his rights. In Adams v. Bell, 5 Cal.2d 697, 56 P.2d 208, 210, an action to set aside a conveyance although an execution had there been returned unsatisfied, the court, in passing on a claim that the defendant was not insolvent at the time of the transfer, said: "As stated above, it is not always necessary to show that a debtor has been stripped of all other assets in order to set aside a fraudulent transfer. Intent to defraud, not present insolvency, is the controlling element in these cases." The principle there applied supports the conclusion that in order to set aside such a transfer it is not essential to have an execution returned unsatisfied.

Kemp v. Lynch, 8 Cal.2d 457, 65 P.2d 1316, 1317, was another action to set aside a fraudulent conveyance. Execution had been issued and returned unsatisfied. However, the court reiterated the rule that in such cases "a judgment creditor who is in a position to levy execution may bring an action to set aside fraudulent conveyances". In Widener v. Hartnett, 12 Cal.2d 287, 83 P.2d 718, the court stated that a creditor may attack the transfer as fraudulent when he has reduced his claim to judgment and has endeavored without avail to collect it by execution. This statement, which was in accordance with the facts there appearing, was made in connection with the discussion of a contention that the action was premature since it was brought before the prior judgment had become final. While the statement was undoubtedly true, the question as to whether an attempt to collect by execution was a necessary prerequisite to maintaining an action to set aside a transfer was not before the court and we do not view that case as intending to change the rule in that regard, which had been long established under the other decisions to which we have referred.

[10] Applying these principles to the case now before us, we conclude that since this is an action to set aside fraudulent transfers, it was unnecessary to levy execution and have it returned unsatisfied. It follows that the delay in issuing execution did not have the effect of extending the time at which the statute of limitations would begin to run.

[11] In Adams v. Bell, supra, an action to set aside a fraudulent conveyance, the court said: "Ordinarily, such cause of action would accrue on date of judgment, but it has been held that, if the creditor knows nothing about the fraudulent conveyance, the cause (in the absence of laches) does not arise until he discovers the fraud by which his rights have been invaded." The time when the period of limitation prescribed by section 338, subdivision 4 began to run in the instant case depends upon whether the respondent had knowledge of the material facts with respect to the fraud at the time his judgment was entered or, if not, upon when such facts were discovered, or perhaps should have been discovered by him. Tully v. Tully, 137 Cal. 60, 69 P. 700; Adams v. Bell, supra.

[12, 13] While it is alleged that respondent's judgment was secured on August 11, 1933, more than three years before this action was filed, there are no allegations in the complaint as to when the respondent first discovered the fraud, or as to the times and circumstances under which the facts in that connection came to his knowledge. In a fraud action such as this it is necessary to allege and prove such facts. Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268. The rule in these cases is that if the defense of the statute of limitations is properly presented the facts and circumstances sur-

rounding the discovery of the fraud must be shown in order that the court may decide whether they furnish justification for the apparent delay. Graham v. Los Angeles First N. T. & S. Bank, 3 Cal.2d 37, 43 P. 2d 543. In Adams v. Bell, supra, the court refused to consider a contention, first made on appeal, that the complaint was deficient in the respect just noted, on the ground that the point had not been raised in the trial court, where a suitable amendment might have been permitted, it being also observed that the plaintiff had stated that the facts were not disclosed to her until the return of the execution unsatisfied.

A different situation here appears. The appellants alleged in their answer that the cause of action and all thereof was barred by the provisions of section 338, subdivision 4, and also alleged laches. They further specifically alleged that more than three years had intervened between the date of respondent's judgment and the time this action was brought, and that during all of this time the respondent had possessed full knowledge of the facts. Moreover, the appellants objected to the first evidence offered on the ground that the complaint did not state a cause of action and that the action was barred by the statute of limitations, and argued to the court that over three years had elapsed after the judgment before this action was commenced. The court suggested that counsel put on their case and then submit briefs on these other matters, which seems to have been done.

While this point was thus directly raised and presented in the trial court we are pointed to no evidence, and we can find none, having any bearing on whether the respondent had knowledge of the material facts at the time this judgment was entered, or upon the time and circumstances of his discovery of such facts. Although the court found that the cause of action was not barred by section 338, subdivision 4, or by any other statute of limitations, there is no evidence in the record to sustain that finding. If the respondent had such knowledge at the time his judgment was entered, or if the facts and circumstances surrounding a later discovery were not sufficient to suspend the running of the statute, the action would be barred. A question of fact was presented which could not be decided in the absence of any evidence as to the material facts.

[14, 15] While the burden was on the respondent to allege and prove the necessary facts to show that his action was not barred it is also true that no evidence was introduced by the appellants supporting their allegation that all facts were known to the respondent at all times from and after the entry of his judgment. It would seem from the record that both parties avoided this important issue in so far as testimony is concerned, with the result that it was decided without any evidence on the point. The practical effect is that there has been no trial on that issue and the record indicates that neither party is free from blame. That portion of the action should be retried and the material facts ascertained before a final judgment is entered.

The appellants further contend that the respondent was guilty of laches and that the court's finding to the contrary is not sustained. It is argued that they spent money in financing, improving and maintaining portions of the transferred property, that this was done in reliance upon the respondent's delay in attacking the transfers, and that they were injured thereby. This question is closely related to the issue of the statute of limitations. In so far as its other aspects are concerned we are satisfied that the evidence is sufficient to sustain the court's finding. In other words, if the action is not barred by the statute there is nothing in this contention which would justify a reversal.

[16] The fraud issue was very thoroughly tried, and the evidence in support of the findings in that connection is so overwhelming that it cannot be reasonably held that a retrial thereof might be expected to produce a different result, and is such in all fairness, as to obviate the necessity or desirability of such a retrial. The issue as to the statute of limitations, in effect, was not tried at all. The respondent, if he so desires, should be permitted to amend his complaint, and the material facts should be ascertained and that issue decided upon the evidence produced.

The judgment is reversed and the cause remanded for a retrial on the sole issue as to the statute of limitations, with directions to the trial court to make the appropriate finding, to enter judgment in favor of the defendants if the action is found to be barred by the statute, and if the contrary is found to enter judgment in favor of the plaintiff for the amount of the original judgment, with accrued interest.

We concur: MARKS, J.; GRIFFIN, J.

45 Cal.App.2d 203

PEOPLE v. FLINT.

Cr. No. 3421.

District Court of Appeal, Second District,
Division 2, California.
June 4, 1941.

1. Criminal law ⚿1144(13)

On defendant's appeal from manslaughter conviction, evidence was viewed most favorably to the people.

2. Homicide ⚿250

Evidence sustained conviction for manslaughter. Pen.Code, § 192, subd. 1.

3. Criminal law ⚿1159(2)

An appellate court will not attempt to determine weight of the evidence, but will decide from the face of the evidence whether it can be held that sufficient facts could have been found by the jury to warrant inference of guilt.

4. Criminal law ⚿1159(2)

If the circumstances reasonably justify verdict of jury finding defendant guilty, opinion of appellate court that those circumstances might also reasonably be reconciled with innocence of defendant will not justify appellate court in interfering with the determination of the jury.

5. Criminal law ⚿1130(2)

On appeal from judgment finding defendant guilty of manslaughter, contention that trial court committed prejudicial error in instructing jury and in refusing to give requested instructions could not be considered, where defendant did not comply with court rule requiring party alleging error to set forth in his brief not alone the instructions which it is alleged were erroneously given or refused, but also all instructions bearing on the subject covered by the instructions given or refused. Rules for the Supreme Court and District Courts of Appeal, rule 8, § 3.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Marvin F. Flint was convicted of manslaughter and he appeals.

Affirmed.

Beecher S. Stowe, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of manslaughter after trial before a jury defendant appeals. There is also an appeal from the order denying his motion for a new trial.

[1] The evidence being viewed most favorably to the people (respondent), the essential facts are:

July 20, 1940, Charles M. Andreason was employed at Riley's Pool Hall in Bell, California. His duties included, among others, tending bar and making collections from card and pool games. Shortly after 11:00 p. m. Mr. Andreason told defendant to "check out" of a poker game in which he was engaged. Thereupon a discussion ensued between Mr. Andreason and defendant, followed by a scuffle between the two men, during the course of which defendant with a knife stabbed Mr. Andreason in the abdomen, causing his death.

Defendant relies for reversal of the judgment on these propositions:

First: There is no substantial evidence to sustain the judgment that defendant was guilty of voluntary manslaughter.

Second: The trial court committed prejudicial error in (a) Instructing the jury, and (b) Refusing to give instructions requested by defendant.

[2-4] Defendant's first proposition is untenable. An examination of the record discloses substantial evidence considered in connection with the inferences which the jury may have reasonably drawn therefrom to sustain the jury's implied finding of the facts set forth above, together with each and every material finding of fact upon which the judgment was necessarily predicated. Several eyewitnesses testified to the recited facts in the case. An appellate court will not attempt to determine the weight of the evidence but will decide on the face of the evidence whether it can be held that sufficient facts could have been found by the jury to warrant the inference of guilt. If the circumstances reasonably justify the verdict of the jury, the opinion of the appellate court that those circumstances might also reasonably be reconciled with the innocence of the defendant, will not justify the appellate court in interfering with the determination of the jury (People v. Pianezzi, 42 Cal.App.2d 270, 277, 108 P.2d 685).

In the instant case, from the facts outlined above, it is evident that the jury may have reasonably concluded that defendant killed the deceased upon a sudden quarrel and hence was guilty of manslaughter as defined in section 192, subsection 1 of the Penal Code.

[5] The second proposition urged by defendant will not be considered by us for the reason that he has failed to observe the provisions of Rule VIII, section 3 of this court requiring the party alleging error to set forth in his brief, not alone the instructions which it is alleged were erroneously (a) given or (b) refused, but also *all* instructions bearing upon the subject covered by the given or refused instructions (Rule VIII, sec. 3, Rules for the Supreme Court and District Courts of Appeal, 213 Cal. xlvii; People v. Stone, 19 Cal.App.2d 91, 93, 64 P.2d 981; People v. Ramirez, 21 Cal. App.2d 466, 468, 69 P.2d 913.)

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and WOOD, J., concurred.

45 Cal.App.2d 235

BADGER v. HOMAN et al.

Civ. 2618.

District Court of Appeal, Fourth District, California.

June 6, 1941.

1. Municipal corporations 🔑200

To impose duty on city police and firemen's pension board to order payment of pension to disabled city fireman, terms of city pension ordinance must be complied with.

2. Mandamus 🔑173

In mandamus proceeding to compel city police and firemen's pension board to pay pension to disabled fireman, whether part of petitioner's disability arising from injuries received in performance of his duties, as found by Industrial Accident Commission, which awarded him compensation for permanent partial disability, was sufficient to necessitate his retirement from active service, as required to entitle him to pension under city ordinance, was a "question of fact" to be determined before payment of pension could be ordered.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Municipal corporations 🔑200

Under section of city ordinance, providing that if any member of city police or fire department became physically disabled because of bodily injury received in discharge of his duties or as result of such injury as to render necessary his retirement from active service, city police and firemen's pension board shall order that "such person retired thereafter" be paid yearly pension during his lifetime, suffering of injury by city fireman does not automatically retire him, but fact question whether he was injured to such extent as to necessitate his retirement is left for decision of such board after hearing under other sections of ordinance.

4. Mandamus 🔑172

Where disabled city fireman applied to city police and firemen's pension board for pension under section of city ordinance providing that any fire department member, desiring to be retired on pension because of disability, shall file verified petition, setting forth certain facts, with such board, applicant's contention that such section applies only to disabled members applying for retirement and is inapplicable in his case because it was board's duty under another section of ordinance to order payment of pension to him when he became disabled, without application therefor, need not be considered in mandamus proceeding to compel board to pay pension to applicant.

5. Municipal corporations 🔑200

Under section of city ordinance, providing that no policeman or fireman shall be retired for disability thereunder, unless certificates of disability, subscribed and sworn to before physician selected by applicant for retirement, city physician, and physician selected by city pension board, are filed with such board, and that it may require additional evidence of applicant's disability before ordering his retirement, hearing and action by board is required and certain minimum requirements must be complied with before it may order a fireman's retirement on pension, as preceding section of ordinance, requiring board to order payment of pension to any police or fire department member so disabled as result of injuries received in discharge of his duties as to necessitate his retirement from active service, is not self-executing.

6. Pleading ⚷345(1)

In mandamus proceeding to compel city police and firemen's pension board to pay pension to petitioner as disabled fireman, where it appeared from face of pleadings that no hearing after notice to petitioner was had by board on his application for pension, that minimum evidence of disability required by city ordinance was not before board, and that neither board nor any other fact-finding body ever determined that petitioner's injuries, incurred in line of duty, were sufficient to necessitate his retirement from active service, board could not be peremptorily ordered to place petitioner on pension list and pay him a pension, and judgment on pleadings, directing issuance of peremptory writ, was improper.

7. Mandamus ⚷187(9)

In mandamus proceeding to compel city police and firemen's pension board to place petitioner's name on pension roll and pay him a pension as disabled city fireman after his dismissal from fire department, questions whether he was member of department within pension ordinance and entitled to benefit of any provisions thereof, except section entitling any fire department member separated from service to withdraw all moneys paid by him into pension fund, with specified additional sum, need not be decided on appeal from judgment granting writ of mandate, and anything said by appellate court on such questions would be purely dicta.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Proceeding by Alvin E. Badger for a writ of mandate, directing Frank A. Homan and others, as members of the police and firemen's pension board of the city of Fresno, to place petitioner on the firemen's pension roll of such city and pay him a pension. From a judgment directing issuance of a peremptory writ, defendants appeal.

Reversed.

C. M. Ozias, City Atty., of Fresno, for appellant.

Rae B. Carter and Lawrence Kennedy, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This was an application for a writ of mandate directing the defendants to place the petitioner upon the pension roll of the city of Fresno and to pay to him a pension in accordance with an ordinance of that city. After answer filed a motion for judgment on the pleadings was granted and a judgment entered directing the issuance of a peremptory writ, from which judgment the defendants have appealed.

The allegations of the petition disclose the following facts: The petitioner was employed as a member of the Fresno city fire department from June 2, 1922, to January 18, 1939, when he was dismissed. On February 5, 1937, while engaged in his duties, he stepped in a depression causing him to fall, resulting in a severe pain in his low back. He returned to work on March 8, 1937, although he still continued to suffer pain and discomfort. On April 21, 1937, his back again caused him to lay off from work. On May 5, 1937, he was ordered to and did return to work and continued although suffering pain and discomfort, until May 1, 1938, when his back again gave way while he was lifting a load of 60 to 90 pounds and he stopped work. He returned to work on October 1, 1938, and worked for one month, when he left his work because of the pain from his back injury. During all of these absences from work he received compensation and medical care from the state compensation insurance fund, the city's insurance carrier.

On December 21, 1938, while he was receiving such compensation and while he was on a trip to San Francisco, where he had been sent by the insurance carrier for medical and surgical examination, he became intoxicated and received severe and extensive injuries in a collision between an automobile in which he was riding and another automobile. On January 18, 1939, he was served with notice of dismissal from the department, four charges being set forth. After a hearing before the Civil Service Board his dismissal was approved and sustained on March 7, 1939, it being held that two of the charges, including one of becoming intoxicated in violation of the rules of the department, were sustained by the evidence.

On March 8, 1940, the Industrial Accident Commission awarded him a fixed sum as compensation for a permanent partial disability, the award being entered against the insurance carrier, and based upon the approval of a compromise and upon stipulated findings. Among other things, it was thus found that the petitioner had suffered injuries to his back, some of which arose out of and in the course of his employment and others of which occurred under circumstances not connected with the performance of any duty in the course of his employment; that he also had a condition of spine which pre-existed any of these injuries; that as a result of these injuries and the pre-existing condition he had a permanent partial disability which was fixed at 75¾ per cent, of which one-third or 25½ per cent was due to injuries.

On April 25, 1940, this petitioner filed with the pension board a petition for a pension, under the provisions of Ordinance No. 1415 of said city, setting forth the nature and extent of his injuries and disability received in the line of duty as above set forth, accompanied by the verified statement of a physician stating the result of his examination and further stating that petitioner could not return to regular duty requiring sudden and strenuous activity "although he might do special work on a partial disability basis". His petition for a pension was denied by the pension board on June 6, 1940.

It is further alleged that petitioner was not notified of any hearing before the pension board, that he was given no opportunity to present evidence in support of his petition, that at no time had he been requested or ordered to undergo a medical examination as required by the terms of Ordinance No. 1415, and that no such medical examination was had. These allegations, relating to the hearing before the pension board, are not denied in the answer.

[1] Petitioner claims to be entitled to a pension under the provisions of Ordinance No. 1415 of the city of Fresno, being the Police and Firemen's Pension Ordinance. Only such portions of that ordinance will be referred to as are material here. Section 10 thereof states that the provisions of the ordinance shall apply to all members of the fire department. Section 19 provides that any member of the fire deparment who "shall become separated from the service either voluntarily or involuntarily" shall be entitled to withdraw from the pension fund all moneys he has paid into that fund, with $100 additional. These two sections seem to imply that a person must be a member of the department in order to be entitled to a pension under the provisions of the ordinance, and that a person separated from the department, whether voluntarily or involuntarily, is to receive a certain refund instead of the pension otherwise provided for. Be that as it may, and whether or not this petitioner would still be considered a member of the department within the meaning of the ordinance, and in so far as his pension rights are concerned, the fact remains that the terms of the ordinance must be complied with before it can become the duty of the pension board to order a pension paid to him.

Section 2 of the ordinance contains provisions for pensions based upon services of 20, 25 and 30 years, respectively, most of which are not material here. However, this section contains the further provision that after such requisite times have been served the removal of a member from the department shall not deprive him of a pension, unless it be for certain named serious offenses. The very fact that such a provision is contained in the ordinance is quite suggestive of an intent that the removal of a member from the department before such times have been served would deprive him of pension benefits.

Section 5 of the ordinance reads, in part, as follows: "Should any member of the Police or Fire Department become physically disabled by reason of bodily injury received in, or by sickness caused by the discharge of the duties of such person in such department, or shall become so physically or mentally disabled as a result of such injury or sickness as to render necessary his retirement from active service, the pension board shall order and direct that such person retired thereafter be paid during his lifetime, * * * a yearly pension * * *".

[2] The respondent argues that the fact that he was so disabled by injuries received in the line of duty as to render necessary his retirement from active service appears from the findings of the Industrial Accident Commission, to which we have referred. It may be observed, however, that it was there found, as a matter of compromise and stipulation with another party and for another purpose, that his percentage of disability was about 75% and that only one-third of this arose from his injuries, and it was not even definitely found that this 25% arose from injuries received in the performance of his duties.

There is nothing to show whether a 75 per cent disability would be sufficient to render necessary his retirement from active service or whether, if it would, a 25 per cent disability would be sufficient for that purpose, two-thirds of this petitioner's disability having arisen from other causes. Although the findings of the Industrial Accident Commission were sufficient for their purpose a question remains here whether that part of petitioner's disability which arose through the discharge of his duties was sufficient to render his retirement from active service necessary. Apparently it was not, because he had not been retired from active service at the time he was injured in an automobile accident. In any event, this was a question of fact to be determined before the payment of a pension could be ordered.

[3] The respondent further argues that section 5 of the ordinance is self-executing, that nothing was required of him in the way of procedure, and that when he became disabled it was the duty of the pension board to order him placed upon the pension list. If this were true, a nice question would be presented as to just when he became disabled to the required extent and when the pension board became obligated to thus act under the circumstances here shown. Section 5, while it permits retirement on pension for disability caused by service injury, provides that it shall be allowed only when the injury is such as to render necessary such retirement from active service, and that the pension board shall then order the pension paid to "such person retired thereafter". This indicates that the suffering of the injury is not to automatically retire the person and that some hearing or determination is to be had. The precise amount of injury which would necessitate a retirement from active service is not fixed and from the very language used a question of fact is necessarily left for the decision of some fact-finding body.

Moreover, it clearly appears from other sections of the ordinance that this question of fact is to be decided by the pension board in the first instance, and that some rules are provided in connection with a hearing on that question. Section 7 provides that any member of the fire department who desires to be retired on a pension shall file with the pension board a verified petition which shall contain certain specified things. It further provides that if retirement is desired on account of disability the petition shall set forth certain additional facts, and shall be accompanied by a report as to the physical condition of the applicant made by a licensed physician, which must be subscribed and sworn to by him. It then provides, in a separate paragraph, that upon the filing of "such petition" the board shall fix a date for a hearing thereon and shall notify the applicant of the time set.

[4] The respondent argues that section 7 was intended to apply only where the disabled member makes application for retirement and that it has no application here since, under section 5, it was the duty of the pension board to order a pension paid to him when he became disabled, without the necessity of his taking any steps toward that end. If we assume that the pension board has authority to retire a member of the department without any application having been made by him such a situation is not involved here as, in this case, the petitioner made application for the pension on account of disability and brought himself directly within the provisions of section 7. Furthermore, other provisions of the ordinance, as set forth in section 8 thereof, are also applicable here. This section reads as follows: "No person shall be retired for disability under the provisions of this ordinance or receive any benefits therefrom unless there shall be filed with the Pension Board certificates of disability which shall be subscribed and sworn to before three (3) legally licensed practicing physicians of the City of Fresno; one to be selected by the applicant, whose certificate of disability shall be attached to applicant's petition as provided by this ordinance; one of whom shall be the City Physician; and one to be selected by the Pension Board. The board may require other and additional evidence of disability before ordering such retirement, but upon satisfactory evidence of disability said Pension Board shall retire such person. The decision of the Pension Board shall be final and conclusive."

[5] In this connection the respondent argues that section 8 applies only where a request for retirement is made and that it has no application where a duty rests upon the board to act under section 5 of the ordinance. However, section 8 clearly states that no person shall be retired for disability "under the provisions of this ordinance" unless certain designated proof is furnished or obtained, and provides that one of the three certificates mentioned shall be furnished by the applicant and attached to his petition. The board also has power to require additional evidence. The sec-

tions just referred to show that section 5 is not self-executing. In any event, a hearing and action by the pension board is required and certain minimum requirements must be complied with before the pension board has authority to order the retirement on pension of a member of the department.

[6] If we here assume that this petitioner was still a member of the fire department within the meaning of this ordinance, and that the pension board had power to pass upon his application for a pension based upon his disability, it appears from the face of the pleadings that no hearing after notice to the petitioner was had by the pension board and that the minimum evidence of disability required by section 8 was not before the board. It further appears that neither the pension board nor any other fact-finding body has ever determined that the petitioner's injuries, incurred in the line of duty, were sufficient to render his retirement from active service necessary. Under such circumstances the pension board could not be peremptorily ordered to place the petitioner on the pension list and to pay him a pension, and the judgment on the pleadings was improperly entered.

[7] The questions whether the petitioner was a member of this fire department within the meaning of this ordinance and in so far as his rights to a pension are concerned, and whether he was entitled to the benefit of any of the provisions of this ordinance, other than section 19 thereof, are very serious questions which need not be decided here and anything we might say thereon would be purely dicta.

Since the allegations of the pleadings do not justify or support the judgment and order entered, it follows that the judgment ordering that a peremptory writ of mandate issue must be, and the same is, reversed.

We concur: MARKS, J.; GRIFFIN, J.

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18 Cal.2d 97

GUILLIAMS v. HOLLYWOOD HOSPITAL.

L. A. 17743.

Supreme Court of California.

June 17, 1941.

1. Hospitals ⚷8

In action against hospital for injuries to patient, allegations of complaint that hospital undertook to prepare plaintiff for operation, to care for and attend him during operation, and thereafter so long as necessary, in skillful, careful, and efficient manner by use of proper and suitable means, sufficiently stated legal duty of care assumed by hospital, thus satisfying first essential element of cause of action for negligent injuries.

2. Hospitals ⚷8

Under complaint, alleging that defendant hospital undertook to prepare plaintiff for operation and to care for and attend him during operation and thereafter so long as necessary in skillful, careful, and efficient manner by use of proper and suitable means, plaintiff could establish hospital's duty of care toward patient under general law or offer proof of obligation arising by virtue of special contract or undertaking.

3. Pleading ⚷205(5)

In action against hospital for injuries to patient, complaint, alleging that one of plaintiff's ribs was broken through defendant's negligence, recklessness, and want of ordinary care after plaintiff entered hospital for kidney operation, was not subject to general demurrer as fatally uncertain because of failure to specify manner in which rib was broken or defendant's acts responsible for such injury.

4. Negligence ⚷111(1)

A cause of action for personal injury may be stated by complaint alleging negligence in general terms, without detailing specific manner in which injury occurred.

5. Negligence ⚷111(1)

In personal injury suit, plaintiff may plead defendant's negligence in general terms, but must indicate alleged negligent acts or omissions and may not recover on bare statement that defendant's negligence caused injury.

6. Pleading ⚷18

The particularity with which plaintiff must state cause of action depends to some extent on circumstances and situation of parties.

7. Negligence ⚷111(1)

The modification of common-law rule that particularity with which plaintiff must state cause of action for personal injuries depends somewhat on circumstances and parties' situation by adoption of code system of pleading, permitting plaintiff to state defendant's negligence in general terms, without stating facts constituting such negligence, grows out of fundamental common-law rule of pleading that no greater particularity is required than nature of thing pleaded will conveniently admit, supported by rule that less particularity is required when facts lie more in knowledge of opposite party.

8. Hospitals ⚷8

In action against hospital for injuries to patient, complaint alleging that defendant so negligently and carelessly attended plaintiff before and during kidney operation that his rib was broken and failed to discover such injury, which should have been discovered in exercise of ordinary skill in attending plaintiff after operation, or, having discovered it, negligently failed to render plaintiff any care or treatment therefor, was not fatally defective as too general, as it alleged two types of negligent conduct, either of which was sufficient to support plaintiff's cause of action and set forth what was done with as much particularity as plaintiff could, considering nature of cause of action and his condition when injury occurred.

9. Pleading ⚷11

In personal injury suit, complaint need not identify and allege precise moment of injury or exact nature of defendant's wrongful act, as such facts are matters of evidence.

10. Negligence ⚷121(2)

In action for personal injuries caused by instrumentality under defendant's control, plaintiff may be aided in trial by "res ipsa loquitur" doctrine, which requires defendant to come forward with explanation.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

11. Appeal and error ⚷863

On appeal from judgment for defendant after sustaining general and special demurrer to complaint without leave to amend, particularity of evidence required to sustain plaintiff's cause of action at trial is immaterial, but sufficiency of complaint is only question before Supreme Court.

12. Hospitals ⚷8

In personal injury action, allegations of complaint that plaintiff suffered pain, loss of health, and delayed recuperation after operation in corporate defendant's hospital as immediate and proximate result of defendants' concurrent acts of negligence, and was thereby damaged in stated sum, were sufficient.

13. Physicians and surgeons ⚷4

In action for injuries to patient in defendant corporation's hospital, where complaint alleged only that defendant agreed to care for plaintiff in usual manner by furnishing him accommodations and maintaining such attendants, including nurses and internes, as would assure him proper care and attention before, during and after kidney operation, allegations of defendant's negligent failure to discover plaintiff's broken rib or willful failure to render care and treatment therefor did not render complaint insufficient to state cause of action as showing practice of medicine by corporation in violation of statute.

14. Hospitals ⚷8

In action against hospital for injuries to patient, complaint was not insufficient for failure to allege that defendant's servants acted within scope of their employment, in absence of allegation of specific negligent act by a particular employee as foundation of plaintiff's cause of action.

15. Hospitals ⚷7

A corporation operating hospital may be liable for failure to perform its obligations to patient therein, as in failing to furnish nurses, suitable quarters, or proper equipment, regardless of whether any of its servants were guilty of any particular negligent acts.

16. Appeal and error ⚷843(4)

On appeal from judgment for defendant after sustaining general and special demurrer to complaint without leave to amend, Supreme Court, having concluded that complaint was good as against general demurrer, need not consider whether lower court would have been justified in sustaining demurrer on any grounds of uncertainty raised by defendant.

17. Pleading ⚷367(2), 368

Though complaint is sufficient against general demurrer, it may still lie within trial court's discretion to require clarification of uncertainties or ambiguities therein or insist that alternative allegations be restated as direct allegations in separate counts.

18. Pleading ⚷225(2)

Where plaintiff could amend his complaint so as to state proper cause of action, it was manifest abuse of court's discretion to sustain special demurrer thereto without leave to amend.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action by Andrew E. Guilliams against the Hollywood Hospital and others for personal injuries. From a judgment for defendants after sustaining a general and special demurrer to plaintiff's second amended complaint without leave to amend, plaintiff appeals.

Reversed.

For prior opinion, see Cal.App., 105 P.2d 318.

Morris Lavine, of Los Angeles, for appellant.

Fred O. Reed and Richard L. Kirtland, both of Los Angeles, for respondent.

W. I. Gilbert, of Los Angeles, for defendant Dr. Charles Laraway.

GIBSON, Chief Justice.

This is an appeal from a judgment of the Superior Court of Los Angeles County entered after sustaining a general and special demurrer without leave to amend.

The second amended complaint charged Hollywood Hospital, and certain doctors, attendants and nurses, with negligent acts and omissions causing plaintiff physical injury and suffering. It contained two counts, the first directed against the hospital and all other defendants, and the second more particularly against the doctors. A general and special demurrer was filed on behalf of defendant Hollywood Hospital, and was sustained without leave tc amend. Applications by plaintiff for leave to file a third and a fourth amended complaint were denied. This appeal was taken from the judgment entered in favor of the defendant hospital.

[1, 2] The complaint alleges that, upon the advice of a physician, plaintiff entered the hospital for a kidney operation, and that the hospital "undertook to prepare plaintiff for said operation and to care for him and attend him during said operation and thereafter as long as he might need such care and attendance and to render to him special care during all of said time in a skillful, careful and efficient manner and by the use of proper and suitable means * * *". It was further alleged that the doctors performed the kidney operation, and that thereafter plaintiff remained in the hospital for about six weeks, "during all of which time, beginning with his entrance to the hospital for said operation, he was under the care and control and attendance of said hospital" and of the other defendants.

The foregoing allegations sufficiently state the legal duty of care assumed by defendant hospital, and thus satisfy the first essential element of a cause of action for negligent injuries. Under this pleading, plaintiff could establish a duty of care under the general law, on the part of a hospital toward its patient. See Restatement, Torts, sec. 320; Silva v. Providence Hospital of Oakland, 14 Cal.2d 762, 97 P.2d 798; Timbrell v. Suburban Hospital, Inc., 4 Cal.2d 68, 72, 47 P.2d 737; Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905; Meyer v. McNutt Hospital, 173 Cal. 156, 159, 159 P. 436; Williams v. Pomona Valley Hospital Ass'n, 21 Cal.App. 359, 131 P. 888; Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228; Stuart Circle Hospital Corp. v. Curry, 173 Va. 136, 3 S.E.2d 153, 124 A.L.R. 176; or he could offer proof of an obligation arising by virtue of a special contract or undertaking. See Criss v. Angelus Hospital Assn, 13 Cal.App.2d 412, 421, 56 P.2d 1274; Jenkins v. Charleston General Hospital & T. School, 90 W.Va. 230, 110 S.E. 560, 22 A.L.R. 323; Clarke, Code pleading, p. 176.

[3-5] The plaintiff next alleges that while he was in the hospital under the care and control of the defendants, "through the negligence, recklessness and want of ordinary care on the part of said hospital, conjoined with the negligence, recklessness and want of care on the part of each of said other defendants herein, one of plaintiff's ribs on his left side, to-wit, his second floater rib, was broken * * *"; and that "plaintiff does not know whether his said rib was broken before, or during or after said operation was performed, as aforesaid, but alleges the fact to be that his said rib was not broken before he entered said hospital * * * and that it was broken at some time after he so entered said hospital and while he was so under the care, attendance and control of said defendants * * * and through the negligence, recklessness and want of care on the part of said defendants and each of them * * *". It is also alleged in this paragraph that "said defendants and each of them wholly omitted and failed to render, and they did not render this plaintiff any care or treatment for said broken rib for a period of about six weeks after said operation, and that none of said defendants became aware of the fact that plaintiff's said rib had been broken, or being aware of said fact, negligently, recklessly and wantonly and designedly failed and refused to render to plaintiff any care or treatment for said broken rib; that by the exercise of ordinary, or any care or skill in the care and attendance upon said plaintiff * * * said defendants and each of them would have become aware and would have known that plaintiff's rib had been broken as aforesaid." Plaintiff further alleges, in a later paragraph, that "the defendants and each of them, so negligently, carelessly and unskillfully attended the plaintiff prior to and during the said operation that the plaintiff's said rib was broken as an immediate and proximate result of the aforesaid negligence and carelessness; that after said operation the defendants and each of them carelessly and negligently failed and neglected to properly attend

to and treat said rib which was so broken during the course of the operation as aforesaid."

A general and special demurrer was interposed by the defendant hospital upon the theory that the complaint was fatally uncertain because it failed to specify the manner in which plaintiff's rib was broken or the acts of the defendant which were responsible for the injury. This contention is without merit so far as the general demurrer is concerned, for it is established that a cause of action may be stated in which negligence is alleged in general terms, without detailing the specific manner in which the injury occurred. See Abos v. Martyn, 31 Cal.App.2d 705, 88 P.2d 797; Dunn v. Dufficy, 194 Cal. 383, 228 P. 1029; Roberts v. Griffith Co., 100 Cal. App. 456, 280 P. 199; Latky v. Wolfe, 85 Cal.App. 332, 259 P. 470; Carnahan v. Motor Transit Co., 65 Cal.App. 402, 408, 224 P. 143; Timbrell v. Suburban Hospital, Inc., supra; Meyer v. McNutt Hospital, supra; Williams v. Pomona Valley Hospital Ass'n, supra; Frisvold v. Leahy, 15 Cal.App.2d 752, 756, 60 P.2d 151; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P. 2d 740; Ales v. Ryan, 8 Cal.2d 82, 64 P. 2d 409; 16 Cal.L.Rev. 151; Clark, Code Pleading, p. 206. There are, of course, limits to the generality with which a plaintiff is permitted to state his cause of action, and it is ordinarily said that while negligence may be pleaded in general terms, the plaintiff must indicate the acts or omissions which are said to have been negligently performed. He may not recover upon the bare statement that the defendant's negligence has caused him injury. Defendant contends that the complaint in the present case fails to state a cause of action because plaintiff has not specified any acts or omissions, but has attempted to state merely that he was injured by defendant's negligence. This, it is said, exceeds the permissible limits of generality.

[6-11] It should be recognized, however, that the particularity with which a plaintiff must state his cause of action depends to some extent upon the circumstances and the situation, of the parties. Even under the strict rules of common law pleading this principle was recognized. As the court said in Stephenson v. Southern Pac. Co., 102 Cal. 143, at page 147, 34 P. 618, 619, 36 P. 407: "In adopting what is known as the 'code system of pleading,' courts * * * have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting such negligence. This modification * * * grows out of a fundamental rule in common-law pleading, to the effect that 'no greater particularity is required than the nature of the thing pleaded will conveniently admit' (Steph.Pl. *367) supported by that other rule that 'less particularity is required when the facts lie more in the knowledge of the opposite party' ([Steph.Pl.] *370)." The court further pointed out that the plaintiff frequently may know only the general cause of the injury and may be entirely ignorant as to the specific acts or omissions which led up to it. See, also, Goldstein v. Healy, 187 Cal. 206, 212, 201 P. 462; 28 Cal.L.Rev. 235; Bliss, Code Pleading [3rd, 1894], pp. 453, et seq. Under these principles, the complaint in the present case cannot be held fatally defective. Plaintiff has alleged that defendant so negligently and carelessly attended to him prior to and during the operation that his rib was broken. It is further alleged that defendant failed to discover the broken rib, which should have been discovered in the exercise of ordinary skill in attending plaintiff after the operation, or that, having discovered it, defendant negligently failed to render plaintiff any care or treatment for the broken rib. While this language is very general, indeed, it sets forth acts and omissions on the part of defendant hospital and classifies both as negligent in character. Either type of negligent conduct is sufficient to support plaintiff's cause of action (Restatement, Torts, sec. 320; see, also, Criss v. Angelus Hospital Ass'n, 13 Cal.App.2d 412, 56 P.2d 1274; Jenkins v. Charleston General Hospital & T. School, supra; Timbrell v. Suburban Hospital, Inc., supra; Meyer v. McNutt Hospital, supra; Williams v. Pomona Valley Hospital Association, supra), and plaintiff has set forth "what was done" with as much particularity as he can, considering the nature of his cause of action and his condition when the injury is alleged to have occurred. So far as the rules of pleading are concerned, there is no requirement that he identify and allege the precise moment of the injury, or the exact nature of the wrongful act. These are matters of evidence, and in situations where an instrumentality under defendant's control causes the injury, plaintiff may be aided in the trial by the doctrine of res ipsa loquitur, which requires the defendant to come

forward with an explanation. As plaintiff suggests, the evidence may show that the attendants dropped him off the carriage while moving him from the operating room, or that they were insufficient in number or inadequately trained to do their work, or that they used defective apparatus furnished by the hospital, or that they ignored his complaints. We mention these matters, however, solely for the purpose of clarifying the distinction between the requirements of pleading and of proof. The particularity of the evidence required to sustain his cause of action at the trial is immaterial here. The sufficiency of the pleading, the only question before us, is established by the authorities cited above.

[12] The complaint, in a number of subsequent paragraphs, alleges that as an immediate and proximate result of the concurrent acts of negligence of the defendants, plaintiff suffered pain, loss of health and delayed recuperation, and was thereby damaged in the sum of $25,000. The allegations of proximate cause are in the usual form, and are sufficient.

[13] There remain two contentions of defendant which require only brief mention. The first is that the allegations concerning negligent failure to discover or wilful failure to render care and treatment cannot state a cause of action for the reason that the discovery and treatment would constitute the practice of medicine by a corporation in violation of the statute. The allegations of the complaint cannot be construed as setting forth an agreement whereby the hospital, as a corporation, undertook for a fee to furnish medical diagnosis and treatment. The complaint charges only what is common practice, that the hospital agreed to care for the patient in the usual manner, that is, to furnish him with accommodations and to maintain such attendants, including nurses and internes, as would assure him proper care and attention before, during and after the operation. Under such circumstances it cannot be said that the hospital is practicing medicine in violation of law.

[14, 15] The other contention of defendant is that the complaint fails to allege that the servants of the hospital acted in the scope of their employment. If plaintiff had alleged a specific negligent act by a particular employee as a foundation of his cause of action against the hospital employer, such an allegation as to scope of employment might be necessary. But the duty of care alleged herein is that of the defendant corporation, and the defendant may be liable for failure to perform its obligations, regardless of whether any of its servants were guilty of any particular negligent acts. Thus, the hospital would be liable if, after its undertaking, it simply failed to furnish nurses, suitable quarters or proper equipment.

[16-18] In view of our conclusion that the complaint is good against the general demurrer, we deem it unnecessary to consider whether the lower court would have been justified in sustaining the demurrer upon any of the grounds of uncertainty raised by defendant. The general order of the court does not indicate that it was based upon the special demurrer and the parties have stressed only the question whether a cause of action was stated. If, as we hold, the complaint is sufficient against a general demurrer, it may still lie within the discretion of the trial court to require the clarification of uncertainties or ambiguities, or to insist that alternative allegations be restated as direct allegations in separate counts. The proffered fourth amended complaint suggests that plaintiff himself believed that improvement in the statements might be made. Hence we do not decide that the trial court was without authority to sustain the special demurrer. But it was a manifest abuse of discretion to sustain the special demurrer without leave to amend where, as clearly appears herein, the plaintiff can amend his pleading so as to state a proper cause of action. See Starr v. Slaney, 11 Cal.App.2d 311, 314, 53 P.2d 395; Payne v. Baehr, 153 Cal. 441, 447, 448, 95 P. 895; Gantenbein v. City of Long Beach, 9 Cal.App.2d 726, 730, 51 P.2d 124, 52 P.2d 495; 24 Cal. L.Rev. 604.

The judgment is reversed.

We concur: CURTIS, J.; SHENK, J.; TRAYNOR, J.; CARTER, J.

45 Cal.App.2d 388

VAN CAUTEREN v. FORGER et al.

Civ. 6589.

District Court of Appeal, Third District, California.

June 16, 1941.

Hearing Denied Aug. 14, 1941.

1. Limitation of actions 🔑146(3)

Under statute providing that no acknowledgment or promise is sufficient evidence of a new contract to toll limitations unless it is in writing, signed by the party to be charged, a writing sufficient to lift ban of statute of limitations does not necessarily have to be confined to one paper or document, but the acknowledgment or promise may be inferred from several communications between creditor and debtor. Code Civ.Proc. § 360.

2. Limitation of actions 🔑146(3)

The statute providing that no acknowledgment or promise is sufficient evidence of a new contract to toll limitations unless it is in writing, signed by the party to be charged, does not prescribe any form in which an acknowledgment or promise sufficient to lift ban of statute of limitations shall be made, and it is sufficient if the writing shows writer treats indebtedness as subsisting and one which debtor is liable and willing to pay. Code Civ.Proc. § 360.

3. Limitation of actions 🔑179(3)

A complaint, which alleged that checks were mailed by mortgagor to mortgagee for precise amount of interest due on note secured by mortgage, and that receipts for such payments were mailed by mortgagee to mortgagor, contained a sufficient allegation of facts from which a written "acknowledgment" extending limitations could be found within statute providing that no acknowledgment or promise is sufficient evidence of a new contract to toll limitations, unless it is in writing, signed by the party to be charged. Code Civ.Proc. §§ 337, 360.

See Words and Phrases, Permanent Edition, for all other definitions of "Acknowledgment".

4. Limitation of actions 🔑151(3)

The effect of an "acknowledgment" of a debt secured by a lien before it has become barred by limitations, so as to continue obligation for an additional term, is that lien is not extinguished by lapse of time prescribed for bringing an action upon original obligation, but lien is extended for period in which obligation is kept alive, however, if statutory period has run upon principal obligation prior to the acknowledgment, lien given as security therefor is extinguished and a new promise or acknowledgment afterwards made does not revive or renew the lien.

5. Limitation of actions 🔑179(3)

A complaint which alleged that mortgage note would have been barred by four-year statute of limitations some six years prior to commencement of action, but that sending of checks by mortgagor to mortgagee for precise amount of interest, together with mailing of receipts for such payments by mortgagee to mortgagor, constituted a written acknowledgment within statute extending limitations, did not show on its face that right to foreclose mortgage had been lost, on ground that note was barred before acknowledgment was made. Code Civ.Proc. §§ 337, 360.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by E. H. Van Cauteren against Albert H. Forger and another on a promissory note and to foreclose a mortgage upon real property given as security for the payment thereof. From a judgment for defendants, after demurrer to the complaint was sustained on ground of limitations, the plaintiff appeals.

Reversed, with directions to overrule demurrer.

W. Cloyd Snyder, of Los Angeles, for appellant.

J. Marion Wright, of Los Angeles, for respondents.

TUTTLE, Justice.

Plaintiff brought this action upon a promissory note executed by defendant, and to foreclose a mortgage upon real property given as security for the payment thereof. The trial court sustained a general demurrer to the complaint, without leave to amend. From the judgment of dismissal entered thereafter, plaintiff appeals.

The complaint, filed March 10, 1939, shows that the note in question was executed July 2, 1926. It was due three years after date. It is the position of respondent that the action was barred by the Statute of Limitations, more than four years having elapsed between the date the note was due and the time the action was commenced. Sec. 337, Code of Civil Procedure. Appellant contends that the allegations of his complaint bring the action within the saving provisions of section 360 of said code, which reads as follows: "No acknowledgement or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

Giving a liberal construction to the allegations of the complaint, it sets forth a copy of the note and mortgage. It is alleged that the interest remained 7 per cent, as specified in the note, and until January 7, 1933, the entire interest was paid, but no portion of the principal; that on December 31, 1933, Van Cauteren told Forger that in view of his (Forger's) impaired financial condition due to the depression, he would credit all payments made during 1933, to principal, and would waive interest for that year, and that interest would be 5 per cent after January 1, 1934; that Van Cauteren thereupon credited $126 upon the principal; waived the interest for 1933; reduced subsequent interest to 5 per cent; and immediately advised Forger in writing of his said action; that thereupon, on January 1, 1934, Forger told Van Cauteren that he would make payments thereafter at the same rate, $31.50 per quarter, in payment of current interest at 5 per cent, the balance of each payment to be credited to the principal, all in consideration of Van Cauteren's action as stated to him on December 31, 1933; that payments by check continued thus to be made regularly, quarterly, and, as always, Van Cauteren in each case mailing to Forger a written receipt, until August, 1938. These receipts were substantially as follows:

"Los Angeles, California,
(Date)

Received of A. H. Forger $ (Amount paid) in payment of interest $ (Amount), Principal $ (Amount) to (Date to which interest was paid). Balance $ (Amount of balance of principal).
$ (Amount of payment)
Signed: E. H. Van Cauteren."

Appellant relies entirely upon the case of Searles v. Gonzalez, 191 Cal. 426, 216 P. 1003, 28 A.L.R. 78. There, a similar cause of action was held to have been taken out of the operation of the Statute of Limitations by "some writing, signed by the party to be charged thereby". The following quotation from that case gives all the facts upon which the opinion is predicated:

"On the 9th day of April, 1914, the cross-defendants Leroy H. and Nani A. Arnold, executed and delivered to the appellant, Mrs. Gonzalez, a certain promissory note for the sum of $5,000, bearing date on that day, and due three years after date, with interest thereon at the rate of 8 per cent. per annum, payable quarterly. As security for the payment of such note, they executed a mortgage on the real property described in the complaint, the lien of which plaintiff seeks to remove in this action. Mrs. Gonzalez placed the note and mortgage for collection with the Southern Trust & Commerce Bank of San Diego, which institution, it is admitted, acted as her agent in dealing with Arnold during the entire transaction. Arnold testified that he kept track of the quarterly interest payments through regular interest notices sent to him by the bank just shortly prior to the payments becoming due. He thereupon wrote his check to the bank for the exact amount of quarterly interest due, $100, and 'inclosed the notice in an envelope with the check and mailed it to the bank; that was the general procedure;' or he took the notice and check in person to the bank. He continued this practice until some time in the year 1921. On one occasion, on October 13, 1917, not having received the interest notice, he wrote the Southern Trust & Commerce Bank of San Diego as follows:

" 'I have received no notice from you regarding interest on my note to Mrs. Maguil Gonzalez for $5000.00, which I believe was due Oct. 9, 1917. I have always received a notice from you and paid the interest at your bank. I inclose check for the amount, $100.00. If you still have the note please apply it on same if not please return it to me and inform me if possible to whom it is to be paid.' No other writings relating to the matter were ever signed by either Arnold or his wife, and no other acknowledgements or references to the indebtedness appear to have been contained in any writings that passed between the parties connected with the transaction."

The court held that the letter and the check sent for interest due, which accompanied it, extended the Statute of Limitations on the note to October 13, 1921. However, the complaint was not filed until after that date, so that the letter is of no consequence in determining whether or not the Statute of Limitations had run subsequent to said date. In order to bring himself within the provisions of section 360, supra, plaintiff there proved the following facts only: that as each quarterly payment of interest became due, the agent of plaintiff, a bank, sent out "a regular interest notice, a form filled out by saying interest will be due on the 9th of such a month * * * upon a note for $5000.00". On the objection of plaintiff, further evidence of the contents of the notices was shut out by a ruling of the court. It was further proven that a check for the interest due was sent to the bank in response to said notice. The notice was returned in the letter which enclosed the check. The court held that the notices and the checks, as thus transmitted, when they were considered together, related to the same subject matter and constituted several parts of one connected transaction, and that: "They were, without question, linked together in the minds of the parties to such an extent that they must be found to have adopted the notices and checks as the expression of their purpose. Nickerson v. Weld, supra [204 Mass. 346, 90 N.E. 589]. From the relation thus established, there is such a reference of one to the other as satisfies the statutory requirement. 2 Ann.Cas. 293 [note]." It is our opinion that the facts in the instant case bring it squarely within the rule of that case. Here, we have checks for the precise amount of interest due, mailed by the mortgagor to the mortgagee, and the receipts for said payments mailed by the mortgagee to the mortgagor. This constituted a contract between the parties which the court in the Searles case says sufficed to bring the action within the purview of said section 360.

The case of Clunin v. First Federal Trust Co., 189 Cal. 248, 207 P. 1009, is relied upon by respondents. It was there held that checks by themselves, which contain no reference to the obligation, do not meet the requirements of said last-mentioned section. This is according to the weight of authority. See note in 125 A.L.R. p. 271. In the Clunin case the checks covered not only the interest due, but other obligations as well. Here, the checks were for the precise amount of the interest due. This certainly was notice to the mortgagee of the purpose for which the payment was made. In this action it is also alleged that receipts were sent out by the mortgagee for all such payments, in the form shown above. The cases are therefore readily distinguishable on the facts.

[1-3] We have examined the other authorities cited by respondents, and find none which cannot be reconciled with the Searles case. It may be said, however, that the latter case for the first time lays down the rule that the writing mentioned in said section 360 does not necessarily have to be confined to one paper or document, but the acknowledgement or promise may be inferred from several communications between the creditor and debtor. This follows the general rule in this state governing said section. It is well established that the code section does not prescribe any form in which an acknowledgement or promise sufficient to lift the ban of the Statute of Limitations shall be made. It is sufficient if it shows the writer treats the indebtedness as subsisting and one which the debtor is liable and willing to pay. From this acknowledgment the law implies the promise to pay. Concannon v. Smith, 134 Cal. 14, 20, 66 P. 40; Foster v. Bowles, 138 Cal. 346, 351, 71 P. 494, 649; Clunin v. First Fed. Trust Co., supra. The complaint, therefore, stated a cause of action.

[4] Respondents contend, however, that while recovery might be had upon the note, the complaint shows that the right to foreclose the mortgage has been lost. The law governing the question is stated in 16 Cal. Jur., page 596, sec. 193, to be as follows: "Applying to a debt secured by a lien the rule that an acknowledgment of a debt before it has become barred is to continue the obligation for an additional term, the effect is that the lien is not extinguished by the lapse of the time prescribed for bringing an action upon the original obligation, but the lien is extended for the period in which the obligation is kept alive. If the statutory period has run upon the principal obligation, a lien given as security therefor is extinguished, and a new promise or acknowledgment afterwards made does not revive or renew the lien."

[5] From the complaint it appears that the note would have been barred by the Statute of Limitations on July 2, 1933, some six years prior to the commencement of this action. It alleges, however, that the sending of the checks and receipts commenced in 1931. It is for the trial court to find, if there is a retrial of this cause, whether or not the action was barred before the new contract was made. We can-

not say that the complaint shows the right to foreclose the mortgage was thus lost.

The judgment is reversed, with directions to the trial court to overrule the demurrer.

We concur: PULLEN, P. J.; THOMPSON, J.

45 Cal.App.2d 302

CALETTI v. STATE.

Civ. 6419.

District Court of Appeal, Third District, California.

June 11, 1941.

1. Evidence 🔑518

In contractor's action on construction contract for roadwork on state highway, which provided that in case of removal of slide outside limits of the cross-section which came into the roadway through no fault of contractor, quantity of excavations would be computed by "average end areas" method, wherein question was meaning of the quoted words, the trial court properly received evidence of expert engineers concerning their meaning. Civ.Code, § 1645.

2. Highways 🔑113(4)

In action on construction contract for roadwork on state highway which provided that in case of removal of slide outside limits of the cross-section which came into roadway through no fault of contractor, quantity of excavations would be computed by "average and areas" method, evidence, including expert testimony, sustained finding that so-called correction for curvatures was a part of method of measuring quantity by average and areas, where the center line is on a curve. Civ.Code, §§ 1644, 1645.

See Words and Phrases, Permanent Edition, for all other definitions of "Average End Area".

3. Contracts 🔑154

If one construction of a contract would make it unreasonable, unfair or unusual, and another construction would make it fair, reasonable and just, the latter construction must be adopted.

4. Contracts 🔑170(1)

In the case of an ambiguous contract, the conduct of the parties may be proved to aid in its construction.

5. Contracts 🔑170(1)

The practical conduct of parties to a contract is evidence only of intention and is not conclusive in construing the contract.

6. Appeal and error 🔑1008(3)

Where contract was susceptible of two interpretations and the finding of the trial court as to meaning of the contract was amply supported by the evidence, the trial court's finding would not be disturbed.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by C. W. Caletti against the State of California on a construction contract for certain roadwork on a state highway. From an adverse judgment, the plaintiff appeals.

Affirmed.

Horace W. B. Smith and Theodore Tamba, both of San Francisco, for appellant.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for respondent.

PULLEN, Presiding Justice.

This is an appeal from a judgment in favor of defendant in an action brought on a construction contract for certain roadwork on a state highway in Mendocino county. During the work a slide occurred, and the dispute here is as to the method of measuring its cubic contents.

The contract provided that roadway excavation would include the removal of slides outside the limits of the cross-section which came into the roadway through no fault of the contractor. The contract also provided that "quantities of excavation will be computed by the method of average end areas". The issue here is what is meant by "average end areas".

Appellant contends that in computing the quantities of excavation by this method, or in this case at least, the center line of the highway must be used as the third dimension. The slide here occurred upon a curve and respondent claims that the use of the center line as a base under such conditions results in an error, pointing out that if the center line is on a curve and the excavation is measured on the inside of the curve, the error results in a determination of a larger quantity than was actually excavated; if the material to be measured is on the outside of the curve, the error results in a finding of a smaller quantity than was actually excavated.

Upon this question the trial court received testimony from various engineers—qualified experts—as to the meaning of the term "average end areas", and found that "the defendant employed what is known as 'the correction for curvature'; that the so-called correction for curvature was and is a part of the method of measuring quantities by the 'method of average end areas' within the usual, common and ordinary meaning of said term, where the center line is on a curve; that the curvature at the place herein involved was 'on a curve' ".

Section 1644 of the Civil Code provides that words in a contract are to be understood in their ordinary and popular sense, unless used by the parties in a technical sense, in which case the latter is accepted, and section 1645 following, states that technical words are to be interpreted as usually understood by persons in the professions to which they apply.

[1, 2] The trial court properly received evidence of experts, which evidence fully supported the foregoing finding of fact. Here it is claimed by appellant that the contract was susceptible of two interpretations and the method contended for by appellant had been applied by the parties in previous computation of materials handled on this particular job, and the interpretation of the language had been established by usage between these parties.

Mr. Edward Von Geldern, a witness called by appellant, testified that the term "average end area" method of measurement may or may not include curvature correction, but stated that it is not the usual custom to include curvature correction, for ordinarily it makes no difference in the final result. Several other experienced engineers testified, and recognized text writers established the fact, that curvature correction was a part of the method adopted in the contract.

It is admitted the state engineers did not use the correction for curvature in computing the amount to be paid appellant for the normal material removed within the roadway prism. The reason seems to have been, as admitted by Mr. Von Geldern, that in that area either method would have yielded approximately the same result, and the failure to use the curvature correction method within the highway prism did not result in any error from the true quantity, but it does appear that if such correction were not applied in the slide area, which area was on one side of the area line, it would result in a substantial error as to the actual quantity of material to be moved.

At the time the contract was entered into it could not have been anticipated that slides would occur, or if they did, upon which side of the curve such slides might happen; for if a slide was to occur on the outside of the curve the contractor would be the loser, if it occurred on the inside, as here, he would be the gainer if the curvature correction method was not applied.

[3] It is well settled that if one construction of a contract would make it unreasonable, unfair or unusual, and another construction would make it fair, reasonable and just, the latter construction must be adopted. Stein v. Archibald, 151 Cal. 220, 90 P. 536. It would seem that here the correction was properly called into use, for it cannot be assumed the contractor was agreeing to take less pay for material actually handled, or that the state was assuming to pay for more yardage than actually removed by the contractor.

[4] In Riverside Heights Water Co. v. Riverside Trust Co., Ltd., 148 Cal. 457, 83 P. 1003, 1007, it was claimed that by certain payments and other acts respondent had recognized a particular construction of the terms of a contract, but the court said: "And while, in a case of an ambiguous contract, the conduct of the parties may be proved to aid in its interpretation, yet it is not conclusive evidence thereof, and it may be disregarded in favor of more satisfactory evidence to the contrary. With the conclusion of the lower court on such conflicting evidence we cannot interfere."

[5] There is no evidence of any practical construction of the contract by the parties in respect to the measurement of the quantities of material in the slide area, but even if there was such evidence, the practical conduct of the parties is evidence only of intention and is not conclusive. Neither can it be said the parties had here adopted the center line method exclusively as applied to the unusual situation of removing slide material on a curve had not theretofore arisen, and in the special contract entered into for the removal of this

particular slide material, the center line method was not particularly specified.

[6] The finding of the court as to the meaning of the term used in the contract is amply supported by the evidence, and the contract being susceptible of two interpretations, the interpretation of the trial court should not be disturbed in view of all the circumstances.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

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45 Cal.App.2d 297

PEOPLE v. MULLEN.

Cr. 3439.

District Court of Appeal, Second District, Division 2, California.

June 11, 1941.

1. Rape 🔑6, 16(1)

A man is guilty of "rape by force and violence" when he has carnal knowledge of a woman forcibly and against her will, and when a man employs force with intent to effect an act of copulation against a woman's will, notwithstanding her resistance, he thereby commits an "assault with intent to rape" provided that his intent is coupled with the present means of accomplishing his purpose, and if penetration is accomplished, it is "rape" and if not it is assault with intent to rape by force.

See Words and Phrases, Permanent Edition, for all other definitions of "Rape by Force and Violence", "Assault With Intent to Rape" and "Rape".

2. Rape 🔑16(7)

Whatever the extent and however rough a man's acts in fondling a woman may be, if the man without fear of interruption voluntarily abandons his endeavor to ravish her sexual organs, the force he employed was not an "assault with intent to rape".

3. Assault and battery 🔑48
Rape 🔑16(1)

Persuasions, caresses and embraces of a woman by a man are not evidences of a felonious intent for purposes of determining whether the man is guilty of assault with intent to commit rape, since a man may employ such arts with force, hoping to persuade, and finally abandon his prey, in which event he is guilty of nothing more than "battery".

See Words and Phrases, Permanent Edition, for all other definitions of "Battery".

4. Rape 🔑16(1)

That defendant might have been guilty of lewdness, indecency and even of lasciviousness was not sufficient to warrant finding that defendant was guilty of an "assault with intent to rape".

5. Rape 🔑16(1)

Before a finding that defendant is guilty of an "assault with intent to rape" can be justified, it must appear beyond reasonable doubt that defendant's acts were such as to clearly indicate a felonious intent to ravish a woman notwithstanding her most violent resistance.

6. Rape 🔑16(1)

The finding of intent to commit rape is the sine qua non of a judgment of guilty of an assault with intent to commit rape.

7. Rape 🔑53(3)

Evidence that defendant took prosecutrix into unlocked room in close proximity to passersby during afternoon and that defendant embraced prosecutrix but failing to show that defendant intended to use all his force to commit rape against any physical opposition offered by prosecutrix or that defendant made any threat of personal violence against prosecutrix and showing that defendant did not state that he desired to gratify his sexual desires or expose his person and that prosecutrix walked from room without molestation, did not authorize conviction for "assault with intent by force and violence to commit rape".

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Jack James Mullen was convicted of assault with intent by force and violence to commit rape, and he appeals.

Reversed and defendant ordered discharged from custody.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Defendant appeals from an order denying his motion for a new trial after a judgment of conviction of the crime of making an assault with intent by force and violence to commit rape. The appeal is predicated upon the insufficiency of the evidence. There is no other issue. The only two witnesses who testified were the prosecuting witness and the defendant.

Disregarding the testimony of defendant, the record supporting the judgment is the testimony of the prosecutrix which in substance follows: On November 28, 1940, in response to an advertisement, I called at the appellant's dance studio where I first rehearsed a few dance numbers with him. He wanted two girls, one for team work and one for solo work. He asked me to return the next day at 2 o'clock in the afternoon. On the following morning, by telephone, he offered to call at my home for me, which offer I declined but I did meet him at his studio according to appointment at 2 p. m.; he took me thence to the third floor of a building on Hill street between Second and Third streets. I waited in the hallway, while he arranged for a nearby room. The room procured was 30x25 feet and it contained no furniture but a piano. We rehearsed some tango numbers and lifts for the adagio, during which appellant hoisted me by the knee and ankle when I buckled up and came down upon him. He remarked that I was a little stiff and would have to limber up and that so far as he was concerned the team work was out. He suggested that I do solo work, which would require dancing partially nude. I replied that I disliked the idea of doing nude dances. He asked me to remove my dress that he might see my figure. I demurred; he insisted and I again stated I did not like nude dances. He then took hold of my dress and pulled it to my waist; I pushed his hand away. He then put his right hand on my breast and his left hand into my private parts while he stood only six inches away. He put his right arm around me and his fingers into my private parts. I begged him to let me go. His face looked peculiar and white. He released me but I feared to leave. He again grabbed me and pulled me to him on the bench. He drew me close and tried to kiss me. He held me so tight that he was forcing the breath out of me. He took me by the waist, pulled me toward him, forced me to sit next to him on a sort of bench and kept kissing me and putting his hand at my breast. In his struggle with me, my necklace was pressed down by his arm making a mark across my neck. He kept telling me something about loving me and just to stay there with him. After considerable time, he released me and told me to leave my coat there but I grabbed my coat, ran out, went down the elevator and went home. Defendant denied the occurrence of all of the offensive acts mentioned.

[1-3] A man is guilty of rape by force and violence when he has carnal knowledge of a woman forcibly and against her will. When the man employs force with intent to effect an act of copulation against her will notwithstanding her resistance, he thereby commits an assault with intent to rape provided that his intent is coupled with the present means of accomplishing his purpose. 52 C.J. 1026. If penetration be accomplished, it is rape; if not, it is the crime of assault with intent to rape by force. Whatever the extent and however rough the fondling of the woman, if her pursuer without fear of interruption voluntarily abandons his endeavor to ravish her sexual organs, then the force he employed was not an assault with intent to commit rape. The mere fact that he is garbed in the vestments of the male and displays the gestures of such is not sufficient to establish an intent upon his part to effectuate his sexual desire against any opposition of the woman. The persuasions, caresses and embraces of the seducer are not evidences of a felonious intent. The man may generously employ all those arts with force, hoping to persuade, and yet finally abandon his prey. In such an event he were guilty of nothing more than simple battery. Commonwealth v. Merrill, 14 Gray, Mass., 415, 77 Am.Dec. 336.

The facts proved by the prosecutrix in this case are not such as to point infallibly to an intent upon the part of the defendant to commit an act of rape, however lewd his behavior or however coarse his blandishments. It was 2 o'clock in the afternoon; they were in a room directly across the hall from the landlady, their door was unlocked and they were in close proximity to passersby. Excepting the piano, there was no other furniture. At all times the two were within calling distance of the lady who delivered to defendant the key for entrance into the spacious room. Never did defendant there say that he desired to gratify his sexual desires; he never exposed his person or in any manner pantomimed the sexual act.

[4, 5] Nothing in the testimony indicates that defendant intended to ravish the woman "at all events and notwithstanding any resistance on her part." Quoting an Iowa case, State v. Hagerman, 47 Iowa 151, the supreme court once said: "The assault must have been made with intent to commit a rape, notwithstanding all possible resistance that could be made." People v. Fleming, 94 Cal. 308, 311, 29 P. 647. In the present case, as in the Fleming case, it might justifiably be inferred from the testimony of the prosecutrix that "defendant desired to have sexual intercourse with her, and that he committed either an assault or a battery upon her, of a technical character at least, while engaged in his solicitations and blandishments; but these things may all be true, and be entirely foreign to any intention on his part to commit the crime of rape by the use of force to the extent of overcoming all resistance she might offer." Id. The fact that defendant may have been guilty of lewdness, indecency and even of lasciviousness would not be sufficient to warrant the finding that he was guilty of an assault with intent to commit rape. Before such a finding can be justified, it must appear beyond a reasonable doubt that the acts of the defendant were such as to indicate clearly a felonious intent to ravish the woman notwithstanding her most violent resistance.

[6, 7] The prosecutrix did not suffer a duress. Her testimony that she feared he would choke her was of little value in view of the fact that all of the behavior of the defendant was described by her. At no time did he make any threat of personal violence. The finding of intent to commit rape is the sine qua non of a judgment of guilty of an assault with intent to commit rape, i. e., to befoul the body of a woman against any physical opposition she might offer. Unless the defendant indicated a resolution to use all his force to commit rape, then there is no satisfactory proof of such intent. Nothing points to such fixed purpose. She was small and illy equipped to cope with so formidable an adversary. He was large and possessed sufficient physical power to have accomplished his purpose. The featherless biped that is animated by a firm purpose to exploit his own depraved desires against a helpless woman has an instinctive fear of apprehension joined usually with an instinctive cunning to devise his safety. The presence of neither is suggested by the conduct of defendant in escorting the prosecutrix to the heart of a great city and into a building that is frequented by men and women bent upon artistic pursuits. But aside from all other considerations, when the prosecutrix testified that, after her feeble resistance, unhindered and alone, she walked forth from the dance room without molestation, she spoke the words that cleared defendant of a felony.

The subject of assault with intent to commit rape has been before the appellate courts on many occasions. In most of the cases the facts were such as to warrant the inference that the defendant had the intent to commit rape at all events regardless of all the prosecutrix could do to prevent it. In those cases, the appellate court had nothing to consider except whether the evidence was sufficient to warrant the inference drawn by the jury and the trial court. People v. Moore, 155 Cal. 237, 100 P. 688; People v. Norrington, 55 Cal.App. 103, 202 P. 932; People v. Onessimo, 65 Cal.App. 341, 224 P. 101; People v. Jones, 112 Cal.App. 68, 296 P. 317, and the authorities cited by them. In each of those cases the proof clearly established that the attempt to effectuate carnal intercourse with terrorism and violence, coarse language and under cover of darkness (People v. Moore) and further by making advanced preparations (People v. Jones) and by exposing the sexual organs (People v. Onessimo) and by committing the nameless act against the body of his victim (People v. Norrington). None of them supports the judgment before us.

The order denying the motion for a new trial is reversed and it is ordered that defendant be discharged from custody.

We concur: WOOD, J.; McCOMB, J.

45 Cal.App.2d 306

BRANDENBURG et al. v. LOS ANGELES COUNTY FLOOD CONTROL DIST.

Civ. 12480.

District Court of Appeal, Second District, Division 1, California.

June 12, 1941.

1. Levees and flood control ⇨10

Flood control district was a public agency created for a public purpose and as such was not subject to liability for damages from negligence of its officers or agents, in absence of statute expressly imposing such liability.

2. Eminent domain ⇨2(10)

Parents' cause of action against flood control district for wrongful death of child could not be bottomed on constitutional provision that state cannot take or damage private property for a public use without payment of just compensation. Code Civ.Proc. § 376; Const. art. 1, § 14.

3. Levees and flood control ⇨9

The statute permitting flood control district to insert in contracts with the federal government such terms as might be prescribed as condition on which federal funds are granted could not be construed to authorize a district to indemnify the federal government against damages from negligence of federal agents engaged in construction work. St.1935, p. 1003, § 15a.

4. Indemnity ⇨9(1)

A provision in contract between Los Angeles County Flood Control District and the federal government for assumption of liability by district for damages caused by or incident to construction of flood control project by the government could not be relied on as an assumption of liability by district for wrongful death of child as result of negligence of United States engineers. St.1935, p. 1003, § 15a.

5. Levees and flood control ⇨9

The Los Angeles County Flood Control District was not empowered under the act creating it to voluntarily assume the role of a joint tort-feasor. St.1915, p. 1502, § 2, subd. 2; St.1935, p. 1003, § 15a.

6. Levees and flood control ⇨11

The statute permitting a flood control district to sue and be sued does not enlarge its liability and applies only to such actions as a public corporation might be subject to in carrying out its purposes. St. 1915, p. 1502, § 2, subd. 2.

7. Courts ⇨93(3), 366(8)

The uniform construction by California courts of the California statute permitting a flood control district to sue and be sued is not only binding on the District Court of Appeal, but is binding also on the federal courts. St.1915, p. 1502, § 2, subd. 2.

8. Appeal and error ⇨917(1)

Where complaint did not charge negligence on part of flood control district trustees, the reviewing court could not speculate or infer that trustees were negligent, as basis for reversal of decision sustaining demurrer.

9. Levees and flood control ⇨11

The statute requiring flood control district trustees to adequately maintain all projects and providing that negligence of trustees shall be imputed to the district could not be relied on as consent to maintenance of wrongful death action against district on theory that district had failed to adequately maintain project, in absence of allegation that trustees were negligent. Gen. Laws 1937, Act 9178, §§ 9, 10.

10. Levees and flood control ⇨10

The Los Angeles County Flood Control District, created in 1915 by special act, was not affected, in matter of liability, by general law enacted in 1931 authorizing creation of permissive districts, possessed of entirely different attributes, particularly in absence of mention, directly or inferentially, in the general law of an intention to change character of existing specially created districts. St.1915, p. 1502; Gen.Laws 1937, Act 9178, §§ 9, 10.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Robert C. Brandenburg and another against the Los Angeles County Flood Control District to recover damages for wrongful death of plaintiff's son. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Baldwin Robertson, of Los Angeles (Russell Breckenridge, of Los Angeles, of counsel), for appellants.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and Arthur

Loveland, Deputy Co. Counsel, all of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment entered in defendant's favor after the trial court had sustained a demurrer to plaintiffs' third amended complaint without leave to amend.

The third amended complaint presents two causes of action, the first of which asserts that plaintiffs' son met a "wrongful death" by reason of an "attractive nuisance" which existed at one of defendant's projects and was not properly guarded against, by reason of the claimed negligence of certain engineers of the United States of America and of the flood control district. In general, the allegations charge that prior to the 18th day of December, 1937, the defendant flood control district entered into an agreement with the United States of America, under the terms of which the latter agreed to furnish the funds necessary for certain construction and improvement work on the banks and channel of the Los Angeles river and to perform said work by and through its corps of engineers. It is further alleged that the parties to such agreement intended thereby that defendant flood control district should be and would become liable to any third person for any and all damage, both personal and property, that might be caused by or result from such construction work or the manner of performance thereof by the United States or its officers or engineers; and further, that such liability on the part of defendant flood control district should be independent of any liability or limitation otherwise existing by law. It is then alleged that pursuant to the terms of the agreement work was commenced by the corps of engineers of the United States; that prior thereto it had been the custom and habit of children residing in the neighborhood, including the deceased son of plaintiffs, to play on the banks of and wade and play in the river itself; that up to the time of the commencement of the construction work the condition of the banks and the river bed was such that it had always theretofore been safe for such recreational activities on the part of neighborhood children. Then follow detailed allegations as to the manner in which the engineers in charge of said construction negligently caused a pit to be dredged in the river bed and negligently allowed large pieces of board or wood to gather in the channel; that the earth dredged from the pit was by the engineers negligently deposited along the side thereof nearest to the center of the channel and opposite the nearest bank of the river, and that while the same was similar in appearance to the natural bank thereof, it was in fact of soft and loose composition so as to render walking or standing thereon unsafe for any person. The ensuing allegations set forth the fact that on the day of the fatality the minor son of plaintiffs, being unaware of the depth of the water in the pit and the loose and dangerous condition of the bank, attempted to float downstream on one of the boards above mentioned, whereupon the current of the river carried him from the point above the pit out and into the deep water of the pit through which water was being diverted; that upon discovery of the depth of water therein the decedent, being in fear of his life and confronted with such imminent danger, directed the board on which he was floating toward the newly created bank of the river and stepped from the board onto the bank, whereupon the earth composing the bank immediately caved in on top of him, sliding down on him until it had forced him down to the bottom of the pit, and by reason of this slide of earth plaintiffs' minor son was killed either by drowning or suffocation. The first cause of action charges that the death of said minor was the direct and proximate consequence of the carelessness and negligence of the defendant flood control district and of the United States engineers performing the construction work.

In the second cause of action all the facts alleged in the first are repleaded by reference, with the exception of the allegations concerning the contractual assumption of liability by the defendant and the allegation that the defendant and the United States, its officers and agents, were jointly and severally negligent in the premises. In place of these allegations it is alleged in the second cause of action that the defendant flood control district failed to adequately maintain the project after it had been started and that the death of the child and the damage to plaintiffs was proximately caused by such failure on the part of defendant flood control district regardless of any purported delegation of the alleged statutory duty to the United States.

[1, 2] It is conceded that respondent flood control district must be deemed a pub-

lic agency created for a public purpose, and as such is not subject to an action for damages resulting from the negligence of its officers or agents in the absence of a statute expressly imposing such liability. However, appellants contend that a parent's cause of action against a state agency for the wrongful death of a child proximately resulting from the method of operation employed in the course of construction of a public project is expressly authorized by section 14 of article I of our State Constitution, which provides that the state cannot take or damage private property for a public use without the payment of just compensation. At the oral argument of this cause appellants conceded that a child is not a chattel and that the parents have no property right in him, but they contend that the statutory cause of action inuring to the parent for the wrongful death of a child (Code Civ.Proc., sec. 376) is a property right, and that the injury to the plaintiffs here sued upon is an injury to that property right and therefore within the contemplation and meaning of the above-quoted constitutional provision. However, plaintiffs are not aided by the concession that such fully accrued cause of action for wrongful death of a minor child constitutes "property" in the possession of the parent, because from whatever angle we view plaintiffs' complaint, it does not charge that the "fully accrued" cause of action which they claim to be "property" was proximately taken or damaged by the public improvement undertaken by defendant in the Los Angeles river. Their claim is, rather, that their son, in whom they could have no property right, was taken, and that by such "taking" a cause of action arose for such wrongful death. And plaintiffs therefore are confronted with the fact that there exists no consent by the sovereignty to be sued in an action for wrongful death. Whiteman v. Irr. Dist., 60 Cal.App. 234, 212 P. 706.

[3-5] It is next contended by appellants that the flood control district, in the exercise of its authorized powers, assumed liability and consented to suit for all classes of damage caused by the United States in the construction of the flood control project, as a joint tort-feasor. This claim is predicated upon the following provision contained in the agreement between the flood control district and the government: "The District further agrees to assume all liability for damages caused by or incident to the construction of said flood control projects by the government, and to hold The United States of America, its officers and agents, free and harmless from all claims for damages which might be filed or asserted by any person whomsoever, as a result of said construction work."

In other words, appellants seek to impute to the respondent flood control district the negligence of the United States engineers by reason of the aforesaid contract whereby the former agreed to hold the United States free and harmless from all claims for damages "as a result of said construction work". Let us therefore analyze section 15a of the Los Angeles County Flood Control Act, added in 1935 (Stats.1935, p. 1003), which it is claimed by appellants enlarges the liability of defendant district. The cited section reads as follows: "The governing body of said district shall have full authority to cause to be inserted in specifications and contracts for any flood control work financed or paid for in whole or in part out of moneys obtained from the United States of America or any department or agency thereof as a loan, grant or appropriation, such provisions or terms as may be prescribed by the United States of America or such department or agency as a condition upon which such Federal funds are loaned, granted or appropriated."

We cannot read into this section an authorization for the district to indemnify the United States of America against damages resulting from the negligence of agents of the federal government engaged in flood control district construction work, because, first of all, such an indemnification is unnecessary, for the reason that the United States is liable to suit only upon claims not sounding in tort. While there are some elements of damage resulting from the construction of public projects for which the United States could be held accountable, the instant case is not one of them, because it sounds in tort. Surely the legislature never intended by the enabling act, nor did either the federal government or the flood control district intend by the contract, that the California public agency should indemnify the federal government against a liability that did not exist. Furthermore, the flood control district was not empowered under the act creating it to voluntarily assume the role of a joint tort-feasor.

[6, 7] It is true, as urged by appellants, that the specific legislative act creating a flood control district (Stats.1915, p. 1502)

provides in section 2 thereof that the district may "sue and be sued". Appellants concede that the courts of this state have uniformly held that the just-quoted language does not enlarge the liability of the public agency and applies only to such actions as a public corporation might be subject to in carrying out its purposes. Whiteman v. Irr. Dist., supra; Western Assur. Co. v. Drainage Dist., 72 Cal.App. 68, 237 P. 59; Nissen v. Cordua Irr. Dist., 204 Cal. 542, 269 P. 171. However, appellants contend that the announced rule has been abrogated by a decision of the Supreme Court of the United States (Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784, holding, in effect, that although a government has the power to extend its immunities to its corporate agencies or subdivisions, it must do so specifically, and that a general grant of power "to sue and be sued" constitutes a waiver of all immunity, since it contains no specific grant of such immunity. It appears, however, that in the cited United States Supreme Court case that tribunal was interpreting a congressional policy in the matter of rendering the corporate creatures of congressional action amenable to suit, and because but two instances were brought to the attention of the court wherein congress had not explicitly provided that such corporate entities should be subject to suit, the court gave a liberal construction to the words "to sue and be sued" as used in the federal legislation creating government corporations. Consequently, by reason of the long line of decisions by the courts of this state construing California statutes adversely to appellants' contentions advanced herein, we are constrained to hold that such decisions are not only binding upon us, but are equally binding and controlling upon the federal courts. Scott v. Austin, 58 Cal.App. 643, 646, 209 P. 251.

[8-10] Finally, appellants urge that a statutory consent to the instant suit is furnished by Act 9178 of Deering's General Laws (Stats.1931, p. 1369), which provides generally for the creation of flood control and water conservation districts, and which legislation reads in part as follows:

"§ 9. Trustees shall make proper rules and regulations for the management and control of the works and projects of the district and it shall be the duty of the trustees to adequately maintain all works and projects of the district after the same are started.

"§ 10. The negligence of a trustee or trustees of a flood control and water conservation district shall be imputed to the district to the same extent as if the water conservation and flood control district were a private corporation, and such district shall have power and authority to levy assessments for the purpose of paying any damage so incurred as hereafter provided."

It is claimed by appellants that their second cause of action is based upon the quoted sections, but the allegations contained in said second cause of action make no mention of the flood control district trustees, nor is any charge of negligence on the part of such trustees pleaded in connection with any duty devolving upon them. We cannot speculate or infer that the district trustees were negligent. For aught that appears in the pleading, the alleged failure "to adequately maintain its said works and project after the same had been started" might be attributable to the dereliction of the United States engineers or other employees, notwithstanding express orders or directions from the trustees. Certainly the second cause of action contains no averment that the district trustees failed or neglected to perform any duty imposed upon them. Moreover, we feel that the two sections above quoted cannot be held to apply to the Los Angeles County Flood Control District. The latter was created in 1915 by a special act of the California legislature. Stats.1915, p. 1502. The act from which appellants quote was enacted in 1931 as a general law relating to the subject of flood control and water conservation districts. It is permissive only, and the commencement of any proceeding under it requires the application or petition of the landowners of a given area, while the functions of the Los Angeles County Flood Control District are mandatory. The latter has no alternative but to function and carry out the purposes of the act, which contemplates the safeguarding of life and property from damage or destruction by flood waters. A special district validly created by the legislature is not changed in one of its essential attributes, such as liability, by a subsequently enacted general law authorizing the creation of permissive districts, possessed of entirely different attributes. This is especially true where the general law makes no mention, directly or inferentially, of an intention or purpose to change, amend or alter the character of existing districts which are the offspring of special creative acts of the legislature. Consequently Act 9178 cannot be held to determine for or impose upon Los Angeles County Flood Control District any added liability.

From the foregoing it follows that the judgment must be affirmed. It is so ordered.

We concur: YORK, P. J.; DORAN, J.

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45 Cal.App.2d 394

PEOPLE v. BESOYAN et al.

Cr. 537.

District Court of Appeal, Fourth District, California.

June 16, 1941.

Criminal law 🔑1182

Where no reporter's transcript and no briefs were filed, and no appearance was made in District Court of Appeal for defendants, and there were affidavits that deceased court reporter's shorthand notes in connection with trial had never been transcribed, and that defendants' attorney at the trial had informed the district attorney that the appeal had been abandoned, motion to affirm convictions would be granted. Pen.Code, § 1253.

Appeal from Superior Court, Kern County; Raymond McIntosh, Judge.

Roy Besoyan and others were convicted of an offense, and they appeal, and the respondent moves to affirm the judgment.

Judgment affirmed.

No appearance for appellants.

Earl Warren, Atty. Gen., and Burdette J. Daniels, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The clerk's transcript on this appeal was filed in this court on October 28, 1940. No reporter's transcript or briefs have been filed and no appearance has been made in this court for the defendants. The matter was regularly placed on the calendar on June 10, 1941, at which time the respondent moved to affirm the judgment under section 1253 of the Penal Code. At that time the respondent presented and filed proof that the court reporter had died, with an affidavit to the effect that the reporter's shorthand notes in connection with the trial of this action had never been transcribed. There was also presented and filed the affidavit of a deputy attorney-general identifying and setting forth a copy of a letter he had received from the district attorney of Kern county, in which letter it was stated that on June 5, 1941, an attorney who represented the defendants at the trial informed the district attorney that he had abandoned the appeal. The record before us is sufficient to justify the granting of the motion.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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45 Cal.App.2d 412

SOVEREIGN OIL CORPORATION v. FENTON et al.

Civ. 2751.

District Court of Appeal, Fourth District, California.

June 17, 1941.

Rehearing Denied July 16, 1941.

Hearing Denied Aug. 14, 1941.

1. Appeal and error 🔑882(3)

Where complaint which described itself as a complaint in interpleader lacked one of the essentials of a complaint in interpleader, but stated a cause of action for declaratory relief, the action was properly tried upon such theory, particularly where counsel agreed at opening of trial that action could be treated as one for declaratory relief and during the trial counsel for defendants in explaining the purpose of offering certain evidence stated that counsel understood action to be one to determine the rights of the parties.

2. Municipal corporations ⚷621

Terms of oil well drilling permit issued by city council, and resolution authorizing it, were not conclusive on issue of whether city council had required that opportunity be given to lot owners who were not included in original lease to join therein or on issue whether such owners availed themselves of that opportunity, since rights of parties aside from incident of drilling depended more on terms of lease than on wording of permit.

3. Mines and minerals ⚷79(1)

Lot owners, who understood that city council had rule by which they would refuse oil well drilling permit unless all owners of other lots in the same block were given an opportunity to join lease, could not oppose participation in royalties by other lot owners on ground that rule did not apply to lots which had been leased to some other company, particularly where other lot owners had secured a release from other oil company and had put themselves in position to comply with rule of city council.

4. Mines and minerals ⚷79(7)

Evidence that city council had rule under which they would refuse oil well drilling permit to lessee of particular lots unless all other lot owners in same block were given an opportunity to join lease, that rule was well understood by particular lot owners, that provision for compliance therewith was included in lease executed by them, and that city council fully intended when granting permit that other lot owners should be given an opportunity to join in lease would not sustain judgment which provided that other lot owners had no right or interest in royalties from well drilled by lessee, though permit issued did not expressly require that any further footage be included in the lease.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by the Sovereign Oil Corporation against F. R. C. Fenton and others involving the right to proceeds of a certain oil well. Various cross-complaints were filed. From a judgment in favor of certain of the defendants, the Edlou Company and others, constituting a part of the remaining defendants, appeal.

Reversed.

Clarke & Bowker, Robert M. Clarke, Britton Bowker, and Dixie Dunnigan, all of Los Angeles, for appellants.

Finlayson, Bennett & Morrow, of Los Angeles, for respondents in Group No. 1.

BARNARD, Presiding Justice.

This is an action involving the right to the proceeds of an oil well located in a certain block in the city of El Segundo. By an ordinance of this city the drilling of an oil well in this area was forbidden unless a permit therefor was secured. Desiring to limit the number of wells in subdivided areas it had been the policy of the city council to refuse such permits where application was made in connection with a lease of part of the lots in a particular block, unless opportunity was offered to other lot owners in that block to join in the lease and to share in the proceeds of the well.

There were 18 lots in block 31 of this city. Under date of November 24, 1937, a lease between the owners of 11 of these lots, who will be referred to as Group No. 1, and the plaintiff was executed. This lease, among other things, provided that drilling was to start within thirty days after a permit from the city was secured; that the lease should be considered a "community lease", as if all lessors had undivided interests in the entire area leased; that each lessor should share in the rentals and royalties in the proportion which his land bore to the total area, computed on a square footage basis; that the lease might be executed by the lessors in any number of separate copies or counterparts; and that

"In the event further square footage is included within this lease by agreement or by requirement of the city authorities of El Segundo, the County of Los Angeles or the State of California, said additional footage shall be taken into account in computing the distribution of royalties as though it had originally been included herein."

On December 8, 1937, the plaintiff's application for permission to drill a well on one of the eleven lots mentioned in this lease was presented to the city council. As disclosed by the minutes of that meeting, the application was continued one week and the clerk was instructed to immediately communicate with the owners of other lots in that block which were not included in plaintiff's lease. On December 10, 1937, the clerk wrote letters to the other lot owners in this block, who will be referred to as Group No. 2, advising them of this application for a permit and informing them that on December 15, 1937, the city council "will grant the permit prayed for, conditioned upon said company permitting other property owners in said block and not included in its lease to join said lease should they so desire within a reasonable time after the permit is granted". These owners were also given plaintiff's name and address so that they might communicate with it. The minutes of the meeting of December 15, 1937, show the adoption of a resolution granting to this plaintiff a permit for drilling the well in question and neither this resolution nor the permit itself say anything about requiring any additional "footage" to be included in the lease. On December 16, 1937, the city clerk wrote a letter to the plaintiff saying that permission to drill had been granted on December 15, and that "Said permission is conditioned upon your filing with the City Clerk a letter signed by all persons, firms or corporations whose signatures might be necessary, consenting and agreeing to permit any property in said Block 31, not now included in your lease, to be included in said lease at any time prior to the setting of your final water string". The court found that the sending of this letter had not been authorized by the council and this finding seems to be sustained by the evidence.

At this time a part or all of the seven lots owned by Group No. 2 were under lease to the Elsie Oil Company. This lease was later cancelled and those lots quitclaimed to those owners by a quitclaim deed recorded on January 26, 1938.

Shortly after the clerk's letter of December 10, 1937, was received by the owners of the other lots in this block two of these owners called at the plaintiff's office and expressed a desire of members of that group to join in the lease. The plaintiff handed them a copy or counterpart of that original lease and thereafter that copy was signed by Group No. 2, the owners of the other seven lots, each owner setting opposite his signature the number of the lot in that block which he owned, with the square footage thereof, in like manner as the original lease had been signed by the original lessors in Group No. 1. These owners acknowledged their signatures to this copy of the lease on February 2, 1938, and the plaintiff corporation also signed that copy of the lease, through its president and secretary, their acknowledgment thereof being dated February 8, 1938.

After the plaintiff received the clerk's letter of December 16, 1937, one of its officers showed it to two of the members of Group No. 1 and told them his company would have to take the other lot owners into the lease. No objection was then made but on February 16, 1938, an officer of the plaintiff told a committee representing Group No. 1 that the plaintiff and the owners in Group No. 2 had executed a copy of the lease, and later that day this committee sent the plaintiff a letter saying that at the time the applicaion for a permit was made to the city council they understood that the council had a rule "by which they withheld permits unless all of the owners of lots within the block upon which the permit was granted were given an opportunity to join in the lease", but that they further understood that the rule "did not apply to lots which were included in an oil lease to any other company". They then stated that they understood that Group No. 2 had been leased their lots to the Elsie Oil Company, and informed the plaintiff that they would resist the inclusion of any other lots within the lease.

The setting of the final water string in the well occurred about the middle of March, 1938, and sometime thereafter the well came into production. On or about the first of June, 1938, an agreement was entered into between the plaintiff and Group No. 1 under the terms of which one half of the rentals and royalties were paid to the members of Group No. 1 and the other half was deposited with a trust company to await determination as to the rights of members of Group No. 2.

This action was begun on June 23, 1938. The complaint was entitled "Complaint in Interpleader". It set up the conflicting claims of Group No. 1 and Group No. 2 to the landowners' royalties provided for in the lease, with the general facts as to execution of both parts of the lease and as to the granting of the permit, and prayed that the defendants be required to interplead with respect to their claims, that the plaintiff be discharged upon payment of the moneys into court, and for other equitable relief. Various cross-complaints were filed and the action proceeded to trial. The court found in favor of Group No. 1 and entered a judgment which, in general effect, provided that the members of Group No. 2 had no right or interest in the royalties from this well and that all thereof should be paid to the members of Group

No. 1 and one or two additional parties, with which we are not here concerned. From this judgment a part of Group No. 2 of the defendants have appealed.

[1] The appellants first contend that the court erred in failing to make an interlocutory order passing upon the plaintiff's right to maintain an action in interpleader, in failing to dismiss the action because the plaintiff was not a disinterested stakeholder, and in not making any finding or judgment on the subject of interpleader. While the complaint lacked one of the essentials of a complaint in interpleader it stated a cause of action for declaratory relief. Moreover, appellants concede that at the opening of the trial "it was agreed by counsel that the action could be treated as one for declaratory relief" and during the trial, in explaining to the court the purpose of offering certain evidence, the leading counsel for the appellants stated to the court: "As I understand, this is an action for the purpose of determining the rights of the parties. * * * We are here from the start in an action in equity to determine the rights of these parties." The action was tried upon this theory under sufficient pleadings and no error appears in this connection.

The main questions here presented are whether the court's findings and conclusions to the effect that none of the appellants is, or ever has been, a party to the lease under which this well was drilled or is or has been included within its provisions, are supported by the evidence, and whether the findings support the judgment. The main finding in this connection is that "said permit did not require, nor did the city authorities of said city of El Segundo then or at any time require any further square footage, or any footage to be included in the lease" which was entered into between Group No. 1 and the plaintiff.

[2] While, strictly speaking, the finding last referred to is supported by the evidence to the extent that the other lot owners were not required to come in whether they wanted to or not, there is no finding on the essential issue as to whether the city council required that an opportunity be given to owners of lots in this block which were not included in the original lease to join in the lease, and there are no direct findings as to the facts in connection with the issue as to whether such owners availed themselves of that opportunity. We cannot agree with the contention of the respondents, meaning Group No. 1 of the defendants, that the terms of the permit which was issued by the city counsel and the resolution authorizing it are conclusive on these matters. The permit, required by the ordinance, might well set forth certain conditions and restrictions governing the manner in which the well might be drilled. But the setting forth therein of such conditions, does not necessarily establish that there had not been another "requirement of the city authorities" which had to be met before the permit was issued at all. While the permit was necessary before the well was drilled the rights of the parties, aside from the mere incident of drilling, depend more upon the terms of the lease than upon the wording of the permit. And the provision of the lease relating to the inclusion of additional land in the lease was based not upon any particular conditions which might be set forth in the permit to drill, or in the resolution authorizing the issuance thereof, but upon any "requirement of the city authorities". The real issues are as to whether there was such a requirement here, within the meaning of that provision of the lease, and whether what was done by all concerned was sufficient to bring the appellants in as participants under the lease.

The original lease recognized the necessity of a permit from the city and the possibility of a requirement leading to the inclusion of other lots. It provided that the respective lot owners should share in the royalties on a square footage basis regardless of who owned the lot on which the well was drilled, and provided that any further square footage included within the lease by requirement of the city authorities should share in the royalties as though it had been originally included.

When the permit was applied for, pursuant to the terms of the lease, the matter came on for hearing before the city council on December 8, 1937. Mr. Powers, the secretary of the plaintiff corporation, testified that he was present at that meeting and that several members of Group No. 1 were also present. He testified that one of the councilmen asked whether they were willing to take in the owners of other lots in this block, that there was quite a discussion as to a time limit for this purpose and that, finally, the mayor stated that they would issue the permit "if we would permit the other lot owners to come in by the time the final string of casing was set". The city clerk testified that on that occasion members of the council asked Mr. Powers if his company would be willing to include in the lease other lots in the block; that Powers answered in the affirmative and stated that there was a paragraph in the lease which provided for this; that the council commended Powers and his company for including such a provision in the lease; that Powers responded that this had been done because of knowledge of difficulties of that nature in the past; and that the length of time to be allowed for such purpose was then discussed.

With respect to the meeting of the council which was held on December 15, 1937, Powers testified that two representatives of Group No. 1 were present, that the mayor instructed the city attorney to advise with the city clerk "as to notifying the other lot owners so there could be no question but what they would be given an opportunity to join with the other lots in block 31"; that there was then considerable discussion as to the time limit which was finally fixed as the time the final string of water casing was set; that he told the council this would be 45 or 50 days after the well was spudded in; and that "they said in that event they would instruct the clerk to prepare a permit and issue it". The city clerk testified that Powers was present at the meeting on December 15, 1937, but when asked whether something was said at that time about giving the other lot owners more time in which to make up their minds whether they wanted to come into the lease or not, he replied: "I don't remember". A little later, however, he testified that there was no discussion at that meeting to the effect that the other lot owners were already tied up on a lease to other oil companies, that they would need some time to get released from that lease if they desired to, and that they could have until the setting of the final water string within which to make up their minds.

There can be no question that it was the policy of the city council, in view of the limited number of wells that would be permitted in this subdivided area, to insist that other lot owners should be given an opportunity to join in the lease when application for a permit was made in connection with a lease covering only a part of a block. It is equally clear that the parties to the original lease understood this situation and contemplated such a requirement when that lease was executed. We think it is equally clear that the "requirement" the parties had in mind and intended was not one compelling the other lot owners to join in the lease but one giving them the opportunity to do so. These matters were not only understood in advance but were quite fully discussed at a meeting of the council on December 8, 1937, with representatives of Group No. 1 present. The minutes of that meeting show that the matter was continued for a week and the clerk instructed to communicate with the other lot owners. In doing so, the clerk notified those lot owners not only that the permit was to be granted upon condition that the other lot owners were to be included if they so desired, but that they were to have a reasonable time after the permit was granted within which to come in. This notice was in accordance with the discussion which had taken place at the council meeting. The other lot owners, after receiving this notice, contacted the plaintiff, expressed a desire to join in the lease, secured a release and quitclaim from the other oil company, and after completing that matter signed and acknowledged a copy of the original lease, setting the numbers of their lots and their respective square footages opposite their signatures, all of which was completed on February 2, 1938, some six weeks before the expiration of the time limit discussed at the council meeting.

[3] It clearly appears that the city council intended to require that these other lot holders be given an opportunity to join in the lease. There is no evidence indicating that the city council intended to change this requirement by anything that was said or done at the meeting on December 15, 1937. It appears, without question, that the city clerk, the plaintiff, and these appellants understood after the permit was issued that this requirement was still in force and effective, and that the permit had been issued with that understanding. We think it also appears that the members of Group No. 1 also had this understanding, even after the permit was issued, since the letter sent to the plaintiff by their committee on February 16, 1938, after notification that Group No. 2 had joined in the lease, indicates this. While they stated in that letter that they would resist the inclusion of the other lots in the lease, the reason there given for their objection was not their understanding that the permit had been issued without any condition for allowing the other lot owners to join in the lease. They stated that they understood that the council had a rule by which they would refuse permits unless all of the owners of other lots in the same block were given an oppor-

tunity to join the lease, but said they understood that this rule did not apply to lots which had been leased to some other company. There was no basis for the only objection that was made, and the other lot owners had already secured a release from the other oil company and had put themselves in a position to comply with the rule of the city council, which Group No. 1 admitted that they thoroughly understood. The letter written on February 16, 1938, is strongly suggestive of the interpretation placed by Group No. 1 both upon the terms of the lease and the situation as it then existed.

[4] The existence of the rule in question seems to have been understood by all parties concerned. There is evidence that on at least two prior occasions the city council had applied this rule and it had been followed, although in neither of those cases was the requirement for permitting other lot holders to join the lease, if they so desired, expressly stated in the permit which was issued. However, it appears that in the next permit of this nature which was issued by authority of the council, in May, 1938, the requirement was expressly inserted in the permit. The extent to which the requirement in question was understood by the plaintiff is indicated by the fact that in connection with drilling its well upon one of the lots included in the original lease it placed its boiler upon one of the lots belonging to a member of Group No. 2, it placed pipe lines across other lots belonging to members of this group, and shortly after the well was brought in and before this action was brought it placed a tank on another of those lots. It further appears from the evidence that the well, as actually drilled, would necessarily drain oil from under the lots owned by these appellants.

With respect to what occurred at the meeting of the council on December 15, 1937, it may be observed that the matter of still permitting other lot owners in this block to avail themselves of the opportunity to share in the original lease was either discussed again or it was not. If it was, the only evidence of what was then said is found in the testimony of Powers, to which we have referred. If it was not again discussed there is no evidence of any change in the policy on the part of the city council and the fact remains that there had been considerable discussion at the meeting the week before as to giving other lot owners a reasonable time after the issuance of the permit in which to join in the lease and the lot owners were notified to that effect.

Moreover, Powers had stated to the council at the meeting on December 8, that the company's lease with Group No. 1 contained a paragraph providing for the inclusion of other lot owners in block 31 who were not already included therein. He was commended for having made this provision and the representatives of Group No. 1 who were present made no objection. If it be assumed that nothing further was said on this matter at the meeting on December 15, the council had a right to rely upon the representation, which had been already made, that this had been provided for and would be done. And, although the representatives of Group No. 1 were again present, the council was not informed of any change in the agreement contained in the lease or in the interpretation thereof. Aside from any other consideration, the members of group No. 1 should now be estopped to deny the effect of their virtual agreement with the city council.

The evidence discloses that there was a requirement on the part of the city authorities that the other lot owners in this block be given an opportunity to join in the lease under which the well was to be drilled, within the meaning of the quoted clause of the original lease, and that the appellants not only elected to avail themselves of the opportunity furnished by this requirement, but by their acts brought themselves within both substantial and actual compliance with this provision of the original lease. It follows that parts of the findings and conclusions are not sustained by the evidence and that the finding that the city authorities did not actually require other square footage to be included in the lease is not sufficient to support the judgment.

While it is unnecessary to go into the matter further, it may be observed that the pertinent clause of this lease also provided for the bringing in of other land "by agreement". This is somewhat ambiguous and the manner of carrying it out is also uncertain. Undoubtedly the parties had in mind the other lots in the same block, and not some other and indefinite area. It may have been intended to permit the plaintiff to extend the lease to other owners in that block by agreement between it and those owners. This seems plausible in view of the representation to the council that provision had been made in the lease for taking such other owners in if they desired. Perhaps the "agreement" referred to in this provision of the lease is that of the other lot owners agreeing to come in. In view of the uncertain language used in the lease, the action of Group No. 1 in saying nothing when that representation was made to the council, and in waiving any objection to the manner in which the "agreement" had been carried out, by objecting only to an immaterial matter in the letter of February 16, 1938, might well estop them from now asserting that the "agreement" portion of this clause of the lease had not been complied with.

For the reasons given the judgment is reversed.

We concur: MARKS, J.; GRIFFIN, J.

45 Cal.App.2d 278

PEOPLE v. McCARTHY et al.

Cr. 2149.

District Court of Appeal, First District, Division 2, California.

June 11, 1941.

1. Burglary 🔑41(1)
Conspiracy 🔑47

Evidence warranted conviction of accused for conspiracy to commit burglary and theft and for first and second degree burglary, on ground that accused conspired with other defendants to commit crimes, and that accused aided and abetted in their commission.

2. Conspiracy 🔑47

In prosecution for conspiracy to commit burglary and theft and for burglary, state need not prove conspiracy by direct evidence, and need not prove by direct or indirect evidence that defendant had been personally present when burglaries were committed. Pen.Code, § 971.

3. Criminal law 🔑1144(13)

On appeal from judgment of conviction, District Court of Appeal must assume in favor of verdict the existence of every fact which jury could have reasonably inferred from the evidence, and then determine whether such facts were sufficient to sustain verdict.

4. Criminal law 🔑720(6)

Arguments of district attorney with respect to inferences which he believed jury should draw from evidence adduced, did not constitute "misconduct," where there was sufficient evidence to support such inferences.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

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Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Juanita McCarthy was convicted for conspiracy to commit burglary and theft and for first and second degree burglary, and from the judgment of conviction and an order denying her motion for new trial, she appeals.

Judgment and order affirmed.

Joseph A. Brown and Alexander Mooslin, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Dennis Hession, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant Juanita McCarthy, her brother Eddie Pacheco, and her brother-in-law Rexal McGee were charged in one count of the information with the crime of conspiracy to commit burglary and theft and in each of several other counts of the information with the crime of burglary. Defendant Juanita McCarthy was convicted upon a trial by jury of the crime of conspiracy as charged in the first count, of the crime of burglary in the second degree as charged in the second count and of the crime of burglary in the first degree as charged in the third count. Said defendant was acquitted on the remaining counts. Her codefendants were also convicted but they have not appealed. Said defendant Juanita McCarthy has appealed from the judgment of conviction and from the order denying her motion for a new trial.

The main contention of appellant on this appeal is that the evidence was insufficient to sustain her conviction. We shall therefore briefly summarize the evidence upon which appellant's conviction was based.

Appellant resided in Oakland and her two brothers, Eddie Pacheco and Victor Pacheco, were in Los Angeles. In the early part of May, 1939, said brothers stole some kettle drums and chimes in Los Angeles, which stolen property was brought to the home of appellant on May 19, 1939, by Eddie Pacheco, who then took up his residence with appellant. Thereafter, said Eddie Pacheco and Rexal McGee committed several burglaries, including two separate burglaries committed on the premises of a Mrs. Mullen who was a neighbor of appellant. It was these two last-mentioned burglaries which were the subjects of the second and third counts of the information.

On May 22, 1939, being three days after the arrival of Eddie Pacheco at the home of appellant, Mrs. Mullen was present with appellant and Eddie Pacheco in the home of appellant. She heard Eddie Pacheco telephoning to someone regarding drums and after concluding he said to appellant, "He has already bought some". Shortly thereafter, appellant stated to Mrs. Mullen that it was necessary that she and her brother go to San Francisco that afternoon. On said afternoon, appellant assisted her brother in moving the drums from the back of his car into the back seat of her own car and drove him to San Francisco, where he disposed of said drums and chimes at a drum shop. The proprietor gave Eddie Pacheco a check which was made out in the fictitious name of Eddie Francis. Shortly thereafter, appellant and Eddie Pacheco appeared at a tavern in San Francisco, the proprietor of which tavern had known appellant for about twenty years but had never known her brother. Appellant requested said proprietor to cash the check received for the drums and chimes but did not tell him that Eddie Pacheco was her brother or that his name was Pacheco, and not Francis. The proprietor cashed the check which was endorsed by Pacheco, using the fictitious name of Eddie Francis which appeared on the check.

On May 25, 1939, the garage on the premises of Mrs. Mullen was burglarized. Said garage had been leased by Mrs. Mullen to a Mr. Coleman who resided with her. Entrance thereto was obtained by opening the padlock on the garage door, and several tools, including two crowbars and a screw driver, were taken. Most of these stolen tools were later found on May 30, 1939, in an automobile occupied by defendants Pacheco and McGee. The stolen screw driver was later found on the floor inside Mrs. Mullen's home after her said home had been burglarized on May 26, 1939.

On the night of May 25, 1939, being the night when the garage was burglarized, appellant had called Mrs. Mullen and had asked Mrs. Mullen to "come and sit with her that evening". Mrs. Mullen told appellant that she could not do so; that she was going to lodge, and that there would be no one at her home that evening. There was no one at the Mullen home from 8 p. m. until midnight that evening and it was during that time the burglary was committed. At the time of the arrest of defendant Pacheco he had in his possession a key ring containing a bunch of keys belonging to appellant. Among these keys was a key which opened the padlock on said garage. Shortly after defendant Pacheco's arrest, appellant phoned police headquarters and requested the return of said keys even though she admitted that she had duplicates of all of said keys other than the key which opened the padlock on said garage.

On May 26, 1939, being the night after the garage was burglarized, Mrs. Mullen's home was burglarized. Entrance thereto was gained by "jimmying" a window and several articles and some money were stolen. The tools used to force the window had left some distinctive marks and some red paint on the window-sill. Expert testimony was introduced to show that the marks left on the window-sill were caused by the use of the screw driver and the crowbars stolen from the garage on the previous night. These tools had all been painted with a red paint by Mr. Coleman and said paint and the flecks on the window-sill were analyzed to show their similarity. As above stated the screw driver was thereafter found on the floor in Mrs. Mullen's home and the crowbars were later found in the possession of the defendants Pacheco and McGee.

On May 26, 1939, and prior to the burglary of Mrs. Mullen's home, Mrs. Mullen had telephoned appellant; told her that all of the occupants of her home except herself would be away that evening; and asked appellant to come to her home and spend the evening with her. Appellant told Mrs. Mullen that she had to prepare dinner and did not know what hour she could leave to visit Mrs. Mullen. Mrs. Mullen then stated that she would go to her daughter's home first and appellant offered to call there for her later. Mrs. Mullen did go to her daughter's home, but, finding no one at home, she walked over to appellant's home. Appellant and defendant Pacheco were there at the time and defendant McGee arrived at about nine o'clock. Mrs. Mullen was then ushered into a sun porch off the kitchen with appellant's daughter and another man, leaving appellant and the other two defendants in the kitchen. Contrary to the custom on former visits of Mrs. Mullen, appellant closed the door between the kitchen and the sun porch and thereafter appellant and the other two defendants were out of Mrs. Mullen's sight and hearing for about one hour. At about 10 o'clock, appellant opened the door and shortly thereafter offered to drive Mrs. Mullen to her home. After arriving there, Mrs. Mullen discovered that the burglary had been committed.

In statements made after appellant's arrest, appellant denied many of the incriminating circumstances. She denied that she had ever seen or heard of the drums; she denied being at the tavern in San Francisco when defendant Pacheco cashed the check; and she denied that she ever asked anyone to cash a check for defendant Pacheco. She further denied owning the key which opened the padlock on the Mullen garage. She further denied that she or either of the other defendants left her house while Mrs. Mullen was there on the night that Mrs. Mullen's house was burglarized. Many of these denials were repeated in her testimony upon the trial, but such denials merely created a conflict with the direct testimony of other witnesses and the reasonable inferences to be drawn therefrom.

[1-3] It appears that the jury believed the direct testimony of the other witnesses and that the several denials by appellant in conflict therewith served to discredit her entire testimony. Our review of the record leads us to the conclusion that there was ample testimony to sustain the conclusion that appellant had conspired with the other defendants to commit the crimes and that she had aided and abetted in their commission. It was of course not necessary to prove the conspiracy by direct evidence (People v. Little, 41 Cal.App.2d 797, 107 P.2d 634, 108 P.2d 63; People v. Fitzgerald, 14 Cal.App.2d 180, 58 P.2d 718), and it was not necessary to prove by evidence, direct or indirect, that appellant had been personally present when the burglaries were committed. Pen.Code, sec. 971. On this appeal we must assume in favor of the verdict the existence of every fact which the jury could have reasonably inferred from the evidence and then determine whether such facts were sufficient to sustain the verdict. People v. Tom Woo, 181 Cal. 315, 184 P. 389; People v. Perkins, 8 Cal.2d 502, 66 P.2d 631. In our opinion the facts which the jury impliedly found against appellant were sufficient and could be reasonably inferred from the evidence presented.

There is a further heading in appellant's brief reading "Errors of the Court and Ruling on Evidence". Under this heading appellant lists several rulings admitting evidence over appellant's objection. We have examined the various rulings referred to and find no prejudicial error in any of them.

[4] Appellant has also included a heading reading "Misconduct of District Attorney". Many of the alleged instances of misconduct are based upon the claim that the district attorney went outside the record in his argument to the jury. The district attorney did point out to the jury the inferences which he believed the jury should draw from the evidence produced. We believe there was sufficient evidence to support these inferences and that the arguments of the district attorney with respect to said inferences did not constitute misconduct. We have examined the remaining claims of alleged misconduct and they appear to be likewise without merit.

The judgment and order denying the motion for a new trial are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

SUTTLES et al. v. HOLLYWOOD TURF CLUB.

Civ. 12465.

District Court of Appeal, Second District, Division 1, California.

June 11, 1941.

Rehearing Denied July 1, 1941.

Hearing Denied Aug. 7, 1941.

1. Civil rights 🔑6

Theaters and like places of a public or quasi-public character are generally included within the operation of statutes which forbid discrimination on account of race or color in "places of public amusement", and such a statute is violated if the proprietor of a theater denies to a colored person, on account of his race and color, access to his theater or to the several circles or grades of seats therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Place of Public Amusement".

2. Civil rights 🔑6

A general clause in a civil rights statute, such as any other "place of public accommodation or amusement", includes a public roller skating rink, a race track, a public dancing pavilion, and a pleasure resort with a bowling alley maintained as a part thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Place of Public Accommodation or Amusement".

3. Civil rights 🔑13

The section of the civil rights statute making it unlawful to refuse admittance to stated places of public amusement, including a race course, to any person over 21 who presents a ticket or tenders admission price and demands admission, did not preclude plaintiffs, who were denied entry to clubhouse at defendant's race track upon presenting tickets because they were negroes, from bringing action under section entitling all citizens to the full and equal accommodations and privileges of stated places of public accommodation or amusement, even though a race course is not specifically enumerated in the latter section. Civ.Code, §§ 51, 53.

4. Civil rights 🔑6

Where tickets for either grandstand or clubhouse at defendant's race track were available to all citizens who conducted themselves properly on the grounds and had money to buy tickets, defendant by refusing admission to clubhouse to plaintiffs who had purchased tickets because they were negroes violated the civil rights statute, and plaintiffs were entitled to recover statutory damages. Civ.Code, §§ 51–54.

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Joseph C. Suttles and another against the Hollywood Turf Club to recover damages for violation of civil rights. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Freston & Files and Ralph E. Lewis, all of Los Angeles, for appellant.

Lloyd C. Griffith, of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an appeal from a judgment awarding to each of the respondents the sum of $100 on account of appellant's refusal to admit them to the clubhouse maintained at Hollywood Park, a racetrack operated by appellant corporation at Inglewood.

From the record herein it appears that respondents at a cost of $2.20 each, procured from Gittelson Brothers, an independent ticket agency operating an office at the Biltmore Hotel in downtown Los Angeles, reservations in the form of an order on appellant for the delivery to respondent Suttles of two box seats for the races on July 21, 1938. In addition, respondents procured two tickets of admission to the clubhouse, paying the sum of $2.75 each therefor. When respondents presented their tickets for admission to the said clubhouse, the attendant stated, "You cannot come in here. We do not allow Negroes in this place"; whereupon respondents in an orderly and peaceable manner left the racetrack, although an opportunity was afforded them to be seated in the grand stand, generally referred to as the general admission section, the price of such facility being $1.10 per person.

Respondents instituted the instant action under the so-called Civil Rights statute of this state, embodied in sections 51 to 54, inclusive, of the Civil Code.

Section 51 entitles all citizens of the state to the "full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens".

Section 52 fixes the liability in damages in an amount not less than $100 of anyone who "denies to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges enumerated in section fifty-one * * * or whoever makes any discrimination, distinction or restriction on account of color or race * * *".

Section 53 makes it "unlawful for any corporation, person, or association, or the proprietor, lessee, or the agents of either, of any opera-house, theater, melodeon, museum, circus, caravan, race-course, fair or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, or who tenders the price thereof for such ticket, and who demands admission to such place. Any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement".

Section 54 provides that any person who is refused admission to any place of amusement contrary to the provisions of section 53, supra, is entitled to recover his actual damages and one hundred dollars in addition thereto.

It is clear from the record that when respondents presented their tickets for admission to the clubhouse, a reserved section maintained at the racetrack and open to the public in general, they were denied entry on the ground that they were members of the Negro race.

Appellant summarizes its argument by asserting in its brief that respondents' "right of recovery hereunder must be based upon section 53 of the Civil Code and that section 53, while prohibiting refusal of *admission,* does not go so far as does C.C. 51 which section prohibits discrimination between facilities or accommodations offered. It is therefore urged that with respect to a race course such as is here involved there is nothing unlawful and nothing which would give rise to a ground for civil action in denying (respondents) admission to a particular facility, so long as there was no refusal of admission to the race course as such". In other words, appellant argues that "no place which is specifically listed, for instance, in section 53, but which is not listed in section 51, can be included in the latter statute under the general or catch-all language there", to-wit: "and all other places of public accommodation or amusement".

[1, 2] In 10 Am.Jur. 916, it is stated in reference to this subject as follows: "Theaters and like places of a public or quasi-public character are generally held to be included within the operation of statutes which forbid discrimination on account of race or color in places of public amusement. Such a statute is violated if the proprietor of a theater denies to a colored person, on account of his race and color, access to his theater or to the several circles or grades of seats therein, as where a negro, because of his race and color, is denied admission to any part of the theater except the gallery. *A general clause in a civil rights statute, such as 'any other place of public accommodation or amusement', includes* a public roller skating rink, *a race track,* a public dancing pavilion, and a pleasure resort with a bowling alley maintained as a part thereof." (Emphasis added.)

[3] It would therefore appear that section 53 of the Civil Code does not exclude respondents from bringing their action under section 51, notwithstanding the fact that a race-course is not specifically enumerated in the latter section.

The leading civil rights case in this state is that of Jones v. Kehrlein, 49 Cal. App. 646, 194 P. 55, 56, in which the facts there involved are stated in the opinion as follows: "The plaintiff is a minor, a citizen of the United States and a negro. The defendants conduct a moving picture show at Fresno, and on June 20, 1918, sold to plaintiff two tickets to the show, upon presentation of which plaintiff and his young woman friend were admitted to the show-room. He was thereupon directed by an usher, acting under general orders from the management to seats on the right side of the house, which were set apart by the management for the use of what the defendants termed 'the dark races.' The boy declined to follow the direction of the usher, and requested a seat in a part of the house not so set aside, namely, in the rear of the center section where, incidentally there were plenty of vacant and unsold chairs. The ticket was of the kind which in the hands of one not of the 'dark races' admitted the holder to seats in this latter section of the house. This request on his part was refused, and he and his companion thereupon left the theater. He subsequently brought this action to recover $5,000 as damages because of the incident, and was awarded judgment for $100."

It was there held (49 Cal.App., at page 651, 194 P., at page 57) that the refusal to seat Jones in any other portion of the house than that set apart for the so-called colored races constituted an illegal discrimination against him under sections 51 and 52 of the Civil Code, and that "the whole transaction with young Jones was tainted from the beginning with illegality arising out of the intent of the management from the start to deprive him of his civil rights under the statute by discriminating against him in the matter of seating accommodations solely on account of his race. The intent was illegally conceived and illegally carried out by the management of the theater".

It was further stated, in the cited case, 49 Cal. App. at page 650, 194 P. at page 57, that "Many of the states have enacted laws known as 'civil rights statutes,' and we are cited to cases upholding and giving effect to such laws. Under them it has been held that the proprietor of a theater will be liable in damages for a refusal to admit a colored person (Joseph v. Bidwell, 28 La.Ann. 382 [26 Am.Rep. 102]; Donnell v. State, 48 Miss. 661 [12 Am.Rep. 375]), and for a refusal to admit a colored person to the several circles or grades of seats in a theater (Baylies v. Curry, 128 Ill. 287 [21 N.E. 595].)"

In the recent case of Evans v. Fong Poy, 42 Cal.App.2d 320, 108 P.2d 942, it was held that the language of the civil code sections guaranteeing to all citizens full and equal accommodations, advantages, facilities and privileges of the enumerated establishments, and all other places of public accommodation or amusement, covers public bars or saloons, and hence covers refusal to serve a person at a public bar in a cafe because of his race or color.

[4] So far as is shown by the record herein, tickets for either the grandstand or the clubhouse at Hollywood Park are available to all citizens alike, who conduct themselves properly on the grounds and who have money to buy the tickets. It is admitted by appellant that the respondents purchased tickets to the clubhouse and were refused admission thereto because they were negroes. This is clearly a violation of the statute.

The judgment appealed from is therefore affirmed.

We concur: DORAN, J.; WHITE, J.

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45 Cal.App.2d 365

ROSENFIELD v. VOSPER et al.

Civ. 12887.

District Court of Appeal, Second District, Division 2, California.

June 16, 1941.

Hearing Denied Aug. 14, 1941.

1. Appeal and error 🔑933(5)

Where affidavit filed by defendants' attorney in support of motion for new trial complained that trial judge made remarks showing prejudice during nonjury trial, and plaintiff's answering affidavit denied that judge made such remarks but judge stated that he had made remarks complained of, on defendants' appeal District Court of Appeal was bound to consider statements in affidavit of defendants' attorney as true.

2. Trial 🔑29(1)

Although efforts on part of a trial judge to expedite proceedings and encourage settlement out of court are ordinarily to be commended, such efforts should never be so directed as to compel either litigant to make a forced settlement.

3. Trial 🔑29(1)

In a nonjury trial, the trial judge should not prejudge issues but should keep an open mind until all evidence is presented to him, and he is bound to refrain from forming an opinion on issues of fact until case is finally submitted to him.

4. Trial 🔑303

When issues of fact are submitted to a jury for determination, the trial judge must admonish jurors at each separation that it is their duty not to form or express an opinion thereon until case is finally submitted to them. Code Civ.Proc. § 611.

5. Appeal and error 🔑1046(5)

In attorney's action against clients to obtain judgment for reasonable value of legal services, where case was tried without a jury, remarks of trial judge, advising counsel for clients to tell clients that it would be to clients' best interests to settle for $7,500, were prejudicial against clients, especially where remarks were made before judge had heard witnesses for clients and a judgment was rendered against clients for $12,567.32 after clients refused to act upon judge's advice.

6. Appeal and error 🔑1046(1)
Trial 🔑18

The trial of a case should not only be fair in fact but it should also appear to be fair, and where contrary appears judgment may be reversed on appeal.

MOORE, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Adolph B. Rosenfield against Sidney C. Vosper and others to obtain a judgment for the reasonable value of legal services rendered by plaintiff to defendants. From a judgment for plaintiff, defendants appeal.

Reversed.

Hearing denied; GIBSON, C. J., and CARTER, J., dissenting.

D. A. Boone and James T. Satchell, both of Long Beach, for appellants.

Adolph B. Rosenfield, of Long Beach, in pro. per.

WOOD, Justice.

Plaintiff commenced this action on March 7, 1939, to obtain a judgment for the reasonable value of legal services rendered by him to defendants between January 7, 1938, and February 22, 1939, in the matter of securing permits to drill for oil on the property of defendants. At a trial without a jury plaintiff was given judgment for the sum of $12,567.32, from which judgment defendants have appealed.

In the original complaint plaintiff alleged that the reasonable value of his services was $5,605 and that he had expended for defendants the sum of $67.32, no part of which had been paid except the sum of $250. Defendants filed an answer in which they denied that any sum was due plaintiff except the sum of $1,000, which they had tendered to him. Plaintiff filed an amended complaint on March 21, 1939, in which he alleged that his services were of the reasonable value of $10,000. Defendants filed an answer to the amended complaint in which they alleged that the reasonable value of plaintiff's services was the sum of $1,000 and in which they also alleged that plaintiff had agreed that his services would be rendered for a maximum of $1,000. The trial was commenced in a Long Beach department of the superior court on December 19, 1939, and the taking of testimony was finally terminated on January 20, 1940. On January 2, 1940, and after the remarks of the trial judge in chambers of which special complaint is made as hereinafter set forth, plaintiff again amended his complaint and alleged that the reasonable value of his services was the sum of $15,000. On January 20, 1940, he again amended his complaint and alleged that the reasonable value of his services was the sum of $18,000. After the filing of the amended complaint alleging the value of the services to be $15,000 defendants filed an amended answer in which they alleged that on June 13, 1938, plaintiff had accepted the sum of $250 under circumstances which constituted an accord and satisfaction as of that date. The trial court found against the defense on the issue of accord and satisfaction and found the reasonable value of the services rendered by plaintiff to be the sum of $13,000, of which plaintiff had received the sum of $500 only.

Defendants contend that the trial judge was guilty of misconduct which prevented their having a fair trial. Plaintiff was on the witness stand during the first seven days of a trial that consumed about fourteen days. In the early days of the trial the judge frequently admonished the attorneys that the matter was taking too much time, spoke of the expense of conducting the court, urged expedition in the handling of the matter and frequently suggested to counsel that a settlement should be agreed upon out of court. On the fourth day of the trial the judge called counsel into his chambers for the purpose of discussing a settlement but the parties could not agree upon terms. The trial was thereupon transferred to Los Angeles for the reason that Judge Beardsley's assignment to Long Beach had terminated. On the fifth day of the trial the judge again called the attorneys into his chambers for the purpose of discussing a settlement. The conversation which took place in the judge's chambers on that occasion is set forth in the affidavits of the attorneys which were filed in support of the motion for a new trial and also in a statement made by the judge from the bench. D. A. Boone, one of defendant's counsel, states in his affidavit:

"* * * That thereafter the case was removed to Los Angeles for further trial and at a recess and before the plaintiff had completed his testimony the court asked the attorneys to step into his chambers, again stated that the case was one that should be settled, to which affiant again agreed, and stated that after all it was an attorney suing for his fee and that he had evidently done a great deal of work, and that a case of this type should not take so much time to try. Again the plaintiff demurred in making a settlement and in effect stated that as far as he was concerned there could be no settlement upon the basis of the amount claimed in his original complaint; that in order to demonstrate to the court the willingness of the defendants to settle the case upon some reasonable basis, affiant asked the court if he had any suggestions as to what he would consider a reasonable amount; that the court stated that he thought $7,500 would be a reasonable amount; affiant then told the court that he felt that the court had placed him in a position where nothing more could be said and that he must state the court's opinion to his clients, and of course allow them to make the decision and advised the court that he would do so immediately. That affiant then started to leave the judge's chambers for the purpose of presenting said matter to clients and as a parting word the judge said, in the presence of Mr. James T. Satchell, an attorney at law associated with affiant: 'Tell your clients that in my opinion it would be to their best interests to settle on that basis.' That affiant thereupon presented said matter to clients, giving them the entire conference which took place in the judge's chambers and stating that under the circumstances it appeared that the court was prejudging the case and in all probability if they continued the judgment would at least be in some amount more than the sum of $7,500, but leaving it entirely to the clients to decide what they should do after hearing the entire story concerning the attitude and statements made by the court. That the above suggestion of amount of settlement and statement by the court was made before the court had heard all the testimony of the first witness for the plaintiff, towit, the plaintiff himself, and was also made with full knowledge on the part of the court that the defendants claimed in their answer that they had paid the plaintiff the sum of $250, and that they were not indebted to the plaintiff in any sums in excess of $1,000, and in that connection further alleged that the plaintiff had agreed to accept the sum of $1,000 as the maximum amount to which he was entitled. That the court made such statements above referred to even though affiant called the court's attention to the fact, and the court admitted that he had heard none of defendants' case. That in view of the above circumstances and in the light of further events occurring in connection with the trial which will hereinafter be set forth, affiant believes that said action was prejudged by the court before hearing all of the testimony in the case and that no consideration whatsoever was given by the court to the defendants' case. * * * That on at least two occasions affiant recalls the court, in connection with conferences in chambers, permitted the plaintiff to make statements concerning the case to him and to appeal to his sympathies, which affiant believes had a direct effect upon the court and which could not have been properly received as evidence, such as statements made by counsel on several occasions that he had done a great mass of work; that there was other work that he had done that he could not recall and of which he had no record; that the work he had done for defendants had broken and injured his health; that he had neglected his other business because of the constant demands of defendants' business; that on such occasions the court intimated to the plaintiff his reaction with reference to testimony that had been received, such as stating that the $250 check caused him some worry and concern and that Rosenfield's testimony first given as an explanation as to the writing on said check was not very satisfactory, plaintiff Rosenfield having testified that he could not recall the writing on the check or what it was;

that he did not recall the words as written on the back of the check although it may have been there. After said questions above referred to the plaintiff then later took the witness stand again and recalled facts and circumstances concerning the check which he had previously testified he had no record of or any remembrance of, which explanation the court, from statements made at the time the decision was rendered from the bench, apparently adopted."

It was stipulated that the trial judge, in lieu of making an affidavit in response to the affidavits filed in support of the motion for a new trial, could make a statement from the bench and that his statement would have the same force and effect as if made under oath. Pursuant to this stipulation the trial judge made a lengthy statement in which he reviewed the allegations which had been made in defendants' affidavits and stated that he had never heard of any of the parties before the commencement of the trial and had no acquaintance with any of the lawyers participating in it. He denied that he had prejudged the case. On the subject of his admonishing counsel to expedite the trial the judge stated: "* * * I do remember that I did repeatedly admonish both sides that too much time was being taken and urged that an attempt be made to cover the ground with less expenditure of time." On the subject of the expense of conducting the court the judge stated: "What the court said was, that he had been told that a statistician had computed that the cost of operating a department of the superior court of the county of Los Angeles was $250 a day; the court itself had no such knowledge, simply passed on the information given to the court." On the subject of suggesting a settlement for $7,500 the judge stated: "At a considerable later period of the trial, the court discussed the matter again in chambers; both sides said then they were willing to consider settlement but neither side as I recollect it nominated any figure. After a good deal of discussion the judge said to Mr. Rosenfield, 'Why don't you offer to settle for $7,500?' and Mr. Rosenfield said, 'I do offer to settle.' The judge didn't say that he thought that was a fair fee. Later, of course, it came to the knowledge of the court that the parties had been unable to get together on a settlement. I find now on page 5 of Mr. Boone's affidavit, line 16, the language: 'That the court stated that he thought $7,500 would be a reasonable amount.' That isn't true according to the best of my recollection. Later, Mr. Boone says that the court said: 'Tell your clients that in my opinion it would be to their best interests to settle on that basis.' I think I did say substantially that."

When the taking of testimony was terminated and the matter was taken under advisement the court reviewed the evidence at some length and closed the review with these remarks: "Now I want to give further consideration to some particular problems here, but I shall not at this time fix the amount for which the court will later give judgment. Both sides will remember that the court at the outset tried rather diligently to show both sides that it would be wise and economical and sporting for them to get together if they could, but that failed at that time and there is nothing to prevent both sides from considering the matter further, if you like. I shall try to get in some time out of hours because there is not time here in this department where I can give a consecutive length of time to matters, so I will try to give a decision in two or three days. The matter will stand submitted."

The plaintiff filed his own affidavit in answer to the affidavits filed on behalf of the defendants, in which he reviews and disputes many of the assertions made in defendants' affidavits. On the subject of the statement of the judge urging a settlement for $7,500 plaintiff states: "When Satchell [one of counsel for defendants] refers to the fact that the court suggested $7,500 as a basis of settlement he omits to state that Boone asked for the court's suggestion. Boone so states in his affidavit. At no time while deponent was present (and he was present as aforesaid at such conference) was any statement made by the court to Boone to 'Tell them I think that is a fair settlement and it would be to their advantage to accept it.'"

[1] It thus appears that plaintiff denies that the judge told counsel for defendants to tell his clients that it would be to their best interests to settle for $7,500, but the judge himself states that he had "substantially" given that admonition to defendants' counsel. Under the circumstances we must consider the statement contained in Mr. Boone's affidavit, substantiated by the statement of the judge, as true.

[2] Although efforts on the part of a trial judge to expedite proceedings and to encourage settlements out of court are ordinarily to be commended, such efforts should never be so directed as to compel either litigant to make a forced settlement. The advice to defendants' counsel to tell his clients that it would be to their best interests to settle for $7,500 was most inappropriate, especially in view of the fact that at the time the suggestion was made the defendants had not had an opportunity to present any of their witnesses. The remarks left the court in such position that if its ultimate judgment should be for a greater sum than $7,500 defendants would naturally feel that they had not been fairly treated.

[3, 4] A trial judge should not prejudge the issues but should keep an open mind until all of the evidence is presented to him. When issues of fact are submitted to a jury for determination it is made the duty of the judge to admonish the jurors at each separation that "it is their duty not to form or express an opinion thereon until the case is finally submitted to them". Code Civ.Proc., § 611. In the case under review the trial judge took the place of the jury as a trier of the issues of fact. It was his duty to determine whether plaintiff had agreed to accept $1,000 in full for his services, whether the receipt of the check for $250 constituted an accord and satisfaction, and the reasonable value of plaintiff's services. These matters constituted issues of fact and the trial judge, like the jurors in a jury trial, had the duty to refrain from forming an opinion on such issues until the case was finally submitted to him.

[5, 6] A mere statement of the facts as above outlined compels the conclusion that the trial judge was not in a position to hear the witnesses for defendants with an open mind and that his action in advising defendants that it was to their best interests to settle for $7,500 was an irregularity which was highly prejudicial to them. According to the statement made by the judge from the bench, plaintiff was willing to accept the judge's suggestion of $7,500 in settlement and the judge told counsel for defendants to tell his clients that it would be to their best interests to settle on that basis. Upon their refusal to act upon the suggestion of the judge a judgment was rendered against them for $12,567.32. The language used by the court in Pratt v. Pratt, 141 Cal. 247, 252, 74 P. 742, 744, is applicable to the present situation: "The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand."

The judgment is reversed.

I concur: McCOMB, J.

MOORE, Presiding Justice (dissenting).

I dissent. The beneficial results of the court's attempt to conciliate controversies are obvious to those who have participated in many and various litigious disputes. "It is a function of a good judge" wrote Coke (4 Coke, 15b) "to adjust disputes." While it would violate all proprieties and transgress recognized judicial ethics for a judge or other arbiter to become an active agent on behalf of one of the parties to negotiate with the other for a compromise settlement (Livermore v. Bainbridge, 44 Howe 357) yet when, in the presence of counsel for both parties, he suggests the expediency and practical value of adjusting their differences, he is performing a function of the judicial office. Kentucky Law Journal, vol. 18, p. 330. How far the judge should go in suggesting why a full trial and a formal judgment should be avoided is a matter to be governed by sound judgment in view of the nature of the case and the disposition of the parties. But, in the absence of a showing of a pernicious activity against a party, and when all of the court's suggestions are made in the presence of all counsel, his indiscreet admonitions alone should not warrant a reversal. In re Nevitt, 8 Cir., 117 F. 448, 54 C.C.A. 622; Atherton v. Atherton, 82 Hun 179 31 N.Y.S. 977; Harrington v. Boston Elevated Railway Co., 229 Mass. 421, 118 N.E. 880, 884, 2 A.L.R. 1057.

In the Harrington case, where the judge had suggested to defendant's counsel alone that he ought to be willing to pay anywhere from $3,750 to $5,000 to settle the case, the supreme judicial court of Massachusetts affirmed the judgment and remarked: "The conduct of the presiding judge did not violate the justly strict and lofty standard of our Constitution."

In the Nevitt case, it was assigned as error that the judge had for many years endeavored to persuade the parties to compromise. But the appellate court's reply was that "his earnest and systematic endeavors to effect a compromise of this controversy bespeak for him emphatic commendation. The policy of the law has always been to promote and sustain the compromise and settlement of disputed claims". [117 F. 452].

The fact that the judge in the trial of a suit involving attorney's fees suggested a figure which might form the basis of negotiations for a compromise is not proof that he did not hear with patience and with an open mind the testimony of the defense witnesses.

45 Cal.App.2d 288

CONSOLIDATED SHIPPERS, Inc., v. PACIFIC EMPLOYERS INS. CO. et al.

Civ. 12763.

District Court of Appeal, Second District, Division 2, California.

June 11, 1941.

Hearing Denied Aug. 7, 1941.

1. Insurance 🔑512½

Where one insurer issued policy insuring truck owner and corporation against loss from operation of truck, and another insurer issued policy insuring corporation against loss from operation of trucks not owned by corporation but transporting merchandise for corporation on contract, and both policies contained proration clauses, the risk covered by each policy was the same so far as corporation was concerned, and first insurer could not be held liable for loss from accident up to the limit of its policy on theory that such policy afforded primary coverage and that other policy afforded secondary coverage.

2. Insurance 🔑512½

Provisions for either "pro rata" or "excess insurance" in automobile liability policies are based on the existence of other valid and collectible insurance covering the same loss, but, if insurance is pro rata, it cannot at the same time be excess insurance as to the same loss, since effect of provision for proration is to require the several insurers of the same risk to share the total loss.

See Words and Phrases, Permanent Edition, for all other definitions of "Excess Insurance" and "Pro Rata Insurance".

3. Insurance 🔑146(1)

An insurance policy is to be construed like any other contract, and, where there is no ambiguity in the language used, it must be construed in accordance with intention of the parties.

4. Automobiles 🔑89

Under the motor carrier act, insurance coverage is required as security for protection of the public. Motor Carrier Act of 1935, § 215, 49 U.S.C.A. § 315.

5. Insurance 🔑512½

Where action was brought by insured against automobile liability insurers to recover amount paid by insured to injured parties, insurer which claimed that pro rata provision in policy issued by other insurer was void, could not rely, as evidence of invalidity, on alleged conflict between provision and indorsement which was inserted in such policy in order to comply with the Federal Motor Carrier Act, since the rights of the parties were to be determined by terms of their contracts and not by provisions of law designed to protect interests of the public. Motor Carrier Act of 1935, § 215, 49 U.S.C.A. § 315.

6. Insurance 🔑514

Automobile liability insurer and insured were competent to limit liability in any manner they saw fit as between themselves, though such limitation would be invalid as to an injured claimant under the policy.

7. Insurance 🔑512½

Where one policy insured truck owner and corporation against loss from operation of truck and policy issued by another insurer covered loss from operation of trucks not owned by corporation but transporting merchandise for corporation on contract, and both policies contained proration clauses, neither policy could be regarded as excess insurance, and risks covered were coextensive in so far as corporation was concerned, regardless of whether corporation's liability as between corporation and truck owner was primary or secondary.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge. On rehearing.

Former opinion and judgment of the trial court reversed.

For prior opinion, see 112 P.2d 673.

Fred Aberle, of Los Angeles, for appellant.

Kenneth J. Murphy, of Los Angeles (Henry E. Kappler, of Los Angeles, of counsel), for respondent.

PER CURIAM.

In this action to recover under the provisions of separate policies of insurance issued by each insurer for a loss sustained, a judgment for $14,522.21 was entered in favor of plaintiff and against appellant Commercial Standard Insurance Company and respondent Pacific Employers Insurance Company, hereinafter referred to respectively as Commercial and Pacific. The judgment, from which this appeal is taken, directs that as between Commercial and Pacific it is to be first satisfied against Commercial to the extent of the limit of liability under its policy ($9,561.10) and that the balance might then be satisfied against Pacific.

Commercial issued a policy of public liability insurance whereby it agreed to insure M. L. Harvey and/or Consolidated Shippers, Inc., plaintiff herein, against loss arising from or resulting from the ownership, maintenance or use of a Chevrolet truck which was owned by Harvey. The limits of liability under such policy were fixed as $5000 for property damage and $10,000 for injury to or death of more than one person. Pacific also issued a policy of public liability insurance by the terms of which it insured plaintiff alone against loss by reason of any liability imposed by law resulting from the operation of all automobiles and trailers other than those owned by plaintiff which were transporting merchandise on a contract basis for the account of plaintiff. The liability under Pacific's policy was further limited to such loss as might result to plaintiff from the operation of trucks and trailers by independent contractors who had executed a prescribed form of blanket hauling contract. The limits of liability under Pacific's policy were $5,000 for property damage and $100,000 for injury to or death of more than one person. Each policy contained a provision for the proration of insurance, providing in effect that if the insured carried other insurance against the same loss the insurer would not be liable for a larger proportion of the entire loss than the amount named in the policy bore to the entire amount of collectible insurance.

During the time that both policies were in force Harvey, while transporting merchandise in his Chevrolet truck on a contract basis for the account of plaintiff, became involved in an accident in Arizona which resulted in the death of two persons. Two actions to recover damages for the death of such persons were instituted in Arizona against Harvey and plaintiff herein. Prior to the trial of such actions the parties stipulated, without admitting liability, to compromise judgments being entered in favor of the plaintiff in each action and against both defendants for an aggregate amount of $11,600.00. The judgments which were accordingly entered were fully satisfied by plaintiff herein. Both Commercial and Pacific were duly notified of the accident and of the filing of the actions in Arizona. Pacific denied liability and refused to investigate the matter or to defend the actions. Commercial did investigate the accident and entered upon the defense of the actions but withdrew therefrom prior to the entry of the judgments and refused to proceed further. By this action plaintiff sought to recover the amount which it had paid in satisfying the Arizona judgments, attorney's fees and costs incurred in such actions and interest.

In order to comply with the terms of the Arizona law which requires a lease agreement where an interstate motor carrier operates equipment not owned by it, Harvey entered into an agreement with plaintiff by which he purported to lease his Chevrolet truck to plaintiff. This lease agreement had been executed and filed in the state of Arizona prior to the happening of the accident. Evidence was introduced on the trial of this action in an effort to show that notwithstanding the apparent relationship between Harvey and plaintiff arising out of the lease agreement, at the time of the accident Harvey was actually an independent contractor and not an employee of plaintiff. Upon such evidence the trial court found that Commercial was primarily liable under its policy and that Pacific's policy was secondary insurance which did not attach or become collectible until the limits of Commercial's policy had been exhausted.

[1] The contention of Commercial that the finding or conclusion of the trial court to the effect that its policy afforded primary coverage and Pacific's secondary coverage is not supported by the evidence and is con-

trary to law must be sustained. So far as plaintiff is concerned, the risk covered by each policy was the same. The Commercial policy afforded plaintiff insurance against loss resulting from any liability arising out of the maintenance or use of the Chevrolet truck. By the Pacific policy plaintiff was insured against loss resulting from any liability arising out of the operation of any truck, although it was not specifically described in the policy. While it is true that the Commercial policy covered Harvey as well as plaintiff, there can be no doubt so far as plaintiff is concerned that the risks covered by both policies were coextensive. If the policies had in effect the same coverage, neither could be primary but both insurers were jointly liable. Each policy provided expressly that if the assured carried other insurance against a loss covered by the policy then the insurer would not be liable for a larger proportion of the entire loss than the amount payable under its policy bore to the total amount of collectible insurance. Neither contained any provision to the effect that the insurance afforded thereby was to be considered as excess insurance in the event the assured carried other collectible insurance covering the same loss. The effect of the trial court's decision, however, is to read such a provision into the policy issued by Pacific.

[2, 3] To construe the Pacific policy as excess insurance is to give it a construction entirely inconsistent with the express terms of the policy. Provisions for either pro rata or excess insurance are based upon the same circumstance, i. e., the existence of other valid and collectible insurance covering the same loss. It is obvious that if insurance is pro rata it cannot at the same time be excess insurance as to the same loss. The effect of a provision for the proration of an insurance loss is to require the several insurers of the same risk to share the total loss. If a policy be considered as excess insurance the idea of sharing the loss is negatived, for the excess insurer is liable only for the amount of the loss in excess of the limits of other valid and collectible insurance covering the same loss. By holding that Pacific was an excess or secondary insurer the trial court completely vitiated the provision for the proration of loss as expressed in the policy. An insurance policy is to be construed like any other contract, and where there is no ambiguity in the language used it must be construed in accordance with the intention of the parties. Rankin v. Amazon Ins. Co., 89 Cal. 203, 26 P. 872, 23 Am.St.Rep. 460. The intention of the parties to the Pacific policy, as expressed in the provision for proration of the loss, being unambiguous, must govern. Had the parties intended the Pacific policy to be excess insurance it would have been a simple matter to express such intention by appropriate language in the policy. Not having done so, they are bound by the express terms of the policy.

[4-6] Pacific contends that the pro rata provision in the Commercial policy is void since it conflicts with an endorsement which was inserted in such policy in order to comply with section 215 of the Federal Motor Carrier Act of 1935, 49 U.S.C.A. § 315. This section so far as is here material provides that no permit shall be issued to a motor carrier until such carrier complies with the regulations prescribed by the Interstate Commerce Commission concerning insurance. Under the authority of the act the commission has ordered that policies of public liability insurance covering motor carriers must contain the following endorsement: "Nothing contained in the policy or any other endorsement thereon, nor the violation of any of the provisions of the policy or of any endorsement thereon by the Insured, shall relieve the Company from liability hereunder or from the payment of any such final judgment." The foregoing endorsement was included in the Commercial policy. Pacific maintains that this endorsement is repugnant to the provision for proration of liability in the event of other insurance, and that since the requirement of the law must prevail, Commercial is absolutely liable to the limits of its policy. The argument would be sound if the judgment creditors of plaintiff in the Arizona actions were suing upon the insurance policy, for by the terms of the Motor Carrier Act the coverage is required as "security for the protection of the public". William Atkin Co. v. National Liberty Ins. Co., 168 Misc. 334, 5 N.Y.S.2d 863. But here the insured is seeking to recover on the policy. Therefore the rights of the parties must be determined by the terms of their contract and not by the provisions of a law which is designed to protect the interests of the public. In this respect it is important to note that the policy specifically provided that as between the insured and the insurer the terms of the policy were to govern as though the endorsement required by law had not been attached, and that if the insurer was required to pay any claim which it would not have been re-

quired to pay except for such endorsement, it was entitled to be reimbursed by the insured for such payment. As between themselves the parties were entirely competent to limit the liability in any manner they saw fit, although under the law such limitation would be invalid as to an injured claimant under the policy.

[7] Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judgment correctly determines the respective liabilities. No California case is cited in support of this proposition and we know of no law in this state fixing degrees of liability in relation to the joint liability for torts. From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone (Schilling v. Central California Traction Co., 115 Cal.App. 30, 1 P.2d 53), or against both jointly, it would seem that there could be no such thing as primary and secondary liability. Moreover, the court made no finding on the issue of primary and secondary liability as between Harvey and plaintiff, and in fact made no finding concerning the relationship existing between Harvey and plaintiff out of which the latter's liability arose. In view of our conclusion that both policies insured the same risk so far as plaintiff is concerned, the fact that plaintiff's liability may have been primary or secondary becomes immaterial. Regardless of the nature of such liability, any loss resulting therefrom was covered by both insurers.

Judgment reversed.

WOOD, Justice (dissenting).

I dissent. In my opinion we correctly decided the issues of this appeal in the original opinion filed on April 30, 1941. It is as follows:

Plaintiff commenced this action to recover under two policies of insurance issued respectively by the Commercial Standard Insurance Company and Pacific Employers Insurance Company hereinafter referred to respectively as Commercial and Pacific. A judgment for $14,522.21 was entered in favor of plaintiff and against Commercial and Pacific, which provided that it was to be first satisfied against Commercial to the extent of the limit of liability under its policy ($9,561.10) and that the balance of the judgment was to be satisfied against Pacific. From this judgment Commercial has appealed.

Commercial issued a policy of public liability insurance wherein it agreed to insure M. L. Harvey "and/or" Consolidated Shippers Inc., plaintiff herein, against any loss arising from or resulting from the ownership, maintenance or use of a certain Chevrolet truck which was owned by Harvey. The limits of liability under Commercial's policy were $5,000 for property damage and $10,000 for injury to or death of more than one person. A non-ownership policy of public liability insurance was issued by Pacific under the terms of which plaintiff alone was insured against loss by reason of any liability imposed by law resulting from the operation of all automobiles and trailers other than those owned by plaintiff which were transporting merchandise on a contract basis for the account of plaintiff. The liability under Pacific's policy was specifically limited to such loss as might result to plaintiff from the operation of trucks and trailers by independent contractors who had executed a prescribed form of hauling contract. The limits of liability under Pacific's policy were $5,000 for property damage and $100,000 for injury to or death of more than one person. Each policy contained a provision for the proration of insurance providing in effect that if the assured carried other insurance against the same loss the insurer would not be liable for a larger proportion of the entire loss than the amount named in the policy bore to the entire amount of collectible insurance.

The yearly premium charged by Commercial for its insurance was $275. Pacific charged a yearly premium of $263.33 for its insurance. The insurance afforded by Commercial's policy specifically covered any liability arising out of the operation of one truck only. Pacific's policy, however, covered liability arising out of the operation of any trucks or trailers operated by independent contractors for plaintiff with no limitation whatever as to the number of trucks or trailers. The evidence shows that while Pacific's policy was in force it actually covered any liability of plaintiff arising out of the operation of four different trucks owned by independent contractors.

During the time that both policies were in effect Harvey, while transporting merchandise in his Chevrolet truck as an independent contractor on a contract basis for the account of plaintiff, became involved in an accident in the state of Arizona which resulted in the death of two persons. Two actions to recover damages for the death of such persons were commenced in Arizona against Harvey and plaintiff herein. Prior to the trial of such actions the parties stipulated without admitting liability that compromise judgments might be entered in favor of plaintiff in each action and against both defendants for an aggregate amount of $11,600. The judgments which were accordingly entered were satisfied in full by plaintiff herein. Both Commercial and Pacific were notified of the accident and of the filing of the Arizona actions. Pacific denied liability and refused either to investigate or defend the actions. Commercial did investigate the accident and entered upon the defense of the actions but withdrew its defense prior to the entry of the judgments and refused to proceed further. By this action plaintiff sought to recover the amount which it had paid in satisfying the Arizona judgments and in addition attorney's fees and costs incurred in defending such actions.

In order to comply with the provisions of the Arizona law, which required a lease agreement when an interstate motor carrier operated equipment not owned by the carrier, Harvey entered into an agreement with plaintiff by the terms of which he purported to lease his Chevrolet truck to plaintiff. This lease agreement had been executed and filed in Arizona prior to the happening of the accident. Although the trial court made no findings concerning the relationship existing between Harvey and plaintiff, and therefore no finding as to the manner in which plaintiff's liability arose, it concluded that Commercial was primarily liable for plaintiff's loss and that Pacific's policy was secondary insurance which did not attach or become collectible until the limits of Commercial's policy had been exhausted.

It is earnestly contended by Commercial that the finding and conclusion of the trial court to the effect that Commercial's policy afforded primary coverage and Pacific's secondary coverage is not supported by the evidence and is contrary to law, but we find ample evidence to sustain the ruling of the trial court which is attacked by Commercial. Although both policies contained provisions for the proration of loss in the event that other insurance existed covering the same loss, such provisions did not become effective in the instant case for the reason that the policies did not cover the same loss. Commercial's policy covered the primary liability of Harvey arising out of the operation of the Chevrolet truck which he owned and extended coverage to plaintiff for any liability which it might incur as a result of such operation. The insurance afforded by Pacific's policy did not cover the primary liability of Harvey but insured only the secondary liability of plaintiff resulting from the operation by independent contractors of trucks not owned by plaintiff. Under such circumstances the trial court was justified in inferring that the two policies were not concurrent or coextensive because they did not cover the same risk with sufficient identity of scope and purpose.

There are additional reasons why the judgment appealed from must be affirmed. From the fact that Commercial charged a premium of $275 for the coverage of Harvey's Chevrolet truck and that Pacific charged but $263.33 to insure plaintiff against liability arising out of the operation of at least four trucks including Harvey's, it may fairly be inferred that the parties intended Commercial's policy to afford primary coverage and Pacific's secondary or excess coverage. It would be unreasonable to assume that, in view of the fact that Pacific's premium charge for each truck covered was less than one-fourth of the premium charged by Commercial, the parties to the Pacific contract intended that Pacific would incur the same liability as was incurred by Commercial. (For a discussion of the matter of the disparity in the premiums charged in determining which of two insurers is primarily liable, see Vol. 7, Ins.Decs. p. 315).

Where as here the coverage afforded by the two insurance policies is not limited to the same subject matter and the risk involved is not identical or coextensive, in determining which is actually primary or basic insurance and which is secondary or excess insurance the court may properly decide which insurance is general and which is specific in its nature. As a general rule that insurance which is specific is held to be primary and that which is general, secondary or excess insurance. Hartford Steam Boiler I. & Ins. Co. v. Cochran O. M. & G. Co., 26 Ga.App. 288, 105 S.E. 856; Commercial Cas. Ins. Co. v. Hartford Accident & Indem. Co., 190 Minn. 528, 252 N.W. 434, 253 N.W. 888. Unquestionably the Commercial policy afforded specific insurance for it covered the operation of Harvey's Chevrolet truck only and covered the liability of Harvey, who was the primary tort feasor, and although it extended coverage to plaintiff it covered no other risk nor any other person. Pacific's policy on the other hand was general in nature since it did not specifically cover the truck involved in the accident nor did it cover the liability of the primary tort feasor. The coverage which was afforded plaintiff by Pacific's policy was not limited to any particular truck or trucks but applied generally to all trucks operated by independent contractors in plaintiff's employ. The trial court properly concluded that Commercial was primarily liable and Pacific secondarily liable.

45 Cal.App.2d 267

WILCOX v. WEST et al.

Civ. 6575.

District Court of Appeal, Third District, California.

June 10, 1941.

1. Mines and minerals ⇨78(2)

Under oil and gas lease providing that if well is not completed by certain date, lease shall be void unless lessee pays certain sum in advance for extension of his privilege to explore, lessee must pay stipulated sum at beginning of rental period, and the same is true if lease provides that if lessee does not drill by certain date, lease will be void unless lessee pays stipulated sum on or before such date.

2. Mines and minerals ⇨78(2)

The location of wells, hauling lumber on leased premises, erection of derricks, providing water supply, moving machinery on the premises, and similar acts preliminary to beginning of actual work of drilling, when performed with bona fide intention to proceed thereafter with diligence toward completion of well, constitutes "commencement" or "beginning" of well or drilling operations within mineral lease requiring lessee to begin or commence drilling within certain time on penalty of forfeiture or payment of delay rental.

> "Commence" means to cause to begin to be; perform the first act of; enter upon; begin; to originate; to do the first act in anything; to take the first step; to start.
>
> See Words and Phrases, Permanent Edition, for all other definitions of "Commencement", "Beginning" and "Commence".

3. Fraud ⇨50

If there be two inferences equally reasonable and equally susceptible of being drawn from proved facts, one favoring fair dealing and the other favoring corrupt practice, it is duty of court or jury to draw inference favorable to fair dealing.

4. Fraud ⇨50, 58(1)

Fraud must always be proved, and when plaintiff's case goes no further than to establish state of facts from which inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by preponderance of evidence, and it becomes duty of court or jury to find in favor of innocence and uprightness.

5. Mines and minerals ⇨78(2, 3)

The assignee of sublessee under mineral lease who took possession of leased premises, posted notices forbidding trespassing, moved materials necessary for drilling onto premises, had roads built and sump hole made, secured necessary permit, license and driller's bonds, and had concrete foundation for derrick made, "commenced" operations for drilling of well within provision of lease making it void if such operations were not commenced by a certain date, provided lessor gave 60 days' notice, and there was no automatic termination of lease, where evidence was conflicting as to whether inclement weather prevented assignee from continuing operations, and no notice was given by lessor.

6. Appeal and error ⇨1071(6)
Trial ⇨397(1)

Under Code of Civil Procedure, full findings by court, unless waived, are required on all material issues raised by pleadings, including issues raised on affirmative defenses set up in answer, and failure to make finding on material issue ordinarily results in prejudicial error entitling complaining party to reversal, provided it appears that there was evidence introduced as to such issue sufficient to sustain finding in favor of such party. Code Civ.Proc. §§ 632, 633.

7. Trial ⚷397(1)

In suit to quiet title of lessor under mineral lease, trial court's failure to make specific findings as to affirmative allegations of answers of defendants claiming interest under original lease and sublease, and particularly as to affirmative allegations of assignee claiming performance of terms of lease, which required commencement of drilling by certain date, on penalty of forfeiture, was erroneous. Code Civ.Proc. §§ 632, 633.

◆

Appeal from Superior Court, Santa Barbara County; Louis C. Drapeau, Judge.

Suit to quiet title by Roy O. Wilcox against Sadie West and others. From a judgment for plaintiff, defendants appeal.

Reversed.

Newby & Newby and Dee Holder, all of Los Angeles, and Preisker, Goble, Twitchell & Stephan, of Santa Maria, for appellants.

Heaney, Price, Postel & Parma and Clarence A. Rogers, all of Santa Barbara, and Chas. F. Johnson, of Los Angeles, for respondent.

SCHOTTKY, Justice pro tem.

Appellants appeal from a judgment which decrees that they have no right or title in certain real property, but that respondent is the owner and entitled to the possession thereof. The amended complaint alleges ownership on the part of plaintiff, alleging that the defendants claim some interest therein, which claim was without right. Certain defendants defaulted, and others filed disclaimers, and the remaining appellants filed answers, in which they denied that they had no interest in said property, and also set up the affirmative defense that they had an interest under a certain oil and gas lease executed by respondent, which lease they alleged was still in full force and effect. There was no controversy as to the ownership of the land by plaintiff or as to the execution of the lease and the various assignments and sub-leases, and the sole issue upon the trial was as to whether or not the rights of the defendants under the lease had been terminated.

The trial court found that the respondent was the owner in fee of the premises involved, and entitled to the possession thereof; that none of the appellants had any right, title or interest in or to the property, and a decree in accordance with such findings was entered. The trial court made no specific findings as to the issues raised by the affirmative defenses set up on the answers. A motion for a new trial was subsequently made and denied.

On May 25, 1937, respondent, the plaintiff herein and the owner of four acres of land near Santa Maria, in Santa Barbara county, entered into an oil and gas lease affecting said land, with appellant, Sadie West. Thereafter, on September 9, 1937, appellant Sadie West assigned a one-half interest in such lease to appellant Charles T. McDermont, and on the same date, appellants West and McDermont entered into a sub-lease of said property with appellant Clyde E. Greathouse as sub-leassee. On September 9, 1937, appellant Clyde E. Greathouse assigned said sub-lease to appellant A. M. Johnson, and on September 23, 1937, appellant A. M. Johnson assigned said sub-lease to appellant E. B. Kenney. On November 8, 1937, appellant E. B. Kenney paid the sum of $150 as rental under the terms of the lease and sub-lease, $75 being paid to respondent, and $75 to appellants West and McDermont, sub-lessors. On December 7, 1937, and again on January 8, 1938, like payments were made by appellant Kenney, but no further payments were made thereafter.

On January 24, 1938, appellant Kenney took physical possession of the property, and did certain acts hereinafter referred to, between that date and February 7, 1938. Appellant Kenney testified that inclement weather prevented him from bringing additional machinery and materials from his property in Los Angeles county; that he had at all times been ready, able and willing to go ahead with the development of the property; that he had expended the sum of $7,775.42 in connection with the lease and the development of the property; that he was never served with any notice of default; and that the filing of the action to quiet title "stuck his work on the lease". Respondent, who was the only other witness, testified that it rained between February 8th and February 25th, but that the rain was not sufficiently heavy to prevent a truck from entering and leaving the property, nor to prevent work on adjoining property. It was admitted that no notice of default was served on any of appellants and that the action to quiet title was filed on March 11, 1938.

A proper understanding of the issues involved requires the quoting of pertinent portions of the lease, which are as follows:

"4. This lease shall terminate as to all rights and obligations contained hereunder unless the lessee shall on or before one year from date hereof commence operations for drilling of a well for oil or gas on the above described land, and prosecute the drilling thereof with due diligence and dispatch until a depth of 5000 feet has been reached.

"5. If operations for the drilling of a well for oil or gas be not commenced on said land on or before six months from this date, this lease shall terminate as to both parties, unless the lessee shall, on or before six months from this date, pay or tender to the lessor or for lessor's credit in the Bank of America at Santa Maria, California, * * * the sum of Eighteen and Seventy-five one hundredths ($18.75) dollars per acre per month, which shall operate as rental and cover the privilege of deferring the commencement of drilling operations for a period of one month. In like manner and upon like payments or tenders, the commencement of drilling operations may be further deferred for like periods successively during the term fixed in the preceding paragraph for the commencement of drilling operations.

"18. Upon the violation of any of the terms or conditions of this lease by the lessee and the failure to remedy the same within sixty days after written notice from the lessor so to do, then, at the option of the lessor, this lease shall forthwith cease and terminate, and all rights of the lessee in and to said land be at an end.

"23. 'Drilling Operations', as used in this lease, is defined to mean placing of material upon premises for the construction of a derrick and other necessary structures for the drilling of an oil or gas well followed diligently by the construction of such derrick and other structures and by the actual operation of drilling in the ground."

The lease here involved is what is generally known as the "unless" lease, and results in an automatic termination of the lease if the lessee fails to commence operations within the time limited, and fails to pay delay rentals in advance.

[1] In Summers' Work on Oil and Gas, it is stated at page 351: "In an Oil and Gas Lease, where the unless clause is used, and the lease expressly provides that, if a well is not completed by a certain date, the lease shall be null and void unless the lessee pays a certain sum in advance for the extension of his privilege to explore the land, there seems to be no question but that the lessee, to save the lease from termination, must pay the stipulated sum at the beginning of the rental period. And the same result follows if the lease instead of expressly providing that the lessee pay in advance provides that if the lessee does not drill by a certain date the lease will be null and void unless the lessee pays a stipulated sum on or before that date."

In "Oil and Gas Leases and Royalties", by Glassmire, at page 175, the same rule is expressed in somewhat more detail. The rule as stated in the foregoing citations is supported by the following California cases: Taylor v. Hamilton, 194 Cal. 768, 776, 230 P. 656; Johnston v. Courtial, 216 Cal. 506, 14 P.2d 771; Andrews v. Russell, 85 Cal.App. 149, 259 P. 113.

Appellants contend that drilling operations were commenced, and that the lease thereupon became effective, and that the only way in which the lease could thereafter be terminated was under the provisions of paragraph 18 thereof, by a written notice to appellants. Appellants concede that if they failed to commence drilling operations or to pay the rental required under the provisions of the lease, then the lease was terminated by the force of its own provisions and without notice to appellants. Respondent, however, contends that the appellants did not commence drilling operations under the lease, and not having made any payment after January 8th, the lease automatically terminated under paragraph 5 thereof. Respondent asserts that prior to February 8, 1938, all material was on the ground, and after that date, nothing whatever was done toward drilling the property, and by virtue of the lien, all rights of defendants terminated ipso facto on midnight of February 25, 1938, by their failure to pay the delay rental or to commence drilling operations.

As we view paragraph 23, defining "Drilling Operations", it is intended to define what completed operations consist of, and certainly there must be a distinction in law and in fact between the commencement of operations and the completion thereof. The word "commence" is defined in 11 Corpus Juris, at page 1237, as follows:

"Commence. To cause to begin to be; perform the first act of; enter upon; begin; to originate; to do the first act in anything; to take the first step; to start." See also 15 C.J.S., Commence, p. 247.

[2] The rule which seems to be supported by the great weight of authority is stated in Summers on Oil and Gas, at page 362, as follows: "No. 113. What constitutes the beginning or commencement of a well or drilling operations. Where the lessee covenants to begin or commence a well or drilling operations within a certain definite time, and his failure to do so places him under a liability to have the lease forfeited, or a duty to pay delay rental, it becomes necessary to determine what act or acts of the lessor will satisfy this requirement. The general rule seems to be that actual drilling is unnecessary, but that the location of wells, hauling lumber on the premises, erection of derricks, providing a water supply, moving machinery on the premises and similar acts preliminary to the beginning of the actual work of drilling, when performed with the bona fide intention to proceed thereafter with diligence toward the completion of the well, constitute a commencement or beginning of a well or drilling operations within the meaning of this clause of the lease."

No case has been called to our attention which goes beyond the text just quoted. We are therefore called upon to decide whether the acts of appellant Kenney in connection with the lease in question constituted the "commencement of operations for the drilling of a well". The evidence is uncontradicted that appellant Kenney took physical possession of the property on January 14, 1938; that he posted notices on the property forbidding trespassing; that he moved some lumber on the property; that he ordered roads built and a sump-hole made; that he secured a permit from the State Mining Department to drill an oil and gas well upon the property; that on the 17th of January the road and the sump-hole were completed and he started to move derrick timbers from his property in Huntington Beach, and such timbers were placed on the property on January 23d; that on January 19th he obtained a driller's bond from the county of Santa Barbara, and on the same day obtained a driller's bond in the sum of $5,000 from the state of California; that on January 22d he obtained a license from Santa Barbara county to drill the well; that on February 7th the work was started on the forms for the concrete foundation for the derrick, and that this work was completed on February 8th; that no further work was done on the premises. Appellant Kenney testified, as set forth above, that inclement weather prevented him from bringing additional machinery and materials from the Los Angeles basin. Respondent, who was the other witness, testified that it rained between February 8th and 25th, but that the rain was not sufficiently heavy to prevent trucks from entering and leaving the property, nor to prevent work on adjoining properties.

A reading of the record convinces us that it must be held that appellants did "commence operations for the drilling of a well" unless it must also be held that all of the work and preparation by appellant Kenney was not performed with the bona fide intention to proceed thereafter with diligence toward the completion of a well. In other words, appellant Kenney must have been acting in "bad faith", and a finding of bad faith would be tantamount to a finding of fraud.

[3, 4] As we have heretofore pointed out, the only findings made by the trial court were that respondent was the owner in fee of the property involved, and that none of the appellants had any interest therein. There was no specific finding that appellant Kenney was acting in bad faith, and even if it could be held that there was an implied finding of bad faith, we do not believe that such a finding would be supported by the record in this case. For, as was said by our Supreme Court in case of Ryder v. Bamberger, 172 Cal. 791, page 799, 158 P. 753, 757: "If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing. [Citing authorities.] For fraud must always be proved, so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence, and it becomes the duty of court or jury, as has been said, to find in favor of innocence and uprightness."

[5] We are convinced, therefore, that appellant did "commence operations for the drilling of a well", and that consequently there was no automatic termination of the lease. If respondent felt that appellant Kenney was not proceeding as diligently as he should, then respondent had the right under paragraph 18 of the lease to terminate the rights of appellants by giving sixty days' written notice.

We believe the instant case is strikingly similar to the case of Scheel v. Harr, 27 Cal.App.2d 345, 80 P.2d 1035, 1036. In that case the lease provided: " 'This lease shall terminate as to all rights and obligations contained hereunder unless the Lessee shall on or before November 1st, 1936, commence the actual drilling and spudding in of a well for oil or gas on the above described land, and prosecute the drilling thereof with due diligence and dispatch until a depth of 5000 feet has been reached. * * *' "

The lease in the case just cited also contained the identical paragraph 18 that is contained in the lease in the instant case. The well was "spudded in" prior to the required date, the well drilled twenty-six feet, and then most of the machinery had been removed and drilling ceased. The plaintiffs then commenced an action to quiet title without first giving a written notice of default. The trial court rendered judgment quieting title against the lessee, and the judgment was reversed on appeal.

The similarity between the Scheel case and the instant case is indeed striking. In the Scheel case the lease terminated "unless" the well was spudded. The well was spudded in, but nothing else was done. In the instant case the lease terminated "unless drilling operations were commenced", and the lessee commenced operations for drilling the well. We can best illustrate the similarity between the two cases by quoting from the opinion in the Scheel case, commencing at page 348 of 27 Cal.App.2d, at page 1037 of 80 P.2d: "The only question before us is whether or not respondents were required, as a prerequisite to commencing this action to quiet title, to give to appellant as the holder of the lease a notice under the above-quoted provisions of paragraph 18 thereafter to perform its terms, and thereupon, before proceeding further, to allow it sixty days in which to do so. On appellant's part the claim is that the lease had gone into effect, and any failure on appellant's part in its performance would amount at the most to a condition subsequent and terminate it only in the circumstances contemplated by the said paragraph 18, that is, the failure to perform within sixty days after notice of default given. Respondents take the position that appellant, never having in good faith commenced operations, as required, a condition precedent to the effectiveness of the lease failed of performance; that in any event the above-quoted language of paragraph 4 provides for the termination of the lease ipso facto upon noncompliance with an essential condition, whereas the provisions of paragraph 18 above referred to provide merely for an optional forfeiture for breach of subordinate covenants; that the more specific provisions of paragraph 4 control the more general provisions of paragraph 18; that appellant's default of itself terminated whatever rights appellant might have had under the lease; and that it was competent to begin and prosecute the present action without the service of any notice; in addition to which it is claimed that appellant has effectually abandoned the leased premises and for that further reason can assert no rights under the lease. We are unable to agree that the above-quoted language from paragraph 4 of the lease creates any condition precedent to its becoming effectual. No condition precedent is there expressed. What the paragraph does say is that the lessees' failure to comply with its requirements shall 'terminate' the lease. That is language appropriate not to a condition precedent but to a condition subsequent. Neither can we agree that the language quoted from paragraph 4 controls that quoted from paragraph 18. It seems to us that the contrary is true. So far as the actual 'spudding in' of the well was concerned, there is no question that it was done within the time which the lease contemplated. * * * The further requirements of paragraph 4 were that the lessee should prosecute the drilling with due diligence and dispatch until a depth of 5000 feet should have been reached, etc., and it is that which was not done. This was not something that had, under the terms of the lease, to be done on or before any particular date. It was something that, in any circumstances, would require some time. In view of the necessity of reading paragraphs 4 and 18 together, and of the unqualified language of section 18, as respects its requirement of the 60-day notice to perform, to be given to the lessees in the event of their default, as a prerequisite to the termination of the latters' rights, we think that at least after drilling had once commenced, the well been 'spudded in', and thereby the only condition subsequent tied to any stated date had ceased to figure in the case, the provisions of section 4 having to do with the termination of the lease if the work were not diligently prosecuted, were as much subject to the requirement of the 60-day notice to perform as any other terms or conditions contained in the instrument. * * * It may then for the purposes of this decision be assumed that the court's finding that appellant's operations were not in good faith is tantamount to a finding both that the appellant was guilty of fraud, and further that the consideration running to respondent for the lease, has, by reason of appellant's breach, failed. But even though all this be true, it does not seem to us to dispense with the requirement of paragraph 18 that the 60-day notice be given as a prerequisite to making effective the termination of the lessees' rights. An instrument procured by fraud is not a void instrument; neither does the failure of consideration render a transaction a nullity from the beginning. Fraud, if perpetrated in its inception is a ground for rescinding a contract and the failure of consideration is a ground for either rescinding or terminating a contract, according to circumstances, but until rescinded or terminated a contract once in effect remains in effect. In the instant case there has been no attempt to rescind and respondent has chosen not to follow the method of effectuating a termination prescribed by the language quoted from paragraph 18."

Appellant makes the further point that the trial court erred in failing to find upon all material issues of the case. They point out that the appellants set up in their respective answers a claim to an interest in the property under the original lease and under a sub-lease, and that appellant Kenney alleged in his answer that he fully performed the terms of the lease. The trial court merely found that respondent was the owner and entitled to the possession of the property, and none of appellants had any interest therein, but made no specific findings as to the affirmative defenses set up in the answers.

[6] Under the system of express findings provided for by the Code of Civil Procedure (secs. 632, 633), full findings, unless waived, are required on all material issues raised by the pleadings. This applies not only to issues raised by denials of the allegations of the complaint, but to issues raised upon affirmative defenses set up in the answer. A failure to make a finding on a material issue ordinarily results in prejudicial error entitling the complaining party to a reversal, provided it appears that there was evidence introduced as to such issue, and that it was sufficient to sustain a finding in favor of such party. See 24 Cal.Jur. page 935, sec. 183.

In the case of Hudson v. Becker, 12 Cal. App.2d 743, at page 747, 56 P.2d 249, 251, a case cited and apparently relied upon by both respondent and appellants, it is said: "With regard to the plaintiffs' contention that the judgment must be reversed because the trial court failed to find specifically that the bank had waived the default and because such finding, if made, must have been in favor of the plaintiffs, there are two answers: First, we have already said that there was substantial evidence that the default had not been waived; second, there was no allegation in the pleadings that the bank had waived the default and there was no issue in the pleadings with regard to the matter. The plaintiffs' complaint was the ordinary action to quiet title. The defendants set up an affirmative defense that they were the owners of the property. The issue as to waiver of the default arose merely in the evidence at the trial. Ordinarily, the findings of fact are sufficient if they follow the language of the pleadings. Dam v. Zink, 112 Cal. 91, 44 P. 331; Vasey v. Campbell, 4 Cal.App. 451, 88 P. 509; Biurrun v. Elizalde, 75 Cal. App. 44, 242 P. 109; also, see cases collected in 24 Cal.Jur. 984. Ownership of the property by the defendants was the ultimate fact which was alleged in the answer and which was set forth in the findings. Hitchcock v. Rooney, 171 Cal. 285, 152 P. 913; Hannah v. Canty, 175 Cal. 763, 167 P. 373. Plaintiff should remember that in reviewing the sufficiency of the findings to support a judgment, regard will be had to the ultimate facts and not to mere probative facts. 2 Cal.Jur. 872, and cases cited in Ten Year Supp."

See, also, Caswell v. Gardner, 12 Cal. App.2d 597, 55 P.2d 1222, and Richter v. Adams, 19 Cal.App.2d 572, 66 P.2d 226.

[7] Applying these authorities to the instant case we conclude that the trial court erred in not finding specifically as

to the affirmative allegations of the answers, and particularly as to the affirmative allegations in the answer of appellant Kenney. However, under the circumstances this omission to find upon the affirmative allegations of the answer is not as important as were the other issues presented which require a reversal of the judgment. It is so ordered.

We concur: PULLEN, P. J.; THOMPSON, J.

BRUNTON et al. v. SUPERIOR COURT OF LOS ANGELES. *

Civ. 13032.

District Court of Appeal, Second District, Division 1, California.

June 13, 1941.

Rehearing Granted July 9, 1941.

1. Injunction ⚷231

Where jurisdiction of superior court to issue injunction was not attacked, and the order for injunction became final, orders finding petitioners guilty of contempt for violating the order for injunction could not be reviewed by certiorari.

2. Certiorari ⚷1

The specific conditions for the issuance of a writ of review differ from those provided for writs of mandate and prohibition, and authority for the issuance of the latter writs is not generally applicable to the issuance of the former. Code Civ.Proc. §§ 1068, 1086, 1103.

Certiorari proceeding by William J. Brunton and others against the Superior Court of Los Angeles, respondent, to review the jurisdiction of the respondent on contempt proceedings.

Writ discharged.

Irving M. Smith, City Atty., of Long Beach, for petitioners.

J. H. O'Connor, Co. Counsel, W. B. McKesson, Deputy Co. Counsel, and George H. Emerson, all of Los Angeles, for respondent.

PER CURIAM.

This matter comes before this court on a petition for certiorari in which we are asked to review the jurisdiction of the superior court on contempt proceedings. The petitioners do not question the jurisdiction of said court to issue the injunction in the original action, and no appeal was taken from the order and judgment in that action. In other words, it is now attempted to have this court determine the guilt or innocence of the defendants in the original action of a charge made against them that they were guilty of contempt of court for violating the order in said action, of which charge they were found guilty after a hearing in re contempt.

[1] Although there seems to be some confusion in the different decisions in California as to just exactly what can be determined by this court in passing upon a petition for a writ of certiorari, we hold, where the jurisdiction of the court is not attacked and where an appeal from the original order has not been taken, and such order has become final, that the orders in re contempt under attack herein cannot be reviewed in this type of proceeding. Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449; Hume v. Superior Court, 17 Cal.2d 506, 110 P.2d 669.

[2] As was stated by this court in Monterey Club v. Superior Court, 44 Cal.App.2d 355, 112 P.2d 321, 324: "It should be noted that, while writs of mandate are governed by the provisions of section 1086 of the Code of Civil Procedure, and must issue, as therein provided, in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law, and writs of prohibition are governed by the provisions of section 1103 of that code and, as there provided, may issue in like situations, the issuance of writs of certiorari is governed by the provisions of section 1068, which specifically authorizes such writs to be issued only in cases where there is no appeal. It may thus be seen that the specific conditions for the issuance of a writ of review differ from those provided for writs of mandate and prohibition; and authority for the issuance of the latter writs is not generally applicable to the issuance of the former."

It appearing herein that an appeal could have been taken from the order granting the injunction, the writ heretofore issued must be discharged.

It is so ordered.

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* Subsequent opinion 116 P.2d 643.

45 Cal.App.2d 359

In re GUZMAN.

Cr. 1768.

District Court of Appeal, Third District, California.

June 14, 1941.

Criminal law ⚷90(2)

The provision of the charter of Stockton that police court should have exclusive jurisdiction of all misdemeanors committed within the city was invalid so far as it attempted to confer jurisdiction on such court over offense of contributing to minor's delinquency, and Superior Court had jurisdiction of prosecution for such offense, where, when such provision of charter was adopted, Juvenile Court Law provided that Superior Court should have jurisdiction of prosecution for contributing to minor's delinquency, and such law was codified and reenacted as part of Welfare and Institutions Code of 1937, not as a new enactment, but as a restatement and continuation. St.1927, p. 2151; St.1937, pp. 1005, 1021, 1033, §§ 2, 571, 702; Const. art. 6, § 5; art. 11, § 8½.

◆

Habeas corpus proceeding by Nick Guzman following his conviction of contributing to the delinquency of the minor.

Writ discharged.

J. LeRoy Johnson, of Stockton, for petitioner.

R. M. Dunne, Dist. Atty., and Maxwell M. Willens, Asst. Dist. Atty., both of Stockton, Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondents.

TUTTLE, Justice.

Defendant was convicted of the offense known as "contributing to the delinquency of a minor", a misdemeanor defined in section 702 of the Welfare Code, St.1937, p. 1033, under the chapter heading of "Juvenile Court Law". He was tried in the superior court of San Joaquin county, and now seeks release by habeas corpus, contending that said court was without jurisdiction. Article VI, section 5 of the Constitution provides: "The superior courts shall have original jurisdiction in all civil cases and proceedings * * *; in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for."

Article XI, section 8½ provides as follows:

"It shall be competent, in all charters framed under the authority given by section 8 of this article, to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State as follows:

"1. For the constitution, regulation, government, and jurisdiction of police courts, and for the manner in which, the times at which, and the terms for which the judges of such courts shall be elected or appointed, and for the qualifications and compensation of said judges and of their clerks and attaches; * * *."

The charter of the city of Stockton is a Freeholder's Charter. In 1927 it was amended to read as follows (1927 Stats., page 2151): "Said police court shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment or by both such fine and imprisonment committed within the corporate limits of the city."

Petitioner urges that the said charter provision gives the police court of Stockton exclusive jurisdiction over the crime charged, it being a misdemeanor. The district attorney contends that since the legislature had granted jurisdiction over this offense (popularly known and designated as a "high misdemeanor") to the superior court, the charter provision was ineffectual to confer jurisdiction upon the police court. This latter contention must be upheld. At the time the said charter was granted the Juvenile Court Law provided, and it now provides that "The superior court in every county * * * in this state shall exercise the jurisdiction conferred by this act" (sec. 16 of Act, Stat. 1915, p. 1238, sec. 571 of Welfare and Institutions Code, St.1937, p. 1021). During all of said times the said act provided, in the section which defines the misdemeanor here involved, that "The juvenile court shall have original jurisdiction over all misdemeanors defined in this section". Sec. 702, Welfare and Institutions Code, sec. 21 of Juvenile Court Act, Stat.1915, p. 1246. The said section of the Juvenile Court Law under which defendant was prosecuted has been in practically the same form since 1909. In 1937 the Juvenile Court Law was codified and re-enacted as a part of the Welfare and Institutions Code. Section 2 of said code, St.1937, p. 1005, provides: "The provisions of this code, in so far as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations thereof, and not as new enactments."

We therefore cannot agree with petitioner when he says that the Welfare Code of 1937 was an original enactment, and that consequently it was competent for the legislature, in granting the charter prior thereto, to vest jurisdiction in the police court over all misdemeanors. As we have seen, the law in question was in force and effect when the charter was granted. To accede to the argument of petitioner would require us to hold that the charter repealed, by implication, a portion of the general law relating to juvenile courts. In this connection the case of Ex parte Dolan, 128 Cal. 460, 60 P. 1094, is a direct negation of the position, taken by petitioner. There, the court held that a provision in a freeholders' charter attempting to confer exclusive jurisdiction upon a police court could not divest a court deriving its jurisdiction from the legislature of its first jurisdiction. Dolan made an application for a writ of habeas corpus, alleging that he was confined in the county jail of Santa Barbara county under a commitment for disturbing the peace issued out of the justices' court of the second township of Santa Barbara county. The boundaries of said township were coterminous with the corporate limits of the city of Santa Barbara. Dolan contended that the police court of the city of Santa Barbara had exclusive jurisdiction over the offense for which he had been convicted, and for that reason the judgment rendered in the justice's court was absolutely void. The city of Santa Barbara was operating under a Freeholders' Charter. By article VI of this charter, there was created a judicial department in that city vesting in the police court thereof exclusive jurisdiction of certain offenses, among others, breaches of the peace and all other misdemeanors punishable by fine not exceeding $500, or by imprisonment not to exceed six months, or by both such fine and imprisonment. The offense of which petitioner Dolan was convicted was one coming within the aforesaid classification, and made triable before the police court of said municipality. It was also a case coming within the jurisdiction of the justices' court under authority found in the general laws of the state. In the Dolan case, supra, the court discussed section 8½ of article XI of the Constitution as it existed at that time, and in so far as the present case is concerned, the language of section 8½ of article XI of the Constitution is identical. Since the Dolan case, there have been certain amendments to section 8½ of article XI, but said amendments do not affect the present controversy. At the time of the Dolan case, said section provided that it was competent for a Freeholders' Charter to provide for the constitution, regulation, government and jurisdiction of police courts. The present wording of section 8½ on this particular point is the same. The court pointed out in the Dolan case that the police court of the city of Santa Barbara was created by its charter, and jurisdiction given to it as heretofore stated, under the authority of said section 8½. The court stated as follows on page 462 of 128 Cal., on page 1095 of 60 P.:

"We attach no importance to the adjective 'exclusive' preceding the word 'jurisdiction,' found in the charter provision. The constitutional provision furnishes the measure of the power given to the framers of the charter, and, unless authority is granted by that instrument to declare that exclusive jurisdiction in the class of cases here involved may be given to police courts, the word has no place in the charter. We must take the constitutional provision as it stands, and by that provision it is only said the jurisdiction of the police court may be fixed by charter. Under the power given by the constitutional provision, the charter may fix the jurisdiction of the police courts, but no authority is conferred upon the charter by the constitutional provision whereby it may oust any other court of jurisdiction it already had.

"It may be stated that in criminal cases the jurisdiction of justices' courts is not fixed by the constitution, but is a matter left solely to the legislature. We then have a direct grant of jurisdiction to justices' courts by the legislature in cases of simple misdemeanor, such as that here involved. We also have, by virtue of the constitutional provision heretofore quoted, a direct grant, through the medium of the freeholders' charter, to police courts, of the same character of criminal jurisdiction as that granted by the legislature to justice courts. In other words, we have the same character of criminal jurisdiction vested in a police court and a justice court; and we see no reason, upon any principle of statutory construction, why the latter grant of jurisdiction to the Police Court should result in a repeal of the general law vesting the same jurisdiction in the justice court. Repeals by implication are not favored, and it would only be upon the theory of repeal by implication—and that a strained implication—which would justify us in holding that the provision in the charter of Santa Barbara relating to the jurisdiction of police courts repealed the general law. In the case of Courtwright v. [Bear River, etc.], 30 Cal. [573] 580, this whole question is exhaustively discussed, and Mr. Justice Bronson is quoted with approval wherein he said, in the case of Delafield v. [Illinois], 2 Hill [N.Y., 159], 164: 'There is nothing in the nature of jurisdiction as applied to courts which renders it exclusive. It is not like a grant of property which cannot have several owners at the same time. It is a matter of common experience that two or more courts may have concurrent powers over the same parties and the same subject-matter. * * * There is, I think, no instance in the whole history of the law where the mere grant of jurisdiction to a particular court, without any words of exclusion, has been held to oust any other court of the power which it before possessed. Creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the courts which before existed a portion of the causes which would otherwise have been brought before them; but it cannot affect the power of the old courts to administer justice when it is demanded at their hands.' "

Here, the legislature, prior to the enactment of the charter, made a direct grant of jurisdiction over this crime to the superior court, and we hold that the enactment of the charter provision relating to the jurisdiction of the police court did not repeal the general law.

We do not deem it necessary to discuss the case of People v. Wong, 61 Cal.App. 497, 215 P. 409, upon which petitioner strongly relies, other than to state that the case has no application here, for the reason that it deals solely with the question whether or not a city charter may provide that its courts have exclusive jurisdiction over misdemeanors committed within the limits of the municipality. That is not the question here. We are concerned only with the question whether or not this charter provision had the effect of repealing an existing general law which had already vested jurisdiction of the particular offense in the superior court.

Petitioner relies upon the case of Robert v. Police Court, 148 Cal. 131, 82 P. 838, 839. We see nothing in that case which alters the rule laid down in Ex parte Dolan, supra. In that case it was held that a provision in the charter of the City and County of San Francisco which purported to grant to the police court concurrent jurisdiction with the superior court of all other misdemeanors (that is, high misdemeanors) was invalid, upon the ground that the superior court must possess original jurisdiction in the absence of any transfer to an inferior court, and loses its jurisdiction entirely by such transfer. In other words, the constitutional provision referred to above does not provide for concurrent jurisdiction in respect to such misdemeanors. It is true the court, in referring to the legislature, said: "It was optional with them whether they should confer any jurisdiction at all upon the police court as to the trial of high misdemeanors. They concluded, however, to do so, not by investing the police court in terms with exclusive jurisdiction thereof, but concurrently, only, with the superior court. It was intended, as far as the provision of the charter discloses an intention, to leave the matter of jurisdiction, as between these two tribunals, entirely at large—not to take it away from the superior court, but to permit it to be exercised by either court. It is clear that this attempt to confer concurrent jurisdiction could not be legally accomplished."

But it must be remembered that in Ex parte Dolan, supra, the legislature by general law had, prior to the granting of the city charter, granted jurisdiction over ordinary misdemeanors, to the justice's court. In the Robert case, supra, the jurisdiction to try the high misdemeanor there charged had never been expressly granted to the superior court. The question of an attempt to repeal a general law by implication, through the granting of a municipal charter was therefore not considered. The concurring opinion of Chief Justice Beatty in the Robert case is in line with our holding here: "I concur in the judgment upon the ground discussed by Justice Lorigan, and upon the further and to my mind more important and more satisfactory ground that the jurisdiction of offenses defined by state law must be regulated by general state law, and that such regulations cannot be altered or qualified by any provision of a freeholders' charter. The trial and punishment of offenses defined by the laws of the state is not a municipal affair. Jurisdiction of such offenses may be conferred upon police courts by act of the legislature, but cannot be conferred by special Freeholders' Charter, and certainly not in a manner which will impair the operation of general laws."

We do not find anything in Matter of Dodge v. City and County of San Francisco, 135 Cal. 512, 67 P. 973, which is in conflict with the pronouncement in the Dolan case.

We are of the opinion that the charter provision relied upon by petitioner is invalid to the extent that it purports to confer jurisdiction over this offense upon the police court of the city of Stockton, and hold that the superior court was the proper forum to hear and determine the cause.

The writ is discharged.

We concur: PULLEN, P. J.; THOMPSON, J.

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45 Cal.App.2d 320

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. NATIONAL FUNDING CORPORATION.

Civ. 2745.

District Court of Appeal, Fourth District, California.

June 12, 1941.

1. Names 🔑10

An action by assignee of automobile conditional sale contract executed by buyer to seller, doing business under fictitious name without having filed statutory certificate, praying for declaratory relief and that assignee be adjudged legal owner of automobile subject to rights of buyer under contract, was an "action upon or on account of contract" or transaction had under fictitious name within statute prohibiting person doing business under fictitious name without certificate, or his assignee, from maintaining action upon or on account of contract or transaction had under fictitious name. Civ.Code, §§ 2466, 2468.

See Words and Phrases, Permanent Edition, for all other definitions of "Action Upon or on Account of Contract".

2. Names 🔑10

In action by assignee of automobile conditional sales contract executed by buyer to seller doing business under fictitious name without filing statutory certificate, praying for declaratory relief and that assignee be adjudged legal owner of automobile subject to rights of buyer under contract, defendant whose interest in automobile was acquired through seller was "estopped" from asserting bar of statute prohibiting person doing business under fictitious name without certificate, or his assignee, from maintaining action upon or on account of contract or transaction had under fictitious name. Civ.Code, §§ 2466, 2468.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

3. Automobiles 🔑19

The failure to register transfer of automobile certificate of ownership with Motor Vehicle Department nullified any transfer of title by virtue of indorsement and delivery of certificate by company purporting to be legal owner of automobile. Vehicle Code, § 186, St.1935, p. 118.

4. Names 🔑10

The purpose of statutes requiring person transacting business under fictitious name to file certificate and prohibiting person doing business under fictitious name without having filed certificate, or his assignee, from maintaining action upon or on account of contract or transaction had under fictitious name, is to protect those dealing with individual or partnership doing business under fictitious name, and is not intended to confer right or advantages on individual or firm failing to comply with law. Civ.Code, §§ 2466, 2468.

5. Names 🔑10

The object of statute requiring person transacting business under a fictitious name to file certificate, is that public notice shall be given and a public record made of individual members of partnerships with such definiteness and particularity that those dealing with partnership may at all times know who are the individuals with whom they are dealing or to whom they are giving credit or becoming bound. Civ.Code, § 2466.

6. Names 🔑10

An unregistered fictitious company selling automobile to buyer and assigning conditional sales contract executed by buyer, to bank loaning money to buyer, or fictitious company's parent company, or assignee of parent company or fictitious company, could not assert failure of fictitious company to file statutory certificate as defense to bank's action praying for declaratory relief and that bank be adjudged legal owner of automobile subject to rights of buyer under contract. Civ.Code, §§ 2466, 2468; Code Civ. Proc. § 1962, subd. 3.

7. Estoppel 🔑52

The office of "equitable estoppel" is to protect one from a loss which but for the estoppel he could not escape.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

8. Estoppel 🔑52

The whole vital principle of "equitable estoppel" is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

9. Estoppel 🔑52

The doctrine of "estoppel" is applied when necessary to prevent the acts of a party from operating as a fraud upon one who has been deliberately led to rely upon them.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

10. Automobiles 🔑19

The registration of transfer of automobile by dealer to himself, as both seller and purchaser, wherein third person was named as legal owner, did not constitute "constructive notice" to bank which loaned money to buyer executing conditional sales contract and which took assignment of such contract. Vehicle Code, §§ 140–186, St.1935, pp. 108–118.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

11. Records 🔑19

"Constructive notice" by record or registration was unknown to the common law, and is matter of statutory origin and in absence of statute does not exist.

12. Automobiles 🔑19

In absence of provision in statute relating to registration of transfer of automobile title, that registration is constructive notice to world of transfer of title, the harsh rule of constructive notice would not be read into statute. Vehicle Code, §§ 140–186, St.1935, pp. 108–118.

13. Automobiles 🔑19
Estoppel 🔑76

An innocent purchaser for value of automobile, executing a conditional sales contract to seller who assigned contract to innocent bank loaning money to purchaser, and such bank, were not "negligent" in not investigating records of Motor Vehicle Department to determine state of title of automobile, or in relying on indicia of ownership with which persons claiming interest in automobile clothed seller, and persons claiming such interest were "estopped", by virtue of having clothed seller with indicia of ownership, from asserting such interest against bank.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligent".

14. Estoppel 🔑76

Where true owner holds out another, or allows him to appear as owner of, or as having full power of disposition over property, innocent third parties who are thus led into dealing with such apparent owner will be protected, and their rights in such cases do not depend on actual title or authority of party with whom they deal directly, but are derived from act of real owner, which precludes real owner from disputing as against third parties, existence of title or power which through negligence, or mistaken confidence, real owner caused or allowed to appear to be vested in party making conveyance.

15. Estoppel 🔑72

Where an owner deposits his property with another and gives the depository such indicia of ownership that a reasonable man dealing with such agent is reasonably led to believe that the agent is the owner of such property, and he parts with value in reliance thereon, the misplaced confidence is "negligence" within meaning of maxim that, where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

16. Estoppel ⟹107

In action by bank loaning money to buyer of automobile and taking assignment of conditional sales contract from seller, against company asserting title to automobile through seller, for declaratory relief and that bank be adjudged legal owner of automobile subject to rights of buyer under contract, bank need not plead estoppel of company to deny that seller was clothed with indicia of ownership of automobile and therefore had apparent authority to transfer title to automobile, where company raised the issue inviting application of doctrine of estoppel.

17. Chattel mortgages ⟹41

Under Uniform Trust Receipts Law, relation of entruster and trustee may be created by execution of trust receipt or by transfer of title to entruster. Civ.Code, § 3014.

18. Chattel mortgages ⟹128

Under Uniform Trust Receipts Law, entruster does not acquire legal title to property but only lien upon property as security for loan. Civ.Code, § 3012 et seq.

19. Chattel mortgages ⟹9, 128

Under Uniform Trust Receipts Law, legal relation created by trust receipt in some respects resembles, but is not the same as, the relation created by a chattel mortgage, and in the case of a trust receipt, title to property remains in trustee until default and foreclosure of the lien. Civ.Code, §§ 3012 et seq., 3016.2.

20. Chattel mortgages ⟹225(1)

A buyer of an automobile sold in ordinary course of trade to buyer acting in good faith and without notice of lien of entruster and paying purchase price in full, took free of entruster's interest in automobile under a trust receipt giving trustee liberty of sale. Civ.Code, § 3016.5(2) (a).

21. Names ⟹10

A person or corporation may transact business under an unregistered fictitious name, and the only disability arising under statutes relating to registration of fictitious name is when there is an attempt to enforce contract made under fictitious name. Civ.Code, §§ 2466, 2468.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action for declaratory relief by the Bank of America National Trust & Savings Association against the Seaboard Finance Company and the Commercial Discount Company. The National Funding Corporation intervened and filed a cross-complaint. Judgment for the plaintiff, and the National Funding Corporation appeals.

Affirmed.

H. E. Lindersmith, Elmer P. Bromley, and S. A. Shoop, all of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson, Hugo A. Steinmeyer, and John E. Walter, all of Los Angeles, for respondent.

KELLY, Justice pro tem.

On or about December 10 or 12, 1936, the Colorado Motor Sales Company was engaged in the business of selling Graham automobiles at the city of Pasadena, California. The sales force was in charge of one H. A. Merrill, as sales manager. On the floor for exhibition and sale was a Graham coupe, serial number 120014, engine number 115182, which is the hapless corpus of the devious adventures hereinafter noted. On or about the date indicated, one Kenneth H. Knights went to the sales room of the Colorado Motor Sales Company with the view of purchasing a car. He examined and was pleased with the described coupe. Mr. Knights being in need of financial aid in consummating his purchase, went to the Bank of America National Trust & Savings Association and arranged for a loan of $754.21. The bank approved his application and advanced the money in the following manner: A conditional sales contract was drawn and executed wherein Knights was named as purchaser, and Colorado Motor Sales Company as seller describing the coupe and reciting the usual provision of reservation of title in the seller until payment made. The Colorado Motor Sales Company then executed an assignment of the contract to the bank, coupled with a warranty of title. The warranty recites that the Colorado Motor Sales Company has the right to make the assignment and that the coupe is free from liens and/or incumbrances. The contract, assignment and warranty, having been duly executed, were delivered to the bank, which thereupon issued its sight draft for $754.21 and on December 23, 1936, the money was paid to the Colorado Motor Sales Company. The coupe was delivered to Knights, who was advised by the Colorado Motor Sales Company that his license and registration slip would come through the mail.

At the trial it was stipulated by the attorneys of record that in this transaction Knights and the bank acted in the best of good faith and had no actual knowledge of any prior liens or incumbrances on the coupe or any claims adverse to the title then transferred. So far, we have a simple transaction of a contract of purchase and sale, financed by a banking institution acting within the proper scope of its legitimate business. At this point simplicity departs.

Some six weeks after the sale transaction as aforesaid, Knights, not having received his license or registration certificate, began inquiries and investigation. He discovered that the Colorado Motor Sales Company had gone out of business. Investigation further revealed that the coupe had, previous to his purchase, been registered in the Department of Motor Vehicles at Sacramento, in the name of Colorado Motor Sales Company as registered owner, and Commercial Discount Company as legal owner. This record was accomplished by the amazing expedient of Colorado Motor Sales Company, as seller, purporting to sell to Colorado Motor Sales Company, as purchaser, the coupe in question on November 2, 1936. The transfer was registered on November 10, 1936. It further developed that at all times in the transactions mentioned the Colorado Motor Sales Company was the fictitious name under which Fairbanks-Fee, Inc., a corporation, was doing business. The corporation was duly licensed and qualified to do business in the state of California. However, the certificate required by section 2466 of the Civil Code was at no time filed or published, thereby subjecting the Colorado Motor Sales Company, its assignee or assignees, to the penalties provided by section 2468 of the Civil Code.

It further appears that on November 28, 1936, Fairbanks-Fee, Inc., entered into a financing agreement whereby Seaboard Finance Company would finance and floor automobiles for it under a trust receipt, and on that date a statement of trust receipt financing was executed by these last two named companies which was immediately forwarded to the secretary of state of California. This statement makes no mention of Colorado Motor Sales Company, the fictitious name under which Fairbanks-Fee, Inc., was operating at that time, and whose contract with the buyer (Knights) the Colorado Motor Sales Company assigned to the bank. At about the same time that the trust receipt was executed the Commercial Discount Company endorsed and delivered to the Seaboard Finance Company the ownership certificate of the coupe. The Seaboard Finance Company thereafter held such certificate which was at no time transferred into its name in the office of the Motor Vehicle Department. The Seaboard Finance Company was the fictitious name and style under which National Seaboard Corporation, a corporation, was doing a financing business. Throughout these various transactions the coupe stood innocently on the sales floor of Colorado Motor Sales Company until it was delivered to Knights under his executory contract as aforesaid.

On December 31, 1937, National Seaboard Corporation, a corporation, was dissolved and all of its assets were transferred to the National Funding Corporation, a corporation, defendant and cross-complainant below, and appellant here. The foregoing transactions having been discovered, demand was made upon the Seaboard Finance Company for delivery of the certificate of ownership which, being refused, this action was brought by the Bank of America National Trust & Savings Association against Seaboard Finance Company, a corporation, and Commercial Discount Company, a corporation, praying for declaratory relief and that the plaintiff be adjudged legal owner of the coupe subject to the rights of Kenneth S. Knights, as purchaser, and directing the defendants and each of them to duly endorse the certificate of ownership of said automobile and to deliver the same to the plaintiff and for general relief. Thereafter, National Funding Corporation intervened and, on motion, was granted leave to file an answer and cross-complaint as successor to the assets of National Seaboard Corporation, a corporation. The National Funding Corporation, by its answer, in a separate affirmative defense, alleged that the maintenance and prosecution of the action was barred by section 2468 of the Civil Code in that the plaintiff is the assignee of Fairbanks-Fee, Inc., a corporation, which was during December, 1936, doing business under the fictitious firm name of Colorado Motor Sales Company, and had not complied with the provisions of section 2466 of the Civil Code. By its cross-complaint, National Funding Corporation prays that its title to the coupe be quieted and for delivery to it of that automobile or its value. Issues being joined, the case was tried by the court without a jury, findings were settled, and judgment was entered for the plaintiff from which the National Funding Corporation prosecutes this appeal.

(1) The appellant first contends that because the plaintiff's assignor, the Colorado Motor Sales Company, had failed to comply with section 2466 of the Civil Code, recovery by the plaintiff is barred by virtue of section 2468 of the Civil Code. Section 2468 of the Civil Code reads, in so far as the same applies to this litigation, as follows: "No person doing business under a fictitious name, or his assignee or assignees, * * * shall maintain any action upon or on account of any contract or contracts made, or transactions had under such fictitious name, * * * until the certificate has been filed and the publication has been made as herein required."

The trial court found that Fairbanks-Fee, Inc., a corporation, was, on or about December 22, 1936, doing business under the fictitious firm name and style of Colorado Motor Sales Company. It is perfectly clear that the interest of the bank is derived from an assignment by Colorado Motor Sales Company of its right, title and interest in the conditional sales contract wherein Knights was named as purchaser, and in all the property therein described and all moneys to become due thereunder.

[1, 2] Respondent argues that as this is an action for declaratory relief, it cannot be said to be an action upon or on account of any contract or transaction had under the fictitious name. We believe that such a contention cannot be sustained. We cannot concede that any rights can be claimed by the plaintiff bank other than those created by the conditional sales contract and the assignment thereof. However, we are constrained to hold that the National Funding Corporation is estopped from asserting the bar of the statute.

[3] To fully appreciate the position of the respective parties in the instant litigation, it must be kept in mind that the plaintiff bank acquired its interest, title and right to the coupe by assignment made by the unregistered Colorado Motor Sales Company of its conditional sales contract with Knights. The National Funding Corporation, appellant here, acquired its right, title and interest to the coupe by a transfer to it of the assets of the National Seaboard Corporation, a corporation, upon dissolution thereof. The National Seaboard Corporation in turn acquired any right, title or interest which it may have had in the coupe as the progenitor of the Seaboard Finance Company, the fictitious name under which the National Seaboard Corporation was doing business. The Seaboard Finance Company in turn acquired any right, title or interest in the coupe which it may have had by virtue of the flooring contract and trust receipt wherein Fairbanks-Fee, Inc., a corporation, assumed title to the coupe which then stood in the name of Colorado Motor Sales Company, the unregistered fictitious name under which the Fairbanks-Fee, Inc., was doing business. So far, we must hold that Fairbanks-Fee, Inc., and National Seaboard Corporation, a corporation, stand in the shoes of Colorado Motor Sales Company, at this point the registered owner of the coupe. The ownership certificates were not negotiable and any interest acquired by reason of a transfer thereof is subject to all of the equities that might be urged by the bank against the Colorado Motor Sales Company. If it be contended that the Seaboard Finance Company acquired an interest as registered owner of the coupe by reason of assignment to it of the ownership certificate, which named the Commercial Discount Company as legal owner, then we are confronted with the failure of these parties to register the transfer with the Motor Vehicle Department at Sacramento. A failure to cause such registration nullified any transfer of title by virtue of the endorsement and delivery of the certificate by the Commercial Discount Company as legal owner to the Seaboard Finance Company. Section 186 of the Vehicle Code, St.1935, p. 118, as it read at the time of these several transactions, is as follows:

"When Transfer Deemed Complete. No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effective for any purpose until transfer of registration is made and the department has issued a new certificate of ownership and registration card with respect thereto as provided herein, except as a transferor may be estopped by law to deny a transfer and except as provided in sections 178 and 180 hereof and in Chapter 3 of this division."

We must then hold that Commercial Discount Company, which does not appear in this appeal, retained legal title if we assume that the certificate naming the Colorado Motor Sales Company both as seller and as purchaser and as registered owner and the Commercial Discount Company as legal owner had any validity whatever. In other words, legal title remained in the Colorado Motor Sales Company, the unregistered, or in the Commercial Discount Company, the stranger. In any event, any interest which the National Funding Corporation, a corporation, appellant here, has at any time acquired proceeds from the Colorado Motor Sales Company. Surely it cannot be said that the Colorado Motor Sales Company could set up its failure to comply with section 2466 of the Civil Code as a defense to the plaintiff's claim in the instant litigation, and those who acquired interest from the fictitiously named concern are subject to the same infirmities unless the doctrine of estoppel applies.

[4] The purpose of section 2466 of the Civil Code is plain. That section, and section 2468 of the Civil Code, are designed to protect those dealing with an individual or partnership doing business under a fictitious name, and were never intended to confer rights or advantages upon the individual or firm failing to comply with the law. These statutes provide a shield for the innocent and the law-abiding, and do not arm the law violator with a weapon of unconscionable defense.

[5] "The object of section 2466, supra, is that public notice shall be given and a public record made of the individual members of partnerships with such definiteness and particularity that those dealing with them may at all times know who are the individuals with whom they are dealing, or to whom they are giving credit or becoming bound." Andrews v. Glick, 205 Cal. 699, 701, 272 P. 587, 588. See, also, Meads, Seaman & Co. v. Lasar, 92 Cal. 221, 226, 28 P. 935.

[6] The foregoing does not affect the rights of the plaintiff bank to maintain this action even though its interest in the coupe was acquired by a transfer to it of the conditional sales contract by the Colorado Motor Sales Company. Neither the last named company nor its parent Fairbanks-Fee, Inc., a corporation, nor any assignee of the corporation or of its illegitimate child may assert the failure of the latter to register under section 2466 of the Civil Code as a defense. Washington Lumber, etc., Co. v. McGuire, 213 Cal. 13, 1 P.2d 437.

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Code Civ.Proc. § 1962, subd. 3.

[7-9] Be it remembered that when the Colorado Motor Sales Company assigned its conditional sales contract to the plaintiff bank it accompanied the same by a solemn written warranty reciting its right to sell the coupe and that the same was not encumbered. While technically the plaintiff is in the position of an assignee of an unregistered concern, it must be remembered that the whole office of an equitable estoppel is to protect one from a loss which but for the estoppel he could not escape. The whole vital principle of equitable estoppel is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position involves fraud and falsehood and the law abhors both. The doctrine of estoppel is applied when necessary to prevent the acts of a party from operating as a fraud upon one who has been deliberately led to rely upon them. Burgess v. California Mutual Building & Loan Ass'n, 210 Cal. 180, 290 P. 1029.

[10-12] (2) It is contended by the appellant that the registration of the purported transfer by the Colorado Motor Sales Company to itself as both seller and purchaser, wherein the Commercial Discount Company was named as legal owner, constituted constructive notice to the plaintiff bank. It is true that this registration with the Motor Vehicle Department at Sacramento occurred some six weeks prior to the sale of the coupe to Knights and the transfer of its interest in the conditional sales contract by the Colorado Motor Sales Company to the plaintiff bank. It is difficult, however, to see upon what theory the appellant here succeeded to any rights vested in the Commercial Discount Company. True, this last named company endorsed and delivered to the Seaboard Finance

Company the ownership certificate. This transaction, however, was never registered with the Motor Vehicle Department and therefore, as we have seen, did not effect a transfer. We cannot hold that the registration of the certificate naming the Commercial Discount Company as legal owner, constituted constructive notice to either the plaintiff bank or the purchaser Knights. It is conceded by the appellant that a reading of sections 140 to 186, inclusive, of the California Vehicle Code, St.1935, pp. 108–118, discloses no express legislative intent to establish constructive notice to the world of transfers of title. The registration of chattel mortgages on motor vehicles do indeed constitute constructive notice by express provisions of the statute. Vehicle Code, sec. 197, St.1935, p. 119. We are, however, confronted with a certificate of ownership and its registration and not with the registration of a chattel mortgage. It is to be noted that constructive notice by record or registration was unknown to the common law. Such notice is a matter of statutory origin and in the absence of statute does not exist. "In the absence of statutory provision, the record of a chattel mortgage would not constitute notice for any purpose. When the terms of the statute are complied with, the record becomes conclusive notice, often contrary to the fact." Bell v. Sage, 60 Cal.App. 149, 153, 212 P. 404, 406. We cannot read into the statutes the harsh rule of constructive notice in the absence of legislative expression.

[13] (3) It is contended by the appellant that the plaintiff bank was negligent in not investigating the records of the Motor Vehicle Department and that when one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer. The application of this doctrine will not aid the appellant. As we have seen, the title of the National Funding Corporation, appellant here, comes through the devious chain of the National Seaboard Corporation, as parent of the Seaboard Finance Company, whose name is fictitious, and which acquired title by virtue of a trust receipt from Fairbanks-Fee, Inc., a corporation, the parent of Colorado Motor Sales Company, fictitiously named and unregistered. As we have said, these several transfers, if legitimate at all, carry with them all the infirmities of the position of the Colorado Motor Sales Company, which was plainly guilty of a brazen fraud in selling the coupe as unincumbered and as its property. We know of no rule of law which required either the purchaser Knights or the plaintiff bank to investigate the records in the office of the Motor Vehicle Department. As we have said, throughout all of the devious adventures heretofore noted, the coupe remained on the sales floor of the Colorado Motor Sales Company for exhibition, demonstration and sale. If negligence exists, it must be held to be solely confined to those who clothed the Colorado Motor Sales Company with the indicia of ownership and permitted that company to perpetrate a fraud upon the buying public by offering to sell and selling that which it is now contended was not the property of such company. Under such circumstances, any one holding any interest, title or right pertaining to the Graham coupe will be estopped from asserting the same as against an innocent purchaser for value or an innocent assignee of a conditional sales contract under which the innocent purchaser bought. It being conceded that both Knights and the bank were innocent, they cannot be deemed to be negligent in relying upon the indicia of ownership with which others neither innocently nor carefully clothed the Colorado Motor Sales Company.

[14] "Where the true owner holds out another, or allows him to appear as the owner of or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power, which through negligence, or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance." Shirey v. All Night and Day Bank, 166 Cal. 50, 134 P. 1001, 1003.

"* * * Where the true owner clothes another with the indicia of ownership of property, and therefore the apparent authority to transfer title thereto, and innocent third parties are thereby led into dealing with such apparent owner, the true owner will be estopped to deny that the apparent authority is the real authority (Code Civ.Proc. § 1962, subd. 3). In such cases the equities are found to be in favor of the bona fide purchaser rather than in favor of the owner who has by his own conduct clothed another with the power to commit the fraud." Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 274 P. 512, 514, 73 A.L.R. 1398. See, also, Moss v. Bowman, 116 Cal.App. 720, 3 P.2d 377; San Joaquin Valley Securities Co. v. Prather, 123 Cal. App. 378, 11 P.2d 45.

It is the owner who, through over-confidence in the dealer or through negligence, places the indicia of ownership in the hands of the dealer who is guilty of negligence and not the innocent purchaser who relies on such indicia in making his purchase. Camerer v. California Savings, etc., Bank, 4 Cal.2d 159, 172, 48 P.2d 39, 100 A.L.R. 667.

"The title holder, having clothed the retail dealer with all the appearances of ownership or authority to sell, could not be heard to assert title or ownership as against a purchaser for value without actual notice of the reserved title who had been led by appearances created by the true owner to believe that the dealer had authority to dispose of the title in the usual course of trade. Under such cases, the rights of the purchaser did not necessarily depend on the actual title or authority of the dealer, but were derived from the act of the real owner, which precluded him from disputing as against an innocent party, the existence of the title or power which, through negligence or mistaken confidence, he had caused or allowed to be vested in the party making the sale." Commercial Credit Co. v. Barney Motor Co. et al., 10 Cal.2d 718, 76 P.2d 1181, 1182. See, also, California Standard Finance Corp. v. Riverside Finance Co., 111 Cal.App. 151, 295 P. 555.

[15] "* * * Where an owner deposits his property with another and gives the depository such indicia of ownership that a reasonable man dealing with such agent is reasonably led to believe the agent is the owner of such property and parts with value in reliance thereon, the third person will be protected even though the true owner is guilty of no more than misplaced confidence. Such misplaced confidence must be held to be negligence within the meaning of the maxim above referred to." Phelps v. American Mortgage Co., 40 Cal.App.2d 361, 104 P.2d 880, 883.

[16] The answer of the National Funding Corporation having raised the issue which invites the application of the doctrine of estoppel, it is unnecessary that the plaintiff bank should have pleaded estoppel. California Standard Finance Corp. v. Riverside Finance Co., supra. We can see no difference between the position occupied by the purchaser Knights and his financial agent, the plaintiff bank.

In addition to what we have said with reference to estoppel, we have reached the conclusion that the provisions of The Uniform Trust Receipts Law (sec. 3012 et seq. Civil Code) is decisive of the questions presented on this appeal and require an affirmance of the judgment.

The trial court found that prior to December 22, 1936, Fairbanks-Fee, Inc., doing business as Colorado Motor Sales Company, executed a trust receipt on the Graham coupe to the Commercial Discount Company to secure a loan and that at the same time it caused the automobile to be registered with the Department of Motor Vehicles with Colorado Motor Sales Company as registered owner and Commercial Discount Company as legal owner; that thereafter Commercial Discount Company assigned and transferred the trust receipt and purported to transfer the pink slip to the predecessor in interest of National Funding Corporation, Seaboard Finance Company, which was a fictitious name, duly registered, under which both Commercial Discount Company and National Funding Corporation did business; that this trust receipt finally passed to National Funding Company. There is also in the record a copy of a trust receipt dated December 28, 1936, to the Seaboard Finance Company, entruster, from Fairbanks-Fee, Inc., trustee, covering the Graham coupe. It is therefore clear that the only interest the National Funding Corporation had in the automobile was as entruster through these transactions.

[17] Under the Uniform Trust Receipts Law the relation of entruster and trustee may be created by the execution of a trust receipt, which was done here, or by the transfer of title to the entruster (Commercial Discount Company), which was also done here. Sec. 3014, Civil Code. As the registration of the legal title to the coupe in the name of the entruster was concurrent with the execution of the first trust receipt it is rather clear that this was done under the provisions of the Uniform Trust Receipt Law to complete the relations there permitted and to give the entruster security for his loan and not with the intention of vesting actual legal title in the entruster.

[18, 19] The contract executed to evidence the trust receipt relation gave the trustee "liberty of sale" as defined in the Uniform Trust Receipts Law. Under this law the entruster does not acquire the legal title to the property, but only a lien upon it as security for the loan. The legal relation created by a trust receipt in some respects resembles, but is not the same as, that created by a chattel mortgage. Commercial Discount Company v. Los Angeles County, 16 Cal.2d 158, 105 P.2d 115. Title to the property remains in the trustee until default and foreclosure of the lien. Sec. 3016.2, Civil Code.

We find the following in section 3016.5 of the Civil Code: "(2) Where a purchaser from the trustee is not protected under subdivision one hereof, the following rules shall govern:

"(a) Sales by trustee in the ordinary course of trade.

"(i) Where the trustee, under the trust receipt transaction, has liberty of sale and sells to a buyer in the ordinary course of trade, whether before or after the expiration of the thirty day period specified in subdivision one of section 3016.4 of this chapter, and whether or not filing has taken place, such buyer takes free of the entruster's security interest in the goods so sold, and no filing shall constitute notice of the entruster's security interest to such a buyer.

"(ii) No limitation placed by the entruster on the liberty of sale granted to the trustee shall affect a buyer in the ordinary course of trade, unless the limitation is actually known to the latter."

[20] Here the Graham coupe was sold in the ordinary course of trade to a buyer acting in good faith and without notice of the lien of the National Funding Corporation. As the purchase price was paid in full it follows that the buyer took "free of the entruster's interest in the goods so sold."

[21] A person or corporation may transact business under an unregistered fictitious name. The disability arises only when there is an attempt to enforce its contract in an action. Because of the clear provisions of the Uniform Trust Receipts Law which we have quoted vesting title in an innocent purchaser for value under the circumstances here presented, we must conclude that the National Funding Corporation lost its lien on the automobile, had no interest in or claim to it that could be enforced and is estopped to assert any defect in the title of the innocent purchaser for value.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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45 Cal.App.2d 374

SEARS et al. v. RULE et al.

Civ. 6588.

District Court of Appeal, Third District, California.

June 16, 1941.

Rehearing Denied July 16, 1941.

Hearing Denied Aug. 14, 1941.

1. Wills ⚷671

Where will devised property to brother for distribution in accordance with wishes previously discussed, trust which testatrix sought to create failed because neither subject, purpose nor beneficiaries were mentioned. Civ.Code, § 2221.

2. Trusts ⚷66

Where will did not create valid trust because failing to mention subject, purpose and beneficiary as required by statute, and also failed to dispose of residuary estate, a "resulting trust" was created, under the circumstances, for benefit of heirs according to rules of succession, notwithstanding terms of will allegedly purporting to designate brother as sole beneficiary. Civ.Code, § 2221; Probate Code, § 229.

See Words and Phrases, Permanent Edition, for all other definitions of "Resulting Trust".

3. Wills ⚷440

Intention of testator must be determined from language employed in will when it is clear and unambiguous and under such circumstances a court may not speculate on what testator may have intended to say or do.

4. Wills ⚷441

When language of a will is uncertain or ambiguous, competent surrounding circumstances may be referred to for purpose of determining testator's intention as expressed in the will.

5. Wills ⚷849

Where language of will construed in light of surrounding circumstances clearly indicates that testator did not intend to devise his property absolutely, then the will fails to dispose of such property and must be considered as "intestate property" which should be distributed to the heirs according to rules of succession, though the will may have attempted to create a trust which is void.

See Words and Phrases, Permanent Edition, for all other definitions of "Intestate Property".

6. Wills ⚷672(2)

Language of will was insufficient to create trust of residuary estate, in absence of language purporting to enforce an imperative obligation on trustee to perform any specific acts.

7. Wills ⚷675

Where testator has made an unrestricted devise of property, subsequent precatory language will not create a trust therein.

8. Trusts ⚷66

Where voluntary trust which testatrix sought to create failed but it appeared that testatrix did not intend to bequeath the subject matter thereof to trustee absolutely, the conveyance of that property by will failed and where it was wrongfully distributed to the trustee as an individual, a "resulting trust" was automatically created for benefit of heirs according to rules of succession. Probate Code, § 229.

9. Trusts ⚷66

Where real property is devised on a trust which fails and there is no provision in will effectively disposing of residue of the testator's real property, the devisee holds it on a "resulting trust" for heirs of the testator, and same rule applies to personal property under similar circumstances, when it is distributed to one who is not the absolute owner.

10. Wills ⚷740(4)

Where one to whom property had been distributed as sole beneficiary subsequently conveyed voluntarily certain property of the estate to other heirs, the conveyances were in the nature of an "admission" that distributee knew he was not sole beneficiary under the will.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

11. Wills ⚷601(1)

Under statute declaring that when a clear and distinct devise is made, subsequent reasons or explanations shall not affect absolute disposal of the property, where will in one paragraph devised property to brother of testatrix and in succeeding paragraph stated that reason for devise was the belief of testatrix that brother would distribute estate in accordance with prior discussions, will could not be construed as an absolute devise and bequest to beneficiary on theory that subsequent paragraph merely stated a reason therefor. Probate Code, § 104.

12. Trusts ⚷66

Where will devised property to brother for distribution in accordance with wishes previously discussed but voluntary trust which testatrix thereby sought to create failed because subject, purpose and beneficiaries were not mentioned, will could not be construed as an absolute devise to brother and subject matter thereof became "intestate property" which brother, after improper distribution to him, held under a resulting trust for benefit of heirs pursuant to rules of succession. Probate Code, § 229.

13. Executors and administrators ⚷315(6)

A decree of distribution is ordinarily conclusive of the rights of all heirs, legatees and devisees but equity will afford relief against decree of distribution which has become final but which has been procured by extrinsic fraud.

14. Wills ⚷866

Where property which remained undisposed of by will included real property which had been given by husband to testatrix in joint tenancy, and neither of spouses had surviving children or parents, the property reverted to heirs of husband. Probate Code, § 229.

15. Judgment ⚷443(1)

Equity will relieve one from the effect of a judgment or decree which is procured by conduct preventing an interested party from appearing and participating in hearing or trial on its merits.

16. Executors and administrators ⚷315(4)

Where executor allegedly failed to disclose to the court an agreement with testatrix regarding distribution of property, and

intentionally deceived court into making to him absolute distribution of residuary estate, the failure to disclose existence of those who were interested and who were thereby prevented from participating in the litigation to their loss, constituted "extrinsic fraud" against which equity could grant relief.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

◆

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Hattie Sears and others against Charles T. Rule and others to establish a resulting trust in real property. From a judgment of dismissal after demurrer to complaint was sustained without leave to amend, plaintiffs appeal.

Reversed with directions.

Edwin J. Miller and Ralph W. Miller, both of Los Angeles, for appellants.

Draeger & Loud, of Beverly Hills, and Geo. T. Warren, of Los Angeles, for respondents.

THOMPSON, Justice.

The plaintiffs have appealed from a judgment of dismissal of an action for equitable relief, after a demurrer to an amended complaint had been sustained without leave to amend the pleading. The application to file a second amended complaint was denied. The suit was instituted after a decree of distribution became final. The action seeks to declare a resulting trust in real property which the will failed to dispose of since the voluntary trust sought to be created by the testatrix failed because neither the subject, purpose nor beneficiaries were mentioned in the will. It is asserted the executor procured an absolute distribution to himself by means of extrinsic fraud.

The complaint alleges that Charles F. Weber died testate January 25, 1934, leaving his entire estate to his wife, Sarah E. Weber, except eight parcels of his separate real property which were previously given to the wife in joint tenancy; that the spouses had neither living children nor parents; that Sarah E. Weber died testate January 1, 1936, in Los Angeles, leaving an estate valued at $300,000; that she left surviving her three brothers who were named in the petition for probate of the will, and also the plaintiffs in this case consisting of a half sister and five children of John E. Weber, a deceased brother of Charles F. Weber, deceased, none of the heirs of the deceased husband having been mentioned in the petition for probate of the will or in the petition for distribution; that the will of Sarah E. Weber bequeathed to her brother Charles T. Rule, absolutely, the household goods and personal effects of the testatrix, but attempted to devise to him the remainder of her estate in trust only, which trust failed under section 2221 of the Civil Code because the "subject, purpose and beneficiary of the trust" were not mentioned; that the eight parcels of the separate property of the deceased husband Charles F. Weber, which were previously given to his wife in joint tenancy, reverted to the plaintiffs in this case as his heirs and descendants by right of representation, pursuant to section 229 of the Probate Code; that the will of Sarah E. Weber was duly admitted to probate in Los Angeles county, and Charles T. Rule was appointed executor thereof; that distribution of the entire estate was wrongfully made to Charles T. Rule, as the absolute owner thereof, on March 15, 1937, without notice or knowledge thereof by any of the plaintiffs in this case; that these plaintiffs did not discover that distribution had been so made until April, 1938, and therefore failed to appeal from that decree; that the absolute distribution of the estate was procured by extrinsic fraud of Charles T. Rule, who failed to notify any of these plaintiffs of the probating or distribution of said estate, and by wilfully failing to disclose to the probate court his knowledge of the fact that the testatrix intended to will to him the residue of the estate in trust only, with an agreement on his part to distribute the property according to their previous understanding; that a secret trust was thereby created, and that since the precatory trust attempted to have been created by the terms of the will failed, a resulting trust in the residue of the estate was automatically created in favor of the heirs of the testatrix and of her deceased husband, by right of succession.

Paragraph four of the will of Sarah E. Weber gives to her brother, Charles T. Rule, absolutely, her household goods and personal effects. Paragraph five provides as follows:

"All the rest, residue and remainder of my estate, of whatever kind and character, and wheresoever situated at the time of my decease, I give, devise and bequeath as follows, to-wit:

"(a) To my brother, Charles T. Rule, of Los Angeles, California, the whole thereof; and in the event he should fail to survive distribution to him, then to my heirs in accordance with the laws of succession of the State of California.

"(b) The reason of making my brother, Charles T. Rule, aforesaid, the sole beneficiary of my estate, is that I am confident, and place my trust in him to the extent that he will distribute my estate in accordance with my wishes he and I have often discussed."

The sixth paragraph of the will then provides that "If any devisee, legatee or beneficiary hereunder contest this will" he shall be given the sum of $1 in lieu of any share of the estate he might otherwise inherit. The seventh paragraph of the will then appoints Charles T. Rule "guardian of the estate of any minor or incompetent person to whom distribution is made hereunder".

The appellants contend that it is apparent from the provisions of the will and the surrounding circumstances that the testatrix did not intend to devise her estate absolutely, other than the household goods and personal effects, to her brother Charles, and upon the contrary that she intended to convey the residue of the property to him in trust only for beneficiaries previously agreed upon between them, and that since that trust failed, and the property was wrongfully distributed to him, a resulting trust was therefore created for the benefit of the lawful heirs according to the rules of succession. It is further asserted that since distribution was procured by extrinsic fraud exercised by Charles T. Rule, the executor, the heirs are not bound thereby but may secure equitable relief in this suit.

We are required to determine whether the proposed amended complaint states facts sufficient to create a resulting trust in the residue of property not disposed of by will, for the benefit of the heirs according to the rules of succession, and whether facts are alleged showing extrinsic fraud so as to relieve the plaintiffs from the binding effect of the decree of distribution.

The respondents contend that the terms of the will, by means of which the entire estate was devised to Charles T. Rule as sole beneficiary thereof, are clear and explicit to that effect, and that the language which follows that devise is a mere recitation of the reasons for doing so, which does not affect the absolute passing of title, as provided by section 104 of the Probate Code.

After a careful examination of the provisions of the will, viewed in the light of the facts alleged in the complaint, we are of the opinion the probate court erred in determining that the residue of the estate, other than the household goods and personal effects, were devised absolutely to Charles T. Rule. On the contrary, we are persuaded the testatrix did not intend to make her brother sole beneficiary of her entire estate. It seems clear that she had a previous understanding with him that she would give him the property in trust to be distributed to individuals or for the benefit of charitable causes according to an agreement between them.

[1, 2] The language of the will does not create a valid trust. It failed to mention the "subject, purpose and beneficiary" as required by section 2221 of the Civil Code. Since the will also failed to dispose of the residue of the estate, we are of the opinion a resulting trust was thereby created for the benefit of the heirs according to the rules of succession.

[3-5] It is true that the intention of a testator must be determined from the language employed in the will when it is clear and unambiguous, and under such circumstances a court may not speculate on what he may have intended to say or do. Gore v. Bingaman, 29 Cal.App.2d 460, 469, 85 P.2d 172; In re Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193. When the language of the will is uncertain or ambiguous, competent surrounding circumstances may be resorted to for the purpose of determining the testator's intention as it is expressed in the will. But if the language of the will, construed in the light of surrounding circumstances, clearly indicates that the testator did not intend to devise his property absolutely, then the will fails to dispose of such property and it must be considered as intestate property which should be distributed to the heirs according to the rules of succession, even though the will may have attempted to create a trust which is void.

[6, 7] It is conceded in the present case that the language of the will is insufficient to create a trust in the residue of

the property by the use of precatory terms. We agree with that statement for the reason that it fails to mention the subject, purpose or beneficiaries thereof, as required by section 2221 of the Civil Code, and because the will does not purport to enforce an imperative obligation upon the brother of the testatrix to perform any specific acts. Wills v. Wills, 166 Cal. 529, 137 P. 249; In re Estate of Mitchell, 160 Cal. 618, 117 P. 774; In re Estate of Lee, 104 Cal.App. 15, 284 P. 948; In re Estate of Browne, 175 Cal. 361, 165 P. 960; In re Estate of Mooney, 25 Cal.App.2d 481, 77 P.2d 1098; 25 Cal.Jur. 288, sec. 146; 26 Cal.Jur. 973, sec. 271; 69 C.J. 713, secs. 1830–1832; 1 Restatement of Law of Trusts, 76 § 25; 1 Bogert on Trusts and Trustees, p. 223, § 48. In the authorities last cited it is said that where a testator has made an unrestricted devise of property by the terms of his will, subsequent precatory language will not be deemed to create a trust therein. In Re Estate of Browne, supra, it is stated that a trust will not be created in the absence of language imposing upon the devisee an imperative obligation to perform specific acts. The early liberal construction of language upholding precatory trusts has been frequently rejected by modern authorities in this and all other jurisdictions. In 1 Bogert on Trusts and Trustees, § 48, it is said in that regard at page 231: "The tide has run so strongly against turning precatory expressions into words of trust that the ordinary words of request, recommendation, wish, and desire are quite generally construed to have no legal effect."

That conclusion is clearly expressed in 69 Corpus Juris at page 713, in the following language:

"To create a private trust the language must charge the trustee with a duty rather than discretion, or option to act or not to act as to him may seem best. * * * A bequest followed by directions to the legatee as to the use of the income from the property is an absolute gift rather than a trust. * * *

"It has been said, in effect, that according to the earlier cases when precatory words are used in a will, following what would otherwise be an absolute gift, a precatory trust will arise if the subject-matter and objects affected by the precatory words are certain. * * * According to the more modern and prevailing view, however, precatory words of themselves are insufficient to create such a trust. The doctrine of precatory trusts is not to be extended. In order that a trust may arise from the use of precatory words, the court must be satisfied, from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust declared in the ordinary manner. * * * Where an absolute estate or interest is in terms given, precatory words which follow are treated as expressions of wish rather than of will, so that no trust is created. * * * A gift to enable the legatee to confer bounty on others is not a trust, but a beneficial legacy to him. * * * It is only where it is clear that precatory words were used by the testator as positive directions that they will be raised into such. * * * A trust is created if it clearly appears that the words were used in an imperative sense; but this only where the testator's desires can be ascertained with reasonable certainty, the subject and the object being clear."

[8, 9] It follows that the will in this case did not create a voluntary trust. But that failure does not necessarily mean that the will is effective as an absolute conveyance of the entire estate. It appears to us that not only was the effort to create a voluntary trust by the use of precatory language void, but it also seems clear the testator did not intend to devise and bequeath the property mentioned in the fifth clause of the will to her brother absolutely, and the conveyance of that property therefore fails. If the probate court erred in construing the will in that regard then the bulk of the estate was undisposed of and since it was wrongfully distributed to Charles T. Rule, a resulting trust was automatically created for the benefit of the heirs according to the rules of succession. In re Estate of Ralston, 1 Cal.2d 724, 37 P.2d 76, 96 A.L.R. 953; Wittfield v. Forster, 124 Cal. 418, 57 P. 219; 2 Restatement of the Law of Trusts, 1259, § 411. In the text last cited, it is said: "If real property is devised upon a trust which fails and there is no provision in the will effectively disposing of the residue of the testator's real property, the devisee holds it upon a resulting trust for the heir of the testator."

The same rule applies to personal property under similar circumstances when it is undisposed of by the will and when it is wrongfully distributed to one who is not the absolute owner thereof.

We are of the opinion the will, construed in the light of surrounding circumstances as alleged in the proposed amended complaint, does not devise the residue of the estate to Charles T. Rule as sole beneficiary thereof. The will clearly bequeaths to him, absolutely, without reservation, all of the household goods and personal effects. If it had been the intention of the testatrix to also will to him the entire estate in the same manner, there would have been no necessity for paragraph five of the will. The simple and clear way to have done so would have been to incorporate in the fourth paragraph all of her estate, including both real and personal property. The fact that she did not do so clearly indicates that she distinguished in the disposition of her estate between her household goods and the residue of her estate. It is a significant fact, indicating that she did not intend to make her brother Charles sole beneficiary of her entire estate valued at $300,000, that she had three other brothers to whom, according to the construction of the trial court, she gave nothing. In subdivision (b) of paragraph five of the will she uses language which is absolutely conflicting with the theory that she intended to make her brother Charles sole beneficiary of her estate. In effect, she says I trust my brother Charles and am confident he "will distribute my estate" according to our agreement and my wishes in that regard, as previously expressed in many discussions. That declaration is not a mere expression of a wish or desire that he would use a portion of his inherited property for the benefit of certain individuals or undisclosed causes. It is significant that the will specifically declares the testatrix has confidence to believe her brother "will distribute" her property consisting of almost the entire estate of the value of $300,000 to the parties or causes previously agreed upon in former conferences. That is inconsistent with the theory that he was entitled to distribution of the entire estate as the sole beneficiary thereof. The theory that the testatrix did not intend to convey her entire estate to her brother Charles, and upon the contrary that she intended to convey the residue mentioned in the fifth paragraph to him in trust to be distributed in accordance with their previous agreement, seems to be conclusive from the sixth clause of the will which declares that "If any devisee, legatee or beneficiary hereunder contest this will", he shall be given the sum of $1 in lieu of any share of the estate he might otherwise inherit. That clause refutes the theory that Charles T. Rule was made the sole beneficiary of the will. It is absurd to hold that a sole beneficiary of the entire estate of a deceased person would contest the will. Paragraph seven of the will contains a clause equally inconsistent with the theory that Charles T. Rule was to become sole beneficiary of the entire estate, for it specifically provides that he shall be appointed "guardian of the estate of any minor or incompetent person to whom distribution is made hereunder". It is apparent the last-mentioned clause contemplates distribution of a part of the estate to minors or an incompetent person. No language could more clearly indicate that Charles was not to become the sole beneficiary or distributee of the entire estate.

[10] Moreover, it is apparent the respondent knew the testatrix did not intend to make him sole beneficiary of her estate, for it is alleged he subsequently voluntarily conveyed property of the estate valued at $23,700 to three other heirs. Those conveyances were in the nature of an admission that Mr. Rule knew he was not sole beneficiary under the will. Yet he procured distribution of the entire estate by representing to the court that he was the sole beneficiary and entitled to the entire estate.

[11] A careful consideration of the entire will, construed in the light of surrounding circumstances, convinces us beyond a doubt that the testatrix did not intend to will her entire estate absolutely to her brother Charles. The language of that will may not be reasonably construed, under the provisions of section 104 of the Probate Code, to contain a mere recital of reasons why the testatrix gave the entire estate to her brother. That section declares that when "A clear and distinct devise" is made, mere subsequent reasons or explanations therefor shall not affect the absolute disposal of the property. The present will certainly does not clearly devise the residue of the property to Charles T. Rule. The intent of the testatrix appears to be clearly otherwise.

[12] Since the apparent effort to create a voluntary trust in the residue of the property failed because the will does not designate the subject, purpose or beneficiaries, the residue of the estate mentioned in paragraph five of the will remains undisposed of. It therefore became intestate property in the possession of the distributee as a resulting trust for the benefit of the heirs pursuant to the rules of succession.

The foregoing principle, which is often reiterated in numerous authorities, is succinctly stated in Re Estate of Madsen, 31 Cal.App.2d 240, 87 P.2d 903, 905, as follows: "It is * * * well settled that where, through extrinsic fraud practiced in probate proceedings, distributees have obtained property to which they are not entitled, equity will do justice not by overthrowing the decree of distribution but by declaring that the distributees hold the property in trust for the rightful owners. [Citing numerous authorities.] 'This character of relief is very common in the matter of fraudulent probate proceedings. The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists.' "

[13] The rule is well established that a decree of distribution is ordinarily conclusive of the rights of all heirs, legatees and devisees. In re Estate of Madsen, supra; 11b Cal.Jur. 787, sec. 1290 et seq. However, it has been uniformly held that equity will afford relief against a decree of distribution which has become final, when it has been procured by extrinsic fraud. Sec. 2224, Civil Code; In re Estate of Walker, 160 Cal. 547, 117 P. 510, 36 L.R.A.,N.S., 89; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98; Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159; In re Estate of Madsen, supra; Godfrey v. Godfrey, 30 Cal.App.2d 370, 379, 86 P.2d 357; 88 A.L.R. 1201, note; 2 Restatement of the Law of Trusts, 1259, § 411.

[14] It is alleged in the amended complaint that the property mentioned in the fifth paragraph of the will, which is undisposed of by the terms of that instrument, includes eight parcels of separate real property of the value of $90,000, which reverts under section 229 of the Probate Code to the heirs of Charles F. Weber, deceased, the former husband of the testatrix, Sarah E. Weber, for the reason that it was given to her by her husband in joint tenancy, and neither of the spouses had surviving children or parents. We are satisfied that under such circumstances that portion of the property would revert to "the brothers and sisters of the deceased spouse and to their descendants by right of representation". The balance of the undisposed property would go to the heirs of the testatrix according to the rules of succession. Section 229 of the Probate Code provided in part: "If the decedent leaves no issue, and the estate or any portion thereof was separate property of a a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, such property goes in equal shares to * * * the brothers and sisters of the deceased spouse and to their descendants by right of representation."

The remaining question to be determined on this appeal is whether the amended complaint or the proposed second amended complaint alleges facts sufficient to establish extrinsic fraud in procuring to Charles T. Rule distribution of the property mentioned in paragraph five of the will. We are of the opinion the defendants should have been permitted to file their proposed second amended complaint, and that the court erred in refusing to grant their motion to do so. We shall consider the allegations of that proposed second amended complaint in determining whether extrinsic fraud has been sufficiently alleged therein.

[15] The pleading alleges that the defendant Hattie Sears is a half sister of Charles F. Weber, deceased, and that the other defendants are children of John E. Weber, a deceased brother of the said husband of the testatrix; that Charles T. Rule knew of the existence and residences of said defendants, but failed to include them in the petition for probating the will or in the petition for distribution, or to give them notice thereof, and that they did not know of the distribution until April, 1938, one year after it had been entered. It is also alleged in effect that Charles T. Rule was guilty of fraud in failing to inform the probate court at the time of distribution of the secret trust created by his previous agreement with

the testatrix to distribute the property of the estate to the persons or causes designated by her; that it was not her intention to give him the entire estate absolutely and that the plaintiffs were not notified of the probating of the estate or the distribution thereof and were thereby prevented from appearing or participating in the proceeding for distribution.

It has been uniformly held that equity will relieve one from the effect of a judgment or decree which is procured by conduct which prevents an interested party from appearing and participating in the hearing or trial on its merits. Ringwalt v. Bank of America, etc., Ass'n, 3 Cal.2d 680, 45 P.2d 967; Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L.R.A.,N.S., 579; Pico v. Cohn, supra; Godfrey v. Godfrey, supra; 9 Cal.Jur. 748, sec. 101; 88 A.L.R. 1201, note. In the case of Fealey v. Fealey, 104 Cal. 354, 38 P. 49, 43 Am.St.Rep. 111, the court quotes with approval from the case of Wickersham v. Comerford, 96 Cal. 433, 31 P. 358, 359, in which an order sustaining a demurrer to the complaint in behalf of creditors in an equitable suit to vacate a judgment setting aside a homestead to the widow of a deceased person, on the ground of extrinsic fraud, was reversed. In the Wickersham case a written agreement settling property rights had been executed by the spouses and a separation occurred. Upon the hearing to set aside the homestead to the widow, she failed to call the court's attention to that agreement. The Supreme Court said: "It seems clear that defendant was not entitled to the homestead." It is further said, as grounds for reversal, that: "She intentionally and willfully suppressed and concealed from the court the said agreement to separate from her husband, and the fact of separation according to the agreement, for the purpose of deceiving and misleading the court; * * * and the concealment of the deed and fact of separation, did deceive and mislead the court to believe that she had resided with her husband, as a part of his family, immediately before his death, and that there had been no separation, and thereby induced the court to make the order setting apart the homestead."

[16] In the present case the defendants allege, in almost the identical language previously quoted, that Charles T. Rule, knowing of the former agreement with the testatrix, failed to disclose that fact to the court and thereby wilfully and intentionally deceived the court into making to him absolute distribution of the residue of the property, instead of receiving it in trust only for the heirs.

The failure to disclose the existence of persons interested in pending litigation, who are thereby prevented from participating therein, and which omission results in loss to them, is held to constitute extrinsic fraud against which equity will grant relief. 113 A.L.R. 1235, note.

While the circumstances of this case present a close question as to whether the allegations of the complaint state sufficient facts to constitute extrinsic fraud, we are convinced they do clearly show that it was not the intention that Charles T. Rule should become sole beneficiary of his sister's will, and a grave injustice to the real beneficiaries will follow unless the decree is modified. That being true, we are of the opinion the court abused its discretion in refusing to permit the defendants to file a second amended complaint to more fully state the facts.

For the foregoing reasons the order sustaining the demurrer and refusing to permit plaintiffs to amend the pleading is reversed. The court is directed to vacate the order refusing to permit the plaintiffs to amend their complaint, and they should be granted a reasonable time to amend that pleading.

We concur: PULLEN, P. J.; TUTTLE, J.

45 Cal.App.2d 334

GOGO et al. v. LOS ANGELES COUNTY FLOOD CONTROL DIST.

Civ. 12805.

District Court of Appeal, Second District, Division 2, California.

June 13, 1941.

Hearing Denied Aug. 11, 1941.

1. Levees and flood control ⚷16

Contractors did not "waive" their right to recover damages for misrepresentation of flood control district regarding amount of material to be excavated by continuing the excavation work under protest after discovering the falsity of the representation.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Fraud ⚷31

A party induced by false representation to enter into a contract may proceed to perform it and sue for damages for the misrepresentation.

3. Levees and flood control ⚷16

Contractors seeking to recover for excavation work which they were compelled to perform but which was not included in their contract with flood control district were not negligent in relying upon district's representation regarding material to be excavated where contractors investigated the site of the work and the district's engineers confirmed contractors' understanding that another company would excavate to within approximately one foot of grade.

4. Levees and flood control ⚷16

In action by contractors against flood control district to recover for excavation work which contractors performed but which was not included in their contract, evidence sustained finding that the district fraudulently misrepresented to contractors that another company would excavate a portion of the material to within approximately one foot of grade, whereas the other company was required by its contract not to excavate closer than five feet above grade.

5. Levees and flood control ⚷16

Generally, where the plans and specifications induce a public contractor reasonably to believe that certain indicated conditions actually exist and may be relied upon in submitting a bid, he is entitled to recover the value of such extra work as is necessitated by the conditions being other than as represented.

6. Levees and flood control ⚷16

Where flood control district represented to contractors that another company would excavate a portion of material to within approximately one foot of grade and contractors' belief that such representation was true was confirmed by the district's engineers, but the other company was required by its contract not to excavate closer than five feet above grade so that the contractors were compelled to excavate nearly five times as much solid rock as they would have been required to excavate if the representation had been true, the contractors were entitled to recover value of the extra work.

7. Levees and flood control ⚷16

Where plans and specifications induce a public contractor reasonably to believe that certain indicated conditions actually exist and may be relied upon in submitting a bid, but contractor is required to perform extra work because conditions are other than as represented, the contractor is entitled to recover for the extra work on theory that action is one to recover damages for misrepresentation by which contract was induced.

8. Levees and flood control ⚷16

Where specifications of flood control district stated that a construction company would excavate to rough grade, whereas the company was obligated to excavate no lower than five feet above grade and contractors relying on the misrepresentation were compelled to perform additional work, and contractors filed complaint, it was unnecessary to determine whether all counts of contractors' complaint against the district were legally sufficient where judgment was supported by the cause of action set forth in one count seeking recovery for loss occasioned by the district's misrepresentation and that count was supported by substantial evidence.

9. Appeal and error ⚷1010(1)

If a judgment is sustained by one of several counts in a complaint which is supported by substantial evidence, it will not be reversed because of the insufficiency of the evidence as to other counts of the complaint.

10. Levees and flood control ⚷16

In action by contractors against flood control district for loss occasioned by district's misrepresentation because of which contractors were compelled to excavate more material than required by contract, evidence of conversations between contractors and district's engineers was properly admitted, since conversations tended to prove that contractors were justified in relying upon misrepresentation in the specifications and were not negligent.

11. Trial ⚷394(1)

The statutory requirement that findings of fact and conclusions of law shall be separately stated is merely directory. Code Civ.Proc. § 632.

12. Appeal and error ⚷1071(1)

If a judgment is manifestly right, it will not be reversed because of the intermingling of findings of fact and conclusions of law. Code Civ.Proc. § 632.

13. Appeal and error ⚷1071(1)

In contractors' action against flood control district for excavation work which contractors performed but which was not included in contract, where court included in its findings of fact conclusions of law regarding the district's liability and the heading "Conclusions of Law" contained statement "That the plaintiffs are entitled to a judgment against the defendant for the sum of $59,590.80 and for costs," the district was not prejudiced because of the method adopted by the court in preparation of its findings and conclusions. Code Civ.Proc. § 632.

14. Levees and flood control ⚷16

Where contractors filed claim against flood control district making demand for work performed and not paid for and in separate claim made special mention of sum withheld as liquidated damages amounting to $12,450, asserting that the claim was made for the full amount and that of such amount $5,650 had been waived, the fact that it was stated in the first paragraph of the claim that the demand was for the sum of $6,800 did not justify a ruling that contractors had failed to make substantial compliance with the statutory requirements.

15. Damages ⚷85

Where delays in performance of contract are occasioned by mutual fault of the parties, the court will not attempt to apportion them but will refuse to enforce a provision for liquidated damages.

16. Damages ⚷85

Where contract between flood control district and contractors provided for liquidated damages for contractors' failure to complete contract within specified time, but the district by its own act rendered performance within the time specified impossible, the district lost its right to claim liquidated damages, notwithstanding the total delay was not caused by the district.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Tom Gogo and others against the Los Angeles County Flood Control District for excavation work performed by plaintiffs but which was not included in their contract. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Stephen Monteleone, of Los Angeles, for respondents.

J. H. O'Connor, County Counsel, S. V. O. Prichard, Asst. County Counsel, and Ned Marr, Deputy County Counsel, all of Los Angeles, for appellant.

WOOD, Justice.

Plaintiffs and defendant entered into a contract whereby plaintiffs agreed to do excavation and construction work for a dam. This action was commenced to recover a judgment for excavation work which they performed but which was not included in the contract. The action was tried without a jury and judgment was rendered in favor of plaintiffs for $59,590.80, from which judgment defendant has appealed.

Defendant published on April 6, 1937, a notice inviting bids for the construction of the spillway of San Gabriel Dam No. 1. Copies of the notice and of the plans and specifications were furnished to various contractors including plaintiffs. Item No. 6 of the bidding schedule called for: "General Excavation, Class F—52,000 cu. yds." The material provisions of the specifications are as follows:

"41. The quantities in the schedule are for comparing bids and may vary from the actual final quantities. Some quantities may be increased and others may be decreased * * *."

"63. Excavation shall consist of the removal and final disposal of all materials of any nature including rock, earth and gravel, incidental to the construction of the proposed work, to the lines and grades shown on the drawings. * * * It should be noted that the West Slope Construction Company, under contract with the District for the construction of San Gabriel Dam No. 1, is conducting quarrying operations within the limits of the spillway site. *In general, these operations will result in rough excavation to grade and cross section for a portion of the spillway and approach channel,* but in no event will West Slope Construction Company excavate below the level of elevation 1400." (Italics added.)

"67. General excavation, Class F, shall comprise all excavation for the floor and side slopes of the approach channel; for the ogee section, except cutoff excavation; for the floor of the spillway channel; for the counterfort retaining walls * * *; all excavation in Brown's Gulch Channel, except cutoff excavation; and any excavation not specifically classified elsewhere. * * * A portion of the spillway approach channel has already been excavated by the West Slope Construction Company. The excavation work required under this contract in the approach channel area shall consist of the removal of the remaining materials."

After reading the specifications and before submitting their bid, plaintiffs proceeded to the site of the proposed work for the purpose of making an estimate of the type of material to be encountered in class F excavation. They there met Mr. Stuver, the resident engineer employed by defendant, who accompanied them and pointed out the various places where excavation was to be done. Stuver stated that there would be very little excavation in the approach channel where the West Slope Construction Company was working at the time and that it would all be below the 1400-foot elevation. Later R. L. Basich went to the site on behalf of plaintiffs and made an estimate of the proposed excavation work, taking into account in his estimates the amount of material in the approach channel and spillway site below the 1400-foot elevation only. The amount of solid rock which would have to be excavated in Brown's Gulch was estimated by plaintiffs and Basich as approximately 10,000 cubic yards. The balance of the 52,000 cubic yards was estimated to be composed of either soft or loose material. Based upon these figures plaintiffs submitted a bid of 60 cents per cubic yard for the class F excavation. Before the bid was accepted plaintiff Gogo asked Mr. Howell, the chief engineer employed by defendant, if he could tell just where the class F excavation was and of what it consisted. The chief engineer replied that he could not, but stated that he would send plaintiff out to the site of the work with Mr. Ream, the engineer who prepared the plans and specifications. After they reached the job Mr. Ream told Gogo that the estimate of 10,000 cubic yards of solid rock excavation in Brown's Gulch was approximately right; and that such excavation would be below the 1400-foot elevation.

The contract for the work, providing for the excavation of approximately 52,000 cubic yards of class F material was awarded to plaintiffs. During the prosecution of the work in accordance with the provisions of the contract plaintiffs discovered that the West Slope Construction Company had ceased their quarrying operations in Brown's Gulch with the consent of defendant at a point which was more than 5 feet above grade. Despite plaintiffs' protests that such work was not contemplated by the contract, they were required, because of defendant's threats to cancel the contract and hold plaintiffs liable for damages, to excavate above the 1,400-foot elevation a total of 40,587 cubic yards of material consisting mostly of solid rock. The total class F excavation amounted to 112,777 cubic yards, for which plaintiffs were paid at the contract price of 60 cents per cubic yard.

[1, 2] Plaintiffs did not waive their right to recover damages for the misrepresentation by continuing the excavation work under protest after discovering the falsity of the representation. "A party induced by a false representation to enter into a contract may proceed to perform it and sue for damages for the misrepresentation." Palmberg v. City of Astoria, 101 Or. 224, 199 P. 630, 632, 16 A.L.R. 1125. The theory underlying this rule is clearly stated in Borough Const. Co. v. City of New York, 200 N.Y. 149, 93 N.E. 480, at page 483, 140 Am.St.Rep. 633, where it is said: "The underlying justice of the principle is that where a municipal representative having authority to speak for it and supposed to be familiar with such matters in apparent good faith and with a show of reason requires a contractor to do certain things as covered by his contract, the contractor, although protesting against the requirement, ought not to be compelled to refuse obedience and incur the hazard of

becoming a defaulter on his contract even though it shall subsequently turn out that he was right and the municipal representative wrong in the dispute."

[3] The contract between defendant and the West Slope Construction Company provided that the company was not to excavate in Brown's Gulch on the site of the approach channel and spillway to a greater depth than 5 feet above grade. This fact was known to defendant at the time the plans and specifications for the class F excavation were prepared but was not discovered by plaintiffs until after they were awarded the contract and had commenced operations. Plaintiffs had submitted their bid in reliance upon the provision of the specifications which provided that the West Slope Construction Company's operations would in general, "result in rough excavation to grade and cross section for a portion of the spillway and approach channel". Evidence was introduced to prove that the phrase "rough excavation to grade and cross section" was commonly understood by the engineering profession to mean excavation to a distance of from one-half to one foot above the fine or finished grade. That plaintiffs were not negligent in relying upon the above representation is evident, for the testimony shows that plaintiffs investigated the site of the work and that in answer to their inquiries defendant's engineers confirmed plaintiffs' understanding that West Slope Construction Company would excavate to within approximately one foot of grade.

The court found that of the 40,587 cubic yards of rock which plaintiffs excavated above the 1,400-foot elevation, they were required by their contract to excavate only 6,915 cubic yards. Based upon the evidence as to cost, the court found that the reasonable cost of removing the additional 33,672 cubic yards of material was $67,344, of which plaintiffs had received $20,203.20 at the contract rate of 60 cents per cubic yard, leaving a balance of $47,140.80 which defendant owed to plaintiffs. It was further found that plaintiffs were entitled to the sum of $12,450 which defendant had withheld from plaintiffs in accordance with the provisions of the contract for liquidated damages because of plaintiffs' failure to complete the work within the time limited by the contract.

In contending that the judgment is erroneous as a matter of law defendant relies upon the rule stated in Powell v. State, Tex.Civ.App., 118 S.W.2d 960, 963, that "where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered". It is asserted that plaintiffs were obligated by the contract to make "all excavation" necessary to complete the job, regardless of the total amount or character thereof, and were only entitled to be paid for such excavation at the contract price of 60 cents per cubic yard. Such contention would be proper in the absence of any question of misrepresentation. The facts of Powell v. State, supra, may be distinguished from those of the present case for it is stated at page 962 of 118 S.W.2d: "While appellant in the instant case alleged fraudulent misrepresentations by the Highway Department as to the quantities of rock and earthen material to be excavated, and that no tests were made upon which to base such estimates, no proof was offered as to this allegation, no bad faith charged against the engineers of the Highway Department * * *."

[4] In the instant case there is substantial evidence to sustain the court's finding that defendant fraudulently misrepresented to plaintiffs that the bulk of the class F excavation would be below the 1,400-foot elevation. Defendant and its engineers were aware of the fact that the West Slope Construction Company was required by its contract not to excavate closer than 5 feet above grade. Notwithstanding such knowledge, defendant made representations in its contract with plaintiffs to the effect that West Slope Construction Company would excavate a portion of the material to within approximately one foot of grade. Plaintiffs' belief that such representation was true was confirmed by defendant's engineers and the bid which plaintiffs submitted was based upon their belief that the expensive solid rock excavation represented only a small portion of the entire work. It is apparent that such misrepresentation was of a material fact, for plaintiffs were compelled to excavate nearly five times as much solid rock as they would have been required to excavate if the representations had been true. Plaintiffs proved that the actual cost of the additional excavation of solid rock was more than three times as great as the contract price of 60 cents per cubic yard.

[5, 6] The present case is very similar to Maney v. Oklahoma City, 150 Okl. 77, 300 P. 642, 76 A.L.R. 258, wherein plaintiff was allowed to recover damages for the extra work. In that case the plaintiff, who was the successful bidder, submitted his bid in reliance upon the representation in the plans and specifications that the excavation work would consist principally of the removal of earth and that there would be not more than 407 cubic yards of rock. The engineers for the defendant city also advised the plaintiff that there was a very negligible quantity of rock. As the work progressed it developed that there was actually 60,000 cubic yards of rock which the plaintiff was required to excavate. The provisions of the contract under which the work was performed were similar to those involved in the contract here under consideration. The defendant city was held to be responsible for the reasonable value of such extra work upon the theory that the excavation of the large quantity of rock was materially different from the quantity which defendant had represented in its plans and specifications and that plaintiff had relied upon such representations in submitting his bid. It may be stated generally that where the plans and specifications induce a public contractor reasonably to believe that certain indicated conditions actually exist and may be relied upon in submitting a bid, he is entitled to recover the value of such extra work as was necessitated by the conditions being other than as represented. Faber v. City of New York, 222 N.Y. 255, 118 N.E. 609; Pitt Construction Co. v. City of Alliance, 6 Cir., 12 F.2d 28; Hollerbach v. United States, 233 U.S. 165, 34 S.Ct. 553, 58 L.Ed. 898; Salt Lake City v. Smith, 8 Cir., 104 F. 457; Palmberg v. City of Astoria, 101 Or. 224, 199 P. 630, 16 A.L.R. 1125. The facts of the instant case bring it within the foregoing rule.

[7] The authorities are divided concerning the theory upon which recovery is allowed in this type of case. Some cases, such as Faber v. City of New York, supra, permit the contractor to recover on the theory of breach of contract because he was compelled to perform work not contemplated by the contract. However, the correct basis of recovery is on the theory that the action is one to recover damages for the misrepresentation by which the contract was induced. Hollerbach v. United States, supra; Maney v. Oklahoma City, supra, and Pitt Construction Co. v. City of Alliance, supra. It would be inequitable to permit defendant to enforce the literal terms of the contract which called for the excavation of "all materials" necessary to complete the job when plaintiffs were induced by defendant's misrepresentation to submit a bid which was much lower than was warranted by the true facts. If instead of stating in the specifications that West Slope Construction Company would excavate to rough grade, defendant had stated the true facts of which it had knowledge—that West Slope Construction Company was obligated by contract to excavate no lower than 5 feet above grade—the present situation would not have arisen. Having failed to impart this knowledge to plaintiffs and having wilfully or carelessly misrepresented the true situation, defendant is obligated to plaintiffs for the additional work occasioned.

[8, 9] The complaint in this action contained three separate counts, by each of which plaintiffs sought to recover damages for performing the additional excavation work. By the first count recovery was sought for the loss occasioned by defendant's misrepresentation. The second count is a common count for the reasonable value of additional work performed at the instance and request of defendant. The third count proceeds upon the theory that defendant was obligated by contract to excavate the extra material above rough grade and seeks damages for breach of contract because of defendant's failure to perform such obligation. Although it is true, as contended by defendant, that the causes of action are inconsistent, it is unnecessary to determine whether all counts are legally sufficient or whether the court erred in denying defendant's motions for nonsuit as to the several counts. The judgment is supported by the cause of action set forth in count one, which we have decided is the correct theory of recovery, and that count is supported by substantial evidence. If a judgment is sustained by one of several counts in a complaint which is supported by substantial evidence, it will not be reversed because of the insufficiency of the evidence as to other counts of the complaint. Martin v. Los Angeles Turf Club, Inc., 39 Cal.App.2d 338, 103 P.2d 188.

[10] It is unnecessary to pass upon the contention that defendant, being a political subdivision of the government, is not bound by the statements of its engineers,

for the judgment is properly based upon the misrepresentation made in the specifications and in the contract by the duly authorized officers of defendant. Evidence of the conversations between plaintiffs and defendant's engineers was properly received in any event, since such conversations tended to prove that plaintiffs were justified in relying upon the misrepresentation in the specifications and were not negligent in failing to discover the true facts.

[11-13] We are asked to reverse the judgment because the court failed to separately state its conclusions of law and findings of fact and therefore did not comply with section 632 of the Code of Civil Procedure. It is settled that the statutory requirement that findings of fact and conclusions of law shall be separately stated is merely directory (Gustafson v. Blunk, 4 Cal.App.2d 630, 41 P.2d 953) and if a judgment is manifestly right it will not be reversed because of the intermingling of findings of fact and conclusions of law. Morris v. Turley, 94 Cal.App. 691, 271 P. 916. In the present case the court included in its findings of fact conclusions of law regarding defendant's liability. Under the heading "Conclusions of Law" appears the following: "That the plaintiffs * * * are entitled to a judgment against the defendant * * * for the sum of $59,590.80 and for costs of suit herein incurred." Defendant has not suffered prejudice because of the method adopted by the court in preparing its findings of fact and conclusions of law.

[14] By count 4 of the complaint plaintiffs sought to recover the amount of liquidated damages which had been withheld by defendant because of plaintiff's failure to complete the work within the time limited by the contract. The contract provided that the work was to be completed within 120 days but plaintiffs actually required 369 days to finish the job. Under the contract provision for liquidated damages of $50 per day for every day of delay, defendant withheld $12,450 from the amount due plaintiffs as damages for the 249-day delay. The evidence shows that the first 40-day delay was occasioned by defendant's failure to cause the West Slope Construction Company to remove from the site and thus permit plaintiffs to commence operations. An additional delay of at least 40 days was caused by the fact that plaintiffs were required to excavate 112,000 cubic yards instead of approximately 52,000 cubic yards of material of the character represented in the specifications and contract. Because of a severe storm plaintiffs were delayed another 37 days. The chief engineer employed by defendant concluded that for these reasons liquidated damages for at least 113 days ($5,650) should be waived, and recommended such action to defendant. His authority rests in the following provision in the specifications: "On all questions relating to * * * the proper execution, progress or sequence of the work * * * the decision of the Chief Engineer shall be final and binding * * *." The finding of the court to the effect that defendant waived its claim to $5,650 is attacked on the ground that the chief engineer lacked authority to bind defendant by his acts. The judgment may be upheld without regard to the finding of waiver, for the record discloses that plaintiffs made substantial compliance with the statutory provisions requiring the filing of claims. In one claim plaintiffs made demand "for the sum of $93,104.85, being for work performed and not paid for * * *." In a separate claim plaintiffs made special mention of the sum withheld as liquidated damages, "amounting to $12,450". It is asserted that "claim is made for the full amount" and that "of said amount $5,650 was waived". This claim was evidently filed in the belief that the sum of $5,650 had been regularly allowed. The fact that it is stated in the first paragraph that the "demand" is "for the sum of $6,800" does not justify a ruling that plaintiffs failed to make substantial compliance with the statutory requirements.

[15, 16] It is finally asserted that in any event plaintiffs are not entitled to recover the entire $12,450 because, discounting the total delay caused by defendant's acts, plaintiffs still did not complete the job within 120 days. In making this contention defendant seeks to have this court apportion the amount of delay attributable to each and to fix damages accordingly. The correct rule is that where such delays are occasioned by the mutual fault of the parties the court will not attempt to apportion them but will refuse to enforce the provision for liquidated damages. Jefferson Hotel Co. v. Brumbaugh, 4 Cir., 168 F. 867; Champlain Construction Co.

v. O'Brien, C.C.Vt., 117 F. 271. It is stated in the Champlain case at page 277 of 117 F.: "There is no way for summing up the defaults of each and apportioning the damages to them, but the whole must be allowed or none; and, as all cannot be, none must be. These deductions must therefore be restored." By its own act defendant rendered performance within the time limited by the contract impossible and has therefore lost its right to claim the liquidated damages provided in the contract. King Iron Bridge & Mfg. Co. v. City of St. Louis, C.C.Mo., 43 F. 768, 10 L.R.A. 826. It follows that plaintiffs were properly awarded the total amount of liquidated damages withheld by defendant.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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45 Cal.App.2d 345

PEOPLE v. PHOTO.

Cr. 612.

District Court of Appeal, Fourth District, California.

June 13, 1941.

1. Larceny 🔑33

The allegation in grand theft information that defendant "took the personal property of another" meant property in the possession of another who was entitled as bailee, lien claimant, or otherwise, to retain possession thereof for some benefit or profit to himself to the exclusion of all others rather than absolute ownership. Pen. Code, § 484; Civ.Code, § 679.

See Words and Phrases, Permanent Edition, for all other definitions of "Took the Personal Property of Another".

2. Larceny 🔑8

If individual from whom grand theft information alleged that defendant took fruit had a valid lien on the fruit, her possessory right was to all the fruit and not merely those of a value to the extent of the lien. Civ.Code, § 3051.

3. Larceny 🔑8

In prosecution for grand theft of oranges, under evidence that defendant had agreed to purchase oranges and had agreed to pay individual from whom oranges were allegedly taken for picking and washing them, and oranges were taken without payment of full amount owed such individual, question whether such individual was a licensed produce dealer or commission merchant was not involved under the evidence. Civ.Code, § 3051.

4. Larceny 🔑3(3)

Under an indictment for larceny, it is a sufficient defense that the property was appropriated openly and avowedly and under a claim of title preferred in good faith even though such claim is untenable. Pen. Code, § 511.

5. Larceny 🔑3(1)

Felonious intent is an essential element of the crime of larceny.

6. Larceny 🔑41

Where it appeared from evidence that defendant charged with grand theft apparently took oranges under a claim of title in himself, if the taking was in good faith after receiving what he thought was legal advice, though it might have been erroneous, a presumption arose in his favor that the taking lacked the elements necessary to constitute larceny.

7. Larceny 🔑8

Where conviction for grand theft of oranges was based on theory of lien claimed by an individual on oranges, grown by another, for picking and washing, if such individual voluntarily relinquished possession of the oranges to defendant who had purchased them, the lien was extinguished.

8. Liens 🔑16

If a lien is lost by voluntary and unconditional surrender of possession to the owner, it cannot be revived by subsequent reacquired possession.

9. Larceny 🔑65

Evidence that defendant purchased oranges from a grower and engaged another individual to pick and wash oranges, that oranges were loaded on defendant's truck by the individual's agents without any reservation whatever, and that it was not until after truck was loaded that the individual gave instructions not to move the truck until money had been received, and that defendant took oranges without paying full amount claimed by the individual, was insufficient to sustain conviction of grand theft.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Gus Photo, also known as Constantine Photopoulos, was convicted for grand theft and he appeals.

Reversed.

See, also, 114 P.2d 77.

Richard C. Fildew, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant Gus Photo, also known as Constantine Photopoulos, and Pete Adams were each charged in separate informations with the crime of grand theft in that they did on November 14, 1940, wilfully and feloniously steal, take and carry away 398 boxes of oranges of the value of $398, the personal property of Mrs. J. A. Prescott. Gus Photo was also charged with a prior conviction of a felony which he admitted. After a plea of not guilty a jury was waived by both Photo and Adams. The two cases were consolidated for trial by stipulation. Both defendants were found guilty by the trial court and sentenced to state's prison. From the judgment and the order denying them a new trial each has perfected a separate appeal. The facts involving each of the appellants may be thus summarized:

James Plakos resided in Los Angeles and was engaged in the business of buying and selling citrus fruits. He knew the appellant Photo and on November 10, 1940, at the latter's request, he went with one Peter Regis and appellant Photo to Orange County with the end in view of obtaining oranges which Photo might purchase. These parties all called at the home of a Mrs. Prescott. Plakos went inside the house and found Mrs. Prescott to be ill in bed at the time. He had a conversation with her about oranges and thereafter came outside the house where Regis and Photo were waiting for him. Plakos told Photo that Mrs. Prescott knew somebody else who had some oranges; that Mrs. Prescott wanted 75 cents a box for oranges and 25 cents a box for picking, hauling and washing. With a Mr. Allen, foreman for Mrs. Prescott, they all went to the orange grove of a Mr. Holmes. Upon arriving at the Holmes grove Photo looked around the grove, saw the oranges on the trees, and gave Holmes a deposit of $30 and each signed an agreement as follows:

"November 10, 1940. Sold to Constantine Photopoulos, address 2445 Clement Street, San Francisco. 500 (more or less) boxes of oranges at 75¢ per box. All oranges to be paid for before hauling from grove.

"(Signed) Constantine Photopoulos."

And:

"November 10, 1940. Received of Constantine Photopoulos $30.00 on oranges as down payment. Balance to be paid as they are picked not later than November 13, 1940.

"(Signed) F. R. Holmes."

"500 boxes (more or less) of oranges at 75¢ per box to be paid road side.

"(Signed) F. R. Holmes."

Appellant Photo told Holmes that Mrs. Prescott was going to pick the oranges, and after some conversation they all left. Plakos went back to Mrs. Prescott's home and had a conversation with her and then returned to Los Angeles. Upon arriving in Los Angeles Plakos phoned Mrs. Prescott and told her that Photo had told him to tell her not to wash the oranges; that she did not have the right equipment. Mrs. Prescott then said that she would take 25 cents a box in any event, whether she washed them or not, or she would not "give the fruit". Plakos forwarded this information on to appellant Photo. Photo returned on November 11th and consulted with Mrs. Prescott, who was still ill in bed, about the oranges. Photo informed her he was the man who bought the oranges and wanted enough to make up 450 boxes. Photo then examined the fruit in the packing house. 40 boxes had been washed. The foreman and Photo returned to her room. He left a draft drawn on the Western Union for $125. $120 of it was to apply on the payment for the fruit. Holmes had previously refused to accept the check in payment for his fruit and referred Photo to Mrs. Prescott. Photo argued about the price being charged for the washing. After some discussion he told her to go ahead and wash the fruit. She replied that "the fruit would be a dollar a box". On Thursday, November 14, Photo motored to the Prescott ranch in his own Chevrolet automobile. Adams, a truck driver for Photo, first appears in the picture. He drove a truck and trailer, owned by Photo, to the packing house shed at Photo's direction for the purpose of trucking the oranges back to San Francisco. They arrived there about noon. The foreman for Mrs. Prescott and Adams loaded the truck with the 382 boxes of oranges which had been picked from the Holmes grove. 16 extra boxes were Mrs. Prescott's oranges and were loaded later, by one of the packing house men who claimed the price of the 16 boxes was to be $1.40 each. After the fruit had been loaded Photo returned to Mrs. Prescott's room with Holmes and informed her that the fruit was on his truck and said that he was ready to pay for the fruit. Adams remained at the truck. Mrs. Prescott and Photo figured up that he owed her $382 for the Holmes fruit (which included 25 cents per box to her and 75 cents per box for Holmes). Her testimony in reference to the price and sale of the 16 boxes of oranges is confusing and not clear. It rather indicates that she intended to charge Photo $1 per box for her fruit. He then paid $140 in currency to her, making $290 in all which she turned over to Mr. Holmes. It was stipulated that Holmes was paid in full for his fruit. She testified that she figured the balance due her was $92. Photo then asked her to call the Western Union in Santa Ana and see if there was some money there for him. She called and was informed that there was, but the amount was not specified. He said: "I will go in there and get that money and I will be right back". He left in the Chevrolet automobile. Adams remained around the premises all afternoon, conversing with Mrs. Prescott. Both wondered what had happened to Photo because he had not returned up until 9 p. m. Adams was given his dinner at her home. About 9 p. m. Adams suggested that he leave the key to the truck and his operator's license with her because he "was ready to throw things up and go on home". Mrs. Prescott asked him to stay in her living room and said that they would probably hear from Photo soon but "under any circumstances, you must not move this truck tonight, because I would have to report it to the police if you moved it. * * * You must leave the fruit until morning". Adams replied that he "couldn't make it until the next night anyway because the truck wouldn't pull" the ridge in the day time, to which she replied: "Well, * * * there would be no harm in your waiting". She offered him a ride to town to a hotel but he said he would walk. After giving her his name, the key, and operator's license and after being told by Mrs. Prescott that "he looked like an honest boy", he walked to the city and later found Photo. Mrs. Prescott testified that before Photo left, there had been no discussion as to when the fruit was to be taken except "they were ready to leave as soon as he paid for it". It was not stated at that time that Mrs. Prescott was retaining possession of the fruit. It was voluntarily and unconditionally placed on Photo's truck. Nothing was said at any time as to Mrs. Prescott claiming any lien thereon under section 3051 of the Civil Code or otherwise.

F. J. Oxnard, assistant court reporter in Orange County, testified that he saw appellant Photo on November 14th in the court room in Santa Ana; that appellant Photo walked in and talked to him; that he asked how soon he could contact a Mr. Burke, an attorney; that he wanted the advice of an attorney and Oxnard told him that Burke was engaged in trying a case and that it would be an hour or so before he would be free to talk to him; that appellant Photo then told the witness that he had bought some oranges and that there was a dispute as to the price; that he claimed he had to pay so much and the other party was to pay so much; that he was anxious to get the advice of an attorney so he could take the load to San Francisco that night; that appellant Photo then asked him if he could impound the money with the sheriff for the amount that he was supposed to pay and take the fruit; and that Oxnard replied that he probably could and then afterwards fight it out as to the price. Appellant and Adams were not permitted to take the stand and testify at the trial upon advice of counsel. Although appellant's brief recites the fact that Photo did go to the sheriff's office and endeavor to impound some money and that the sheriff refused to accept it due to the fact that it was a civil case, the evidence does not disclose this fact. It was stipulated that no money was impounded with the sheriff. It was also stipulated that Photo received $70 at 3:40 p. m. at the Western Union Telegraph office.

Sometime after 9 p. m. on November 14th, Photo, with Adams, returned to the Prescott ranch. Photo had a duplicate set of keys for the truck. He drove the truck and oranges to Los Angeles. Adams drove the Chevrolet to that city. Adams then rode on the truck with Photo to San Francisco. Their arrest on the charges herein specified followed. On their return to Santa Ana they were questioned by the officers. Appellant Photo, it is claimed, stated that he had not taken Mrs. Prescott's fruit; that he had taken his own fruit; that 25 cents a box was too much for handling it; that before leaving with the fruit he had consulted with an attorney in Santa Ana to get his advice on procedure before removing the fruit so he could keep out of trouble; that he wanted to put up a bond or cash equivalent to a bond; that he saw a man outside of the court room where Burke was then engaged in trial who told him it was all right to go ahead and move the fruit, and let them make the first move; that he then started out for the Prescott ranch but had trouble with his car and didn't arrive until later in the evening; that Adams was driving the car and when they arrived at the ranch appellant Photo had another key to the truck and Photo drove the truck out; that Adams drove the Chevrolet; that Photo was willing to pay for the fruit if Mrs. Prescott would cancel the charge of 25 cents a box for hauling and washing; and that with reference to the 16 boxes belonging to her and which the packing house man had loaded on the truck, he had made no deal to purchase any oranges from her.

Mrs. Prescott's packing shed was about 400 feet back from her house and a road ran in front of the shed cutting through the premises to the highway. The truck was parked on this roadway in front of the shed and the fruit was loaded onto the truck while in this position. Upon this evidence the trial court found both defendants guilty as charged.

On a motion for new trial appellant offered, under the ground of newly discovered evidence, an affidavit showing that Mrs. Prescott did not, during all the times herein mentioned, have a license to act as either a produce dealer or a commission merchant, as required by section 1261, subdivisions e and f, and section 1273 of the Agricultural Code, St.1937, pp. 715, 720. Appellant claims error in denying his motion for new trial on this ground as well as on the ground that the verdict is contrary to the law and the evidence.

It is first argued: (1) That under the charge, appellant did not "take the property of another"; (2) that the oranges were fully paid for and were the property of appellant Photo; (3) that the only interest Mrs. Prescott could have had in and to the oranges purchased from Holmes was a special interest created by virtue of a lien under section 3051 of the Civil Code; (4) that she was not rightfully in possession of the fruit, under the evidence, and therefore no lien was created; (5) that she was not a produce dealer or commission merchant within the meaning of the Agricultural Code, had no license as such, and therefore was not entitled to claim a lien; (6) that if she had a lien it was lost by her failure to make a seperate demand for her charges; (7) that the services rendered did not improve the fruit and were not therefore a basis for a lien under section 3051 of the Civil Code; (8) that Mrs. Prescott's employes delivered possession of the fruit to appellant Photo and Adams, when they placed it upon appellant Photo's truck, thereby extinguishing any lien under that section; (9) that there was no intent to steal; that appellant Photo took his own property under a claim of right and upon advice of a court attache whom appellant thought was a lawyer; (10) that the value of services performed did not amount to grand theft but if anything, petit theft; and (11) that there is a fatal variance between the proof and the charge in that the information does not plead the fact that the appellant Photo took his own property which was subject to a lien.

[1-4] The allegation in the information that appellants "took the personal property of another", as that term is used in section 484 of the Penal Code, means property in the possession of another who is entitled as bailee, lien claimant, or otherwise, to retain possession thereof for some benefit or profit to himself to the exclusion of all others, rather than the absolute ownership, defined in section 679, Civil Code. If the proof established such right in the instant case, the offense of grand theft was properly pleaded. If Mrs. Prescott had and maintained a valid lien on the fruit, her possessory right was to *all* the oranges and not merely those of a value to the extent of the lien. People v. Cain, 7 Cal.App. 163, 93 P. 1037. Such a lien may be created under section 3051, Civil Code; Golden State Orchards v. Harter, 93 Cal.App. 390, 269 P. 735. The question whether Mrs. Prescott was a licensed produce dealer or commission merchant did not become involved under the evidence. All of the other contentions of appellant are sufficiently answered by the

holding in People v. Cain, supra, except these questions: (1) Whether Mrs. Prescott had and retained a lien on the fruit when appellant Photo drove the truck away; (2) whether the evidence related overcame the presumption of innocence and established beyond a reasonable doubt that the appellant did wilfully and feloniously steal the property of Mrs. Prescott; and (3) if appellant Photo can be found guilty under the charge, is the evidence sufficient to support a conviction of Adams as an accomplice or an accessory. Appellant cites People v. Devine, 95 Cal. 227, 30 P. 378, which holds that to constitute the offense of larceny, there must be a felonious intent, and where there is absence of proof of such intent, and the evidence tends to prove that the property taken was honestly believed to be the property of the defendant accused of larceny, the fact that he took and carried away the property of another does not justify a verdict of larceny. The court there said, "Appellant acted throughout as he would be expected to act if he thought he was dealing with his own property, and the evidence tends strongly to prove that he really and honestly so thought. We think the evidence, coupled with the presumption of innocence, which attends the accused from first to last, sufficient to overcome the presumption of a guilty intent, arising from a wrongful appropriation of the property of another". Many cases are cited, including State v. Homes, 17 Mo. 379, 57 Am.Dec. 269, quoting Mr. Freeman: "To constitute the offense of larceny it is absolutely necessary that the taking of the goods be with a felonious intent * * *. We cannot sustain the conviction without confounding the distinction between criminal acts and such as, however reprehensible, involve only a violation of private rights and injuries, for which there is a remedy only by civil action." Section 511, Penal Code, provides: "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him." This rule also applies to larceny. Burke v. Watts, 188 Cal. 118, 204 P. 578.

People v. Eastman, 77 Cal. 171, 19 P. 266, involved the taking of a mare, which was pledged by the owner with another party for a disputed unpaid claim for wages. The defendant took the mare openly and without any concealment and pledged her to another party. The court there said: "It is one thing to take and carry off personal property with the intention to steal, and another to take it way under a mistaken idea of legal rights honestly entertained, * * *".

[5] Felonious intent is an essence of the crime of larceny. The general rule stated in 36 C.J., § 105, p. 764, is: "If one, in good faith, takes the property of another, believing it to be legally his own, or that he has a legal right to its possession, he is not guilty of larceny, although his claim is based on a misconception of the law or of his rights under it, for although ignorance of law and honest intentions cannot shield a man from civil liability for a trespass committed by him, yet they do protect him from criminal liability, by divesting the act of the felonious intent without which it cannot be a crime. It is necessary, however, in all cases that the claim of right to be a bona fide one, and not a mere cover for a felonious taking, and must be something more than a vague impression; it must amount to an honest conviction. Knowledge of the existence of an adverse claim by another person does not negative the existence of good faith."

[6] From the evidence it appears that Photo apparently took the fruit, under a claim of title in himself, and if done in good faith after receiving what he thought was legal advice though it might have been erroneous, a presumption arose in his favor that the taking lacked the elements necessary to constitute larceny. This theory is upheld in Groover v. State, 82 Fla. 427, 90 So. 473, and 26 A.L.R. 373, 375, and cases there cited. However, in view of the following determination this point becomes unnecessary to decide.

[7-9] Respondent endeavors to uphold the felony conviction solely on the theory of the lien claimed by Mrs. Prescott on the Holmes fruit at the time of the alleged taking. All agree that if she had no lien at that time on that fruit the felony charge must fall as to both appellants. It is also admitted that her lien thereon was dependent upon possession, and if she voluntarily relinquished possession of the fruit to appellants, her lien was extinguished. We are not without authority upon this point in our own state. People v. Knox, 32 Cal.

App. 158, 162 P. 407; Pacific States Finance Corporation v. Freitas, 113 Cal. App.Supp. 757, 295 P. 804; Covington v. Grant, 82 Cal.App. 749, 256 P. 213. The law is clear that if a lien is lost by voluntary and unconditional surrender of possession to the owner, it cannot be revived by any subsequent reacquired possession. Davis v. Young, 75 Cal.App. 359, 242 P. 743. The question here presented is whether the voluntary and unconditional delivery and loading of the fruit on appellant's truck by Mrs. Prescott's agents without any reservation whatever, under the circumstances here related, constituted a delivery of possession of the fruit to its legal owner. The evidence is clear that nothing was said by Mrs. Prescott or anyone else about her having or claiming a lien on the fruit. The price of one dollar per box was fixed as the price appellant Photo must pay to her for the Holmes fruit. The evidence discloses that Mrs. Prescott and appellant Photo had considerable controversy as to the amount she was charging for the washing of the fruit. Mrs. Prescott at one time agreed to "take off a nickel a box * * * if you do not want it washed * * *". Photo suggested that Mrs. Prescott make the price of the Holmes fruit less than one dollar per box, to which she replied, "It is difficult for me to make the price of the fruit less, because that day we had turned down two opportunities to sell the fruit for $1.30 a box, and that I couldn't see how we could charge less for the fruit when we had an opportunity to sell it, even though he didn't want it washed * * *, the price of the oranges is here in the packing house, * * * he was to pay a dollar a box for the oranges at Mr. Holmes' grove, * * *". Evidence also discloses that Photo asked Mrs. Prescott to give him 4 or 5 more boxes of oranges due to shrinkage, to which she replied, "You go on. If you don't want that fruit, I will take it myself * * *". It was not until the truck was loaded and ready to be moved that appellant Photo encountered difficulty in settling the price to be paid and the time and method of payment. Photo was not told by Mrs. Prescott that he could not remove the truck until the price was paid. It was not until 5 or 6 hours after the truck was loaded and after Photo left, that Adams was told not to move the truck until the money was received. The giving of the key and license to her was purely voluntary on the part of Adams and was most convincing evidence of his good faith in the transaction. The evidence forces the conclusion that when the truck was loaded and appellant Photo was placed in possession of his fruit, Mrs. Prescott's lien thereon was extinguished. In effect, she was merely endeavoring to hold his truck with the fruit thereon to insure the collection of her charges, or the most that could be said was that she was endeavoring to regain possession of the fruit after she had parted with possession. People v. Eastman, supra; Simons v. Hill Street Fire Proof Building Co., 69 Cal.App. 129, 230 P. 955. Accordingly, the conviction of grand theft cannot be upheld.

It is therefore ordered that the judgment and order denying a new trial are and each is reversed.

I concur: BARNARD, P. J.

MARKS, Justice (concurring).

I concur.

I concur in the judgment and agree with that portion of the opinion which holds that Mrs. Prescott had waived her lien on the oranges by unconditionally delivering them to Photo when her agents loaded them on the truck.

The only lien Mrs. Prescott could have claimed on the oranges was under the provisions of section 3051 of the Civil Code, which makes the lien dependent on possession in cases of this kind. Section 2913 of the Civil Code provides that the voluntary surrender to the owner of the property on which the lien is asserted extinguishes the lien.

It is clear that Photo became the owner of the Holmes oranges when he paid for them in accordance with the terms of his written contract. Mrs. Prescott was never the owner of that fruit. Her lien, therefore, was extinguished when she delivered unconditional possession to Photo and it could not be revived by her subsequently taking possession of the property. See, Davis v. Young, 75 Cal.App. 359, 242 P. 743; Covington v. Grant, 82 Cal.App. 749, 256 P. 213; Lundblade v. Pierce, 95 Cal. App. 192, 272 P. 329; Jewett v. City Transfer & Storage Co., 128 Cal.App. 556, 18 P.2d 351; C. I. T. Corp. v. Biltmore Garage, 3 Cal.App.2d Supp. 757, 36 P.2d 247.

The exact terms of the transaction involving the delivery to Photo of the sixteen boxes of oranges belonging to Mrs. Prescott are not at all clear. The delivery was voluntarily made by Mrs. Prescott's foreman and the circumstances point to a sale of that fruit on credit which would not support the charge of the theft of that fruit. However, the sixteen boxes of oranges did not have sufficient value to support the conviction of grand theft. Sec. 487, Penal Code.

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45 Cal.App.2d 356

PEOPLE v. ADAMS.

Cr. 611.

District Court of Appeal, Fourth District, California.

June 13, 1941.

1. Criminal law ⇨308

In prosecution for grand theft, there was a presumption of innocence.

2. Larceny ⇨65

Evidence was insufficient to sustain conviction for grand theft.

◆

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Tom Pete Adams was convicted of grand theft, and he appeals.

Reversed.

C. B. Conlin and L. J. Seay, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Appellant Adams prosecuted a separate appeal from a judgment of conviction on a charge of grand theft and from an order denying him a new trial as set forth in the case of People v. Gus Photo, Cal.App., 114 P.2d 71, this day filed. The facts here applicable are fully set forth in that opinion. They will be here briefly summarized. One Gus Photo, owner of a truck and trailer, employed appellant Adams as a truck driver to haul from the ranch of a Mrs. Prescott some oranges on which it is argued she claimed a lien, which fruit Photo had previously purchased from a Mr. Holmes. From the evidence produced, Adams had no knowledge of the purchase transaction. The truck driver helped the foreman of Mrs. Prescott load the fruit onto Photo's truck. A dispute arose, out of the presence of Adams, between Mrs. Prescott and Photo as to the price and manner or method of payment for picking and washing of the fruit. The purchase price of the Holmes' fruit was fully paid. Photo left the truck after it was loaded and went to a nearby town to secure money for the picking and washing charge. Adams, after several hours, became disgusted and voluntarily gave the keys to the truck to Mrs. Prescott, together with his operator's license, and left the premises. Photo returned later in the evening with Adams. Photo drove away the truck with the oranges. Adams drove away in a separate car belonging to Photo. He later rode with Photo, who drove the truck to San Francisco. Both were arrested.

[1, 2] Respondent, under the evidence, cannot argue that a conspiracy to commit the crime charged was established. The actions and conduct of appellant Adams negatives rather than supports a conclusion that he was an accessory to any unlawful taking of the fruit. He was employed for the purpose of driving the truck. When appellants returned to the ranch on the evening of November 14, Adams drove away Photo's car while Photo drove the truck. This would tend to indicate that Adams did not want to have anything to do with the taking. The evidence tending to connect the appellant Adams as being a co-conspirator or accessory is unsubstantial, and in view of the presumption of innocence is not sufficient to establish his guilt of the crime charged beyond a reasonable doubt. Also, in view of the fact that it has been held in the companion case above cited that Mrs. Prescott had no special property interest in the fruit by reason of the fact that her claimed lien thereon had been extinguished before the alleged taking occurred, the judgment of conviction and order denying a new trial must be and each is reversed.

I concur: BARNARD, P. J.

MARKS, Justice (concurring).

I concur.

I concur, but wish to amplify one of the grounds of my concurrence.

Holmes was paid in full for all of his fruit. Mrs. Prescott could only claim a lien upon that fruit while it was in her possession under the provisions of section 3051 of the Civil Code. The lien was extinguished when she voluntarily delivered possession of the Holmes oranges to Photo (sec. 2913, Civil Code) and was not revived when she regained possession of them. Davis v. Young, 75 Cal.App. 359, 242 P. 743; Covington v. Grant, 82 Cal. App. 749, 256 P. 213; Lundblade v. Pierce, 95 Cal.App. 192, 272 P. 329; Jewett v. City Transfer & Storage Co., 128 Cal.App. 556, 18 P.2d 351; C. I. T. Corp. v. Biltmore Garage, 3 Cal.App.2d 757, 36 P.2d 247.

The circumstances surrounding the delivery of the sixteen boxes of Mrs. Prescott's fruit to Photo point to a sale on credit which would not support the charge of theft. The value of that fruit was less than fifty dollars, so its taking, if felonious, would not support the conviction of grand theft. Sec. 487, Pen.Code.

45 Cal.App.2d 314

In re RAENTSCH'S ESTATE.

RAENTSCH et al. v. ARMSTRONG et al.
Civ. 6573.

District Court of Appeal, Third District, California.

June 12, 1941.

Hearing Denied Aug. 7, 1941.

1. Wills 🔑334

In proceeding for probate of will, where court found that the document involved was his last will and testament, and had not been cancelled or revoked, finding that testator did not leave a later will was included in such finding, and specific finding of existence of later will was unnecessary.

2. Wills 🔑306

In proceeding to probate will, where only testimony that there was a later will was from an interested witness, and was not clear and convincing but in certain instances contradictory, trial court was not bound to accept such testimony at face value, but was bound to weigh the evidence and judge credibility of the witness.

3. Wills 🔑306

Evidence *held* to sustain admitting a will to probate, as against contention that testator had executed a later will containing revocatory clause.

Appeal from Superior Court, Solano County; Hilliard Comstock, Judge.

Proceeding in the matter of the estate of Karl Ruprecht Raentsch, deceased, for admission of will to probate, offered by Ida M. Armstrong and others, and opposed by Karl L. A. Raentsch and others. From a judgment admitting the will to probate, Karl L. A. Raentsch and others appeal.

Affirmed.

Marvin C. Hix, of San Francisco, for appellants.

White & Harber, of Sacramento, for respondents.

PULLEN, Presiding Justice.

This is an appeal from a judgment admitting a will to probate, it being the claim of appellants that the admitted instrument had been revoked by a later will, which could not be found after the death of the testator.

Karl R. Raentsch, the deceased, was the son of appellant Karl L. A. Raentsch, and of Carrie Armstrong Raentsch, who died when he was quite young. He then went to live with his maternal grandmother and aunt Ida Armstrong. In 1918 his father married Margaret W. Raentsch, also one of the appellants herein, and the boy, then about 9 years old, went to live with them, and shortly thereafter his stepmother formally adopted him. He was the beneficiary of a considerable estate left in trust for him by his deceased mother. It was necessary that a guardian be appointed of his estate, and his father acted in that capacity until the boy was about 15 years old, when the father resigned and the stepmother was substituted. In 1931, young Raentsch married Mary E. Daniels, but they were divorced in 1934, and she remarried in 1936.

In April, 1937, Karl Raentsch Jr. made an unsuccessful attempt to take his own life by inhaling carbon monoxide gas. Following the attempted suicide he spent about a month in a sanitarium and then went to the home of his stepmother, Margaret W. Raentsch. He remained with her about a month, and in May or June of 1937 went to Arizona to visit a former college friend and roommate, Paul M. Brophy. He died there on August 14, 1937.

Shortly after his death, Messrs. White and Harber, of Sacramento, who had been the attorneys for the deceased, received from Paul Brophy, a document, which was later admitted as the last will and testament of Karl R. Raentsch, deceased.

At an appointed time there were gathered in the office of these attorneys, Ida M. Armstrong and Agnes Armstrong Harrison, his aunts, Margaret W. Raentsch, his stepmother, and a Mrs. Morris Carden, and to them the will was then read.

What happened at that time, as testified to by Margaret W. Raentsch, is that before the reading had continued very far she realized there was a later will and so stated to those assembled. When asked in what way the later will differed from the will then being read she replied there were some variations, one was that in the later will Mrs. Harrison was mentioned as sharing equally with her sister Ida Armstrong, whereas in the earlier one Mrs. Harrison was not mentioned, nor was there any reference to insurance, and in the later will the father was bequeathed $10 instead of $1.

Mrs. Agnes Armstrong Harrison testified that as nearly as she could remember, Mrs. Raentsch there said she had seen a later will which left the property "to you and Ida" (referring to Agnes Armstrong Harrison and Ida M. Armstrong), and she also said "that was what was in the newspapers". Mrs. Harrison then remarked "Yes, we saw what was in the newspapers, that he had left his property to his aunts, but we did not see the item in the papers stating who the aunts were, and do you know he had an aunt in Germany?" To which Mrs. Raentsch replied, "no, he mentioned your name". Upon further examination concerning this conversation Mrs. Raentsch said: "I said at that time he left his property to his aunts, and naturally meant Ida Armstrong and Agnes Harrison."

At the time young Raentsch attempted suicide there was found in his car an envelope on which was written the following: "Last will and testament. To Karl L. A. Raentsch 10.00 M. W. Raentsch 10.00. I. M. Armstrong everything I have—Karl L. A. Raentsch has had plenty. M. W. Winters also. Karl R. Raentsch." This instrument was found by the chief of police, who was searching the car, and was handed to the constable who was then about to accompany the young man to the hospital.

Accounts of these incidents were reported in the local papers, which were seen and read by the various interested parties, including Margaret W. Raentsch. One account said, "A note was left in the car willing $10.00 to his father and the balance of his property to several aunts", and another, "* * * and the bulk of his property to his aunts".

After young Raentsch had been removed from the scene of the attempted suicide, the chief of police continued his search of the car and found a second memorandum in the following words: "April 12/37. To whom it may concern. To M. W. Winter's-Raentsch I leave the sum of $10.00 She has had plenty. To Karl L. A. Raentsch I leave the sum of ten bucks—$10—the". This latter writing was retained by the officer and its existence revealed to no one until shortly before the contest, when he showed it to one of the attorneys for the proponent of the will. Neither of these instruments were holographic wills, as one was not dated, and the other was not signed.

The record also indicates that the deceased and his father had been estranged for several years before his death, and were quite bitter. Margaret W. Raentsch and Karl L. A. Raentsch were divorced in 1934. During the period Margaret W. Raentsch served as the guardian of young Karl Raentsch she was given a monthly allowance for his maintenance and education, and when he attained his majority she was allowed $1,520 for her services as guardian. Young Raentsch expressed dissatisfaction at her obtaining this allowance, and after that they were not as friendly as they had formerly been.

Mr. Brophy testified that a few hours after the arrival of Karl Raentsch at his home in Arizona, Raentsch told him of his attempted suicide and then told him that "all his valuables, and all his belongings were in that bag, and he said at that time that his will was in that bag". At a subsequent time the testator read the will to his friend Brophy, and at the time telling him it was his will. After his death Brophy found the instrument in the bag and sent it to Messrs. White and Harber in

Sacramento, who, Brophy learned from other papers in the bag, were the attorneys for Raentsch, and it was thereafter offered for probate.

This will, holographic in form, was dated February 16, 1936, and left to the father $1, one-half the income to his former wife Mary E. Daniels until she remarried or died, and also to her a wrist watch; a pair of field glasses to Paul Brophy, and also an express wish that out of his insurance money Ida M. Armstrong pay to Paul Brophy $1,000, and all of the residue and remainder to Ida M. Armstrong.

In support of her claim that there was a later will, Mrs. Raentsch testified that after the attempted suicide and after young Raentsch had left the sanitarium he came to her home in San Francisco. One evening as they sat in front of an open fire, burning some old letters and papers, she said young Raentsch handed her "something that he said he felt embarrassed about, among his effects, when he was discovered, I think by the Constable of Dixon. * * * Here is the famous will. * * *" He then handed her a document entirely written, dated and signed by him. She could not recall the exact date but thought it was April 12, 1937, being a day before his attempted suicide. As to the contents, her recollection was about the same as the admitted will except the balance of the property was given to Ida M. Armstrong and Agnes Armstrong Harrison. She could not recall what he did with the paper, whether he burned it up or returned it to the leather bag which had the combination lock, and in which he kept his things of value. At one time the witness testified the instrument, written in ink on two sheets of typewriter paper, was not enclosed in an envelope. At another point in her testimony she stated the will was enclosed in an envelope, plain white in letter size.

She also testified that the deceased and a mutual friend had dinner together the evening he returned from the sanitarium, and the friend chided him for not remembering his stepmother in his attempted bequests found in the car, and on the following evening, Mrs. Raentsch testified, he repeated the conversation between himself and the friend about omitting her, and that he seemed embarrassed and said he didn't know what he could have been thinking of in not remembering her, and said "here is the famous will". It is to be recalled, however, that in the second paper found by the chief of police and retained by him and not exhibited to the contestants until after the foregoing testimony by Mrs. Raentsch, young Raentsch had remembered his stepmother, and had attempted to leave her $10, reciting that she had had plenty.

It is also to be noticed that in all the testimony by Mrs. Raentsch as to the contents of the purported will she did not mention remembering a clause revoking any former will, and did not set up that fact in the verified opposition to the probate of the will, and it was not until after a demurrer had been sustained upon that ground that such additional averment was set out in the opposition and consent, and an express revocatory clause alleged and recalled. It would also seem probable that the reference to "the famous will" was to the instrument referred to in the newspapers, as that was the only "famous will" then known.

Upon the foregoing testimony the trial court admitted the proffered will to probate.

[1] The first point urged by the appellants is that the court failed to make any findings of fact on the issues of a later will. The only issue, however, for the court to determine was whether the document bearing date of February 16, 1936, which the court admitted to probate, was the last will and testament of the testator. The court having found it was his last will and testament, and that it had not been canceled or revoked, it was not necessary to make a further finding to the effect that the testator did not leave a later will. That fact was included in what had already been found to be true.

[2, 3] It is next urged that the evidence was insufficient to support a finding in favor of the proponents, contending apparently that the testimony of one witness was sufficient to establish the fact that there was a later will than the one admitted, and that it contained an express revocatory clause. Margaret W. Raentsch was the only witness to so testify, but the trial court was not bound to accept such testimony at its face value. She was a witness vitally interested in the issue, for if young Raentsch died intestate she, as the adoptive mother, stood to inherit a substantial portion of the estate. There is no corroborative evidence, whether direct or circumstantial. Her testimony was not clear and convincing, and in certain instances she

contradicted herself. Under such circumstances it was the duty of the court to weigh the evidence and to judge of the credibility of the witness. A trial judge of experience, known for his thoughtfulness in the handling of probate matters, passed upon these issues, and he found against the contention of appellants. After stating orally in open court his views of the issues in answer to an inquiry by appellants' counsel, the court said:

'Mr. Hix, I dislike to say that I view with distrust the testimony of a woman who impresses me as being a lady, and the best that I can do is to say that I have reconciled the conflict upon the basis that she has received impressions which are erroneous; that she fully believes them to be true, but that she probably received false impressions from a combination of circumstances. * * *"

It is also claimed the court applied a too stringent test in determining the degree of proof required to overcome an instrument offered for probate, but the record does not support this contention.

Further details of the facts and deductions that the court might have drawn could be given, but enough has been said to make clear the issues before the court and the correctness of the judgment based thereon.

The judgment is affirmed.

We concur: THOMPSON, J.; TUTTLE, J.

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45 Cal.App.2d Supp. 811

PEOPLE v. NOWELL

C. A. 1793.

Appellate Department, Superior Court, Los Angeles County, California.

June 6, 1941.

Rehearing Denied June 13, 1941.

1. Automobiles 🔑330, 355(4)

While one may be guilty of speeding without being guilty of "reckless driving", mere speed of automobile may be so excessive as to afford proof of driver's willful or wanton disregard of safety of persons or property, as required to establish crime of reckless driving. Vehicle Code, § 505(a), St. 1935, p. 175.

See Words and Phrases, Permanent Edition, for all other definitions of "Reckless Driving".

2. Automobiles 🔑181(1), 330

"Willful misconduct", within automobile guest statute, and "reckless driving", within statute defining such crime, are the same thing so far as they are concerned with state of mind of automobile driver whose conduct is in question. Vehicle Code, §§ 403, 505(a), St.1935, pp. 154, 175.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

3. Automobiles 🔑330

Mere speed at which automobile was driven, without other acts, may demonstrate driver's "willful misconduct" or "reckless driving", when considered in relation to width and surface of, and presence or lack of traffic on, highway and question whether automobile was driven before or after dark. Vehicle Code, §§ 403, 505(a), St.1935, pp. 154, 175.

4. Negligence 🔑11

"Willful misconduct" implies intentional doing of something, with knowledge that serious injury is probable, as distinguished from possible, result thereof, or with wanton and reckless disregard of its possible result.

5. Automobiles 🔑330

One driving automobile in manner showing wanton and reckless disregard of possible consequences to persons or property may be found guilty of "reckless driving", though it may not be a fact, and so he may not know, that probable result of such driving will be to injure a person or property. Vehicle Code, § 505(a), St.1935, p. 175.

6. Automobiles 🔑355(4)

Evidence that automobile attained and maintained speed of 75 to 85 miles per hour justified court's conclusion that driver intentionally and deliberately drove at such speed in wanton and reckless disregard of possible consequences of injury to persons and property, so as to warrant his conviction of "reckless driving". Vehicle Code, § 505(a), St.1935, p. 175.

Appeal from Municipal Court of City of Los Angeles; Joseph L. Call, Judge.

Silas Nowell was convicted of reckless driving, and he appeals.

Affirmed.

Haight, Trippet & Syvertson, of Los Angeles, for appellant.

John F. Dockweiler, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

BISHOP, Judge.

[1] One is guilty of reckless driving who drives a motor vehicle "upon a highway in * * * wilful or * * * wanton disregard for the safety of persons or property." Subdivision (a), section 505, Vehicle Code, St.1935, p. 175. The trial court's conclusion that the defendant was guilty of reckless driving we find to rest in the main on the fact that the defendant drove at a rate of speed varying from 75 to 85 miles per hour. Even so, we are of the opinion that the conclusion was warranted. While we recognize that one may be guilty of the offense of speeding and yet not be guilty of the crime of reckless driving, we are nevertheless of the opinion that mere speed may be so excessive as to afford proof of the elements necessary to make out the more serious crime of reckless driving.

[2] We have heretofore had occasion to determine the meaning of the words "wilful and wanton disregard for the safety of persons or property," as employed to define "reckless driving." People v. McNutt, 1940, 40 Cal.App.2d Supp. 835, 105 P.2d 657, 659. We concluded, in the light of several cited cases: "On consideration of all these authorities, we find no substantial difference between wilful misconduct [as used in section 403, Vehicle Code, our "guest statute"] and reckless driving, and conclude that they are in truth the same thing, so far as they are concerned with the state of mind of the driver, whose conduct is in question, so that the decisions construing the term 'wilful misconduct' may be applied to the statutory provision prohibiting 'reckless driving.'"

We still adhere to this conclusion. There are, however, conflicting statements in the cases construing "wilful misconduct," and we are required to choose between them. For one thing, it is declared in Petersen v. Petersen, 1937, 20 Cal.App.2d 680, 686, 67 P.2d 759, 761: "Speed in itself and alone is not sufficient to establish wilful misconduct." Then we repeatedly find statements in the cases which support this observation, in 2 Cal.Jur. Ten Year Supp. 576: "According to the authorities, a recovery is sustainable only where the evidence leads to the conclusion that the driver knew or ought to have known that injury 'probably' would result from his conduct or was 'likely' to be the consequence thereof."

If either of these statements correctly expresses the principle governing our case, we would "probably" conclude that the trial court was not warranted in finding the defendant guilty of reckless driving. The evidence is not voluminous. An officer of a California Highway Patrol testified that about 7:45 p. m. on December 11, 1940 he pursued the defendant for 4.3 miles, during which chase the defendant drove at the rate of 75 to 80 miles an hour across intersections and passed nine cars, on a street not named in the complaint, and then on the street named (Slauson Avenue) he (the defendant) passed "approximately 12 more cars at a rate of speed varying from 75 to 85 miles per hour." If speed in itself and alone may not establish wilful misconduct, then it may well be that the defendant was not proven guilty of reckless driving. If before it could be held that the defendant had driven recklessly it had to appear that he knew that his driving would probably or likely lead to disaster, then he was not guilty, for it was likely and still more probable that he could drive as he did and escape harm.

[3] It is our opinion that neither of the two premises conditioning the last two sentences is tenable. If we wished to be pedantic we would note that speed is never "in itself and alone". Of necessity, when referring to the speed of an automobile, there is involved the highway on which it travels, with its width, surface and the presence or lack of traffic upon it. There is involved, too, the factor of visibility; was the car driven before or after dark? When considered in relation to these matters, mere speed, without other acts, may demonstrate wilful misconduct or that the driving is reckless. The same court that uttered the words quoted from Petersen v. Petersen, supra, later, in Fisher v. Zimmerman, 1937, 23 Cal.App.2d 696, 73 P.2d 1243, had before it a case where a speed of 85 miles an hour was the only misconduct involved. The court noted, however,

that the driving was at night (as it was in our case); the highway had soft shoulders (a circumstance of no consequence if the driver keeps on the roadway); and there was another car upon the highway. The court stated (23 Cal.App.2d pages 701, 702, 73 P.2d page 1246): "It is generally held that mere speed, of itself, does not constitute willful misconduct. This may not always be true. There may be a point at which the speed becomes so excessive, the danger of injury to the passenger so probable, that such extreme speed alone might be held to be willful misconduct." The court continued its treatment of the subject by quoting from Hall v. Mazzei, 1936, 14 Cal.App.2d 48, 57 P.2d 948, 950: "'We do not wish to be understood as holding that mere speed may never constitute willful misconduct if indulged in under certain conditions. Willful misconduct, like negligence, must relate to the time, place, person and surrounding circumstances, and must be measured by them. Excessive speed under some circumstances may amount to negligence, under others to gross negligence, and under still others to willful misconduct.'"

We turn to the use of the word "probable" as a part of the definition of wilful misconduct. "Webster's and the Century dictionaries," said the court in Brown v. Beck, 1923, 63 Cal.App. 686, 697, 220 P. 14, 19, "define 'probable' as follows: 'Having more evidence for than against; supported by evidence which inclines the mind to belief but leaves some room for doubt; likely.'" "Likely," it appears, is the stronger word; the chances are a bit greater if a thing is likely than if it is merely probable. Webster's New International Dictionary, 2d Ed. If, in order for a driver to be guilty of wilful misconduct he must have knowledge that his course of conduct will probably cause a catastrophe, then one may deliberately take a chance on an accident and yet not be said to drive recklessly, provided only that the odds are more than even that he will escape without a scratch. One may deliberately drive at a high rate of speed, on the left-hand side of the road, around a blind curve, and yet not be guilty of wilful misconduct, if the fact be that the chances are only two in five that another car will be encountered on the curve, provided the test depends only on the driver's knowledge of what the probable or likely result will be.

[4] Of course it is plain that a person who so drives that he knowingly runs the risk of a probable accident (we are not attempting a full definition) is guilty of wilful misconduct. But it does not follow that if he does not know that an accident is probable, that he is for that reason to be freed from the charge of reckless driving. A course of conduct constituting wilful misconduct, alternative to that of knowing the probable result to be a disastrous one, is recognized in a host of cases, and, in our opinion, must be taken into account adequately to define reckless driving. The two situations are expressed antithetically in Howard v. Howard, 1933, 132 Cal.App. 124, 129, 22 P.2d 279, 281, with the emphasis that of the court: "Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result." The words we have just quoted were deemed worthy of repetition in the following wilful misconduct cases: Gibson v. Easley, 1934, 138 Cal.App. 303, 307, 32 P.2d 983; Ceiken v. Goldman, 1935, 5 Cal.App.2d 162, 164, 42 P.2d 719; Meek v. Fowler, 1935, 3 Cal.2d 420, 426, 45 P.2d 194; Id., Cal.App., 35 P.2d 410; Gimenez v. Rissen, 1936, 12 Cal.App.2d 152, 158, 55 P.2d 292; Medberry v. Olcovich, 1936, 15 Cal.App.2d 263, 268, 59 P.2d 551, 60 P.2d 281; Wright v. Sellers, 1938, 25 Cal.App.2d 603, 608, 78 P.2d 209; and their substance, without quotation marks appears in Weir v. Lukes, 1936, 13 Cal.App.2d 312, 314, 56 P.2d 987; and in Horn v. Volko, 1936, 13 Cal.App.2d 582, 584, 57 P.2d 175.

A somewhat different expression of the same thought is quoted from a Massachusetts case in Helme v. Great Western Milling Co., 1919, 43 Cal.App. 416, 421, 185 P. 510, 512: "The term 'serious and willful misconduct' is described by the Supreme Judicial Court of Massachusetts as being something 'much more than mere negligence, or even gross or culpable negligence,' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its possible consequences.'" Burns' Case, 218 Mass. 8, 105 N.E. 601, Ann.Cas.1916A, 787. This description in the alternative of wilful misconduct, quoted in Helme v. Great Western Milling Co., supra, was requoted in the following cases: Hoffman v. Dept. of Indus. Relations, 1930, 209 Cal. 383, 389, 287 P. 974, 68 A.L.R. 294; Parsons v. Fuller, 1937, 8 Cal.2d 463, 468, 66 P.2d 430; Weber v. Pinyan, 1937, 9 Cal.2d 226, 231, 70 P.2d 183, 112 A.L.R. 407; Lucas v. City of Los Angeles, 1938, 10 Cal. 2d 476, 485, 75 P.2d 599; Porter v. Hofman, 1938, 12 Cal.2d 445, 448, 85 P.2d 447; Id., Cal.App., 78 P.2d 1023; Howard v. Howard, supra, 132 Cal.App. 124, 128, 22 P.2d 279; Norton v. Puter, 1934, 138 Cal. App. 253, 258, 259, 32 P.2d 172; Manica v. Smith, 1934, 138 Cal.App. 695, 698, 33 P.2d 418; Sanford v. Grady, 1934, 1 Cal. App.2d 365, 371, 372, 36 P.2d 652, 37 P.2d 475; Candini v. Hiatt, 1935, 9 Cal.App.2d 679, 683, 50 P.2d 843.

[5, 6] We conclude, therefore, that one may be found guilty of reckless driving if he drives so as to show a wanton and reckless disregard of the possible consequences to persons or property of his manner of driving, even though it may not be a fact, and so he may not know, that the probable result of his driving will be to injure a person or property. We conclude, further, that the rate of speed at which a car is driven may of itself be so great that injury to persons and property is a distinct possibility, and that in this case the trial court was warranted in determining that a speed varying between 75 and 85 miles per hour did endanger persons and property. We conclude, still further, that while a different decision may be reached where the speed in question appeared to have been a burst, attained to overtake and pass a car (60 miles per hour in Hall v. Mazzei, 1936, 14 Cal.App.2d 48, 57 P.2d 948; 73 miles per hour in McLeod v. Dutton, 1936, 13 Cal.App.2d 545, 57 P.2d 189), nevertheless, where, as in this case, a high rate of speed was attained and maintained, the trial court was justified in concluding that it was intentional, deliberate, and revealed that the driver pursued his course in a wanton and reckless disregard of the possible consequences.

Other points argued by the appellant have been considered and found to be without merit. The judgment of conviction and the order denying the defendant a new trial are affirmed.

SHAW, P. J., and FOX, J. pro tem., concur.

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45 Cal.App.2d Supp. 817

PEOPLE v. HUGON.

C. A. 1794.

Appellate Department, Superior Court,
Los Angeles County, California.

June 9, 1941.

1. Automobiles 🔑353

Defendant charged with driving his automobile in traffic lane nearest to center line of four-lane street, though lane of traffic to right of automobile was free and unobstructed, had burden of showing that he came within one of the exceptions of the statute requiring automobiles to be driven on the right half of a roadway. Vehicle Code, § 525, St.1939, p. 2197.

2. Automobiles 🔑316

In prosecution for violating statute requiring an automobile to be driven on the right half of a roadway, the statute providing that whenever any roadway has been divided into three or more clearly marked lanes for traffic, a vehicle shall normally be driven in the lane nearest the right-hand curb or edge of the roadway, could not be relied on as limiting the effect of the former statute, where evidence showed that the highway involved was a four-lane highway with a marked double line in the center. Vehicle Code, § 526, St.1935, p. 181; § 525, St.1939, p. 2197.

3. Statutes 🔑158, 161(1)

Repeals by implication are not favored, and where such a repeal is in question two statutes on the same subject will be reconciled and effect given to both, if reasonably possible.

4. Automobiles 🔑6

The rule that where repeal by implication is in question, two statutes on the same subject will be reconciled and effect given to both, if reasonably possible, applies to all parts of the statute requiring an automobile to be driven on the right half of a roadway and the statute authorizing a motorist to overtake and pass to the right of another automobile under certain conditions, where several interacting provisions date from the same time and some of those found in the latter statute are later in date than those of the former and, if they limit the former, would to that extent repeal the former by implication. Vehicle Code, §§ 525, 529, St.1939, pp. 2197, 2198.

5. Automobiles 🔑6

The statute authorizing a motorist to overtake and pass to the right of another automobile under certain conditions is not in irreconcilable conflict with the statute requiring an automobile to be driven on the right half of a roadway, since the former statute does not purport to legalize the conduct of any person who is passed on the right. Vehicle Code, §§ 525, 529, St.1939, pp. 2197, 2198.

6. Automobiles ⟹6

The provision of the statute which authorizes a motorist to overtake and pass to the right of another automobile under certain conditions stating that the statute shall not relieve the driver of a slow moving vehicle from the duty to drive as closely as practicable to the right-hand edge of the roadway, does not repeal by implication the statute requiring an automobile to be driven on the right half of and as close as practicable to the right-hand curb or edge of the roadway, since that provision is in the nature of a "proviso" and does not enlarge the enacting clause. Vehicle Code, §§ 525, 529, St.1939, §§ 2197, 2198.

See Words and Phrases, Permanent Edition, for all other definitions of "Proviso".

7. Automobiles ⟹6

The statute providing that except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase his speed until completely passed by the overtaking vehicle, does not limit the effect of the statute requiring an automobile to be driven on the right half of and as close as practicable to the right-hand curb or edge of the roadway. Vehicle Code, § 528(c), St.1935, p. 182; § 525, St.1939, p. 2197.

◆

Appeal from Municipal Court of City of Los Angeles; Ben Rosenthal, Judge.

Paul D. Hugon was convicted of violating subdivision (a) of section 525 of the Vehicle Code, St.1939, p. 2197, and he appeals.

Affirmed.

Ernest A. Tolin, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

SHAW, Presiding Judge.

Defendant was convicted on a charge of violating subdivision (a) of section 525 of the Vehicle Code, St.1939, p. 2197, and appeals. That provision reads as follows: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway, except as follows: (1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement. (2) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making, a left turn. (3) When the right half of a roadway is closed to traffic while under construction or repair. (4) Upon a roadway designated and signposted for one-way traffic."

[1] The evidence for the prosecution shows that defendant, while traveling along "a four lane highway with a marked double line in the center of the street", in the City of Los Angeles, drove his automobile for a distance of about one mile "in the lane of traffic nearest to the center line of said street", although "at all times the lane of traffic to the right of defendant's car was free and unobstructed". Under the circumstances thus shown, it was obviously practicable for defendant to drive his car in the lane of traffic to the right of that in which he did drive it. If he came within any of the exceptions of section 525, the burden of making a showing in that respect was upon him, and he failed to do so. The evidence is clearly sufficient to show a violation of the part of section 525 above quoted, unless other provisions of law alter or control the effect of that provision.

[2] The first contention of appellant is that section 526 of the Vehicle Code, St. 1935, p. 181, has that effect. By its introductory language that section is limited in its application to situations "whenever any roadway has been divided into three or more clearly marked lanes for traffic." The evidence here does not show such a situation, but only that there is "a four lane highway with a marked double line in the center of the street", which would make only two *marked* lanes for traffic.

[3-6] It is also contended that the provisions of section 529 of the Vehicle Code regarding passing on the right limit the effect of section 525. Section 529, as amended in 1939, Stats.1939, p. 2198, reads

as follows: "(a) The driver of a motor vehicle may overtake and pass to the right of another vehicle only under the following conditions: (1) When the vehicle overtaken is making or about to make a left turn. (2) Upon a city street with unobstructed pavement of sufficient width for two or more lines of vehicles in each direction. (3) Upon a one-way street. (4) Upon any highway outside of a city with unobstructed pavement of sufficient width and clearly marked for four or more lines of moving traffic. (5) Upon a highway divided into two roadways where traffic is restricted to one direction upon each of such roadways. (b) The driver of a motor vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. In no event shall such movement be made by driving upon the shoulder of the highway. (c) The provisions of this section shall not relieve the driver of a slow moving vehicle from the duty to drive as closely as practicable to the right-hand edge of the roadway." Section 525 was also amended in 1939 but the amendment consisted merely in the insertion of a subdivision (b) which is immaterial here. Stats.1939, p. 2197. An amendment of section 525 made in 1937 is also of no consequence to our present problem. Section 525 as first enacted, Stats.1935, p. 181, was the same as the present subdivision (a) thereof, above quoted, except for this amendment of 1937. Section 529 as enacted in 1935, Stats.1935, p. 182, contained the substance of paragraphs (1) and (2) of subdivision (a) of the section as it now reads. Thus several of the interacting provisions of these two sections date from the same time and must be construed accordingly, but some of those found in section 529 are later in date than those of section 525, and if they limit section 525, such effect would constitute to that extent a repeal by implication. Such repeals are not favored, and where such a repeal is in question two statutes on the same subject will be reconciled and effect given to both, if that is reasonably possible. Boyd v. Huntington, 1932, 215 Cal. 473, 482, 11 P.2d 383; Southern Pacific Co. v. Railroad Comm., 1939, 13 Cal.2d 89, 100, 87 P.2d 1055. Substantially the same rule of construction is applied to different provisions enacted at the same time as parts of the same statute (In re Goddard, 1937, 24 Cal.App.2d 132, 138, 74 P.2d 818; 23 Cal.Jur. 760), so that we have this rule in operation between all parts of sections 525 and 529. Looking at these two sections in the light of this rule, we find no irreconcilable repugnancy between them. While it may be said that section 529 recognizes the possibility that some vehicles to be passed on the right may be found in some lane of traffic farther to the left than section 525 would place them, this would not be true of many others, and section 529 does not purport to legalize the conduct of any person who is passed on the right. Its permissive hand is extended to the driver who so passes, with an apparent purpose to facilitate his progress and enable him to pass with a minimum of horn-blowing, annoyance and delay. Such a purpose is quite sufficient to explain its enactment, without looking for implications of repeal of provisions relating to other drivers. The provision which comes nearest to raising such an implication is probably that of subdivision (c) that the section does not relieve the driver of a slow moving vehicle from the duty to keep to the right. But even this does not declare that any other driver is so relieved; it is in the nature of a proviso and does not have the effect of enlarging the enacting clause. 59 Cor.Jur. 1090, 1091. It appears to be unnecessary, and its presence in the section is to be attributed to an excess of caution on the part of the legislative draftsman.

[7] It is also suggested that subdivision (c) of section 528 of the Vehicle Code, St.1935, p. 182, bears upon our question. It provides: "Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle." Here again we note that the provision is not directed to the question, On what part of the highway shall a vehicle be driven? The introductory language of section 528 declares, "The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction." Like the other provisions referred to in defendant's behalf, this deals with the situation as it happens to exist when the occasion for passing arises; it does not concern itself with the legality of that situation. Hence we find in it no implied limitation on the operation of section 525.

The judgment is affirmed.

BISHOP and FOX, JJ., concur.

HANSEN v. TOWN OF ANTIOCH et al.

S. F. 16228.

Supreme Court of California.

June 18, 1941.

Rehearing Denied July 17, 1941.

1. Licenses ⇨7(3)

A city may lawfully classify merchants having a fixed place of business in town and those who sell their goods in town without maintaining fixed place of business for license tax purposes, and city may impose on the latter a higher license tax, so long as all bear some proportion of the tax burden and it does not appear that rate imposed on one class is unreasonable, or that it was exacted solely as a tariff or penalty to protect local merchants from competition of those conducting their business from other localities.

2. Licenses ⇨7(3)

Where ordinance of town of Antioch imposed an annual license tax of $100 on merchants having no fixed or regular place of business in town, and required merchants having a fixed place of business to pay an annual license tax based on average monthly sales, fact that oil fuel dealer having no fixed or regular place of business in town conducted his business in same manner as local fuel oil merchants did not establish that he should be classed with them for purposes of the license tax.

3. Licenses ⇨7(3)

Evidence established that ordinance of town of Antioch imposing an annual license tax of $100 on merchants having no fixed or regular place of business in town, as applied to oil fuel dealer who had no fixed or regular place of business in town, was not so unreasonable or excessive as compared with license tax imposed on merchants maintaining regular places of business in town, which was based on average monthly sales, as to be invalid, unreasonable or arbitrarily discriminatory, although fuel dealer would have been required to pay only $20 if chargeable under provision of ordinance assessing license tax on merchants maintaining a regular place of business in town.

In Banc.

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by R. A. Hansen against the Town of Antioch and others for return of a license tax paid under protest and to have the defendants restrained from enforcing as to him the provisions of ordinance of defendant town requiring every person who conducts business of peddling in defendant town to pay an annual license tax of $100. From a judgment sustaining defendants' demurrer to the second amended complaint and denying motion to amend, plaintiff appeals.

Affirmed.

Henderson & Henderson and J. W. Henderson, all of San Francisco, for appellant.

John Sutton, Jr., of Antioch, for respondents.

SHENK, Justice.

The plaintiff appealed from a judgment sustaining the defendant's demurrer to the second amended complaint and denying leave to amend.

The complaint shows the following:

The plaintiff is a dealer in fuel oil burners and fuel oil and has his principal places of business in the cities of Livermore, Alameda county, and Martinez, Contra Costa county. He has no fixed or regular place of business in the Town of Antioch, but has regular customers in that town whom he agrees to keep supplied with fuel oil. The usual method of supplying fuel to Antioch customers is to check the quantity in their reservoirs and to deliver oil to their supply tanks from the plaintiff's fuel stores maintained at Livermore or Martinez.

Under section 13 of ordinance No. 17A of the Town of Antioch, as amended, every person who sells merchandise at a fixed place of business is required to pay an annual license tax based on average monthly sales. By subsection 2 of section 14 of the ordinance, it is provided that every person who conducts the business of peddling or "who from place to place offers to or does sell, barter or exchange any goods, wares or merchandise then in his possession in said Town of Antioch" shall pay an annual license tax of $100. The section also provides that "every person who, not having within said town a fixed place of business * * *, travels from place to place and offers to sell, barter or exchange anything then in his possession in said town * * * shall be deemed a peddler within the meaning of the ordinance". In 1936 on the demand of the municipal authorities for the payment of the license tax pursuant to said section 14, the plaintiff paid the tax under protest, claiming that he was chargeable only with the amount required by section 13 which, in his case, would be the sum of $20. By this action the plaintiff sought the return of the license taxes paid under protest and to have the defendants restrained from enforcing as to him the provisions of said section 14.

It is contended by the plaintiff that he is not a peddler within the meaning of the ordinance and that the provisions thereof make an unreasonable discrimination between him and merchants in said Town of Antioch who conduct an identical business in a similar manner.

[1] Persons conducting sales of fuel oil in the manner adopted by the plaintiff have been held to be peddlers. Commonwealth v. Bergeron, 296 Mass. 60, 61, 5 N.E.2d 31. But we deem it immaterial what designation is applied by the city council of Antioch to the plaintiff and others who sell merchandise in that town without maintaining any fixed and regular place of business therein. It is the law in this state that for license tax purposes a city may lawfully classify merchants having a fixed place of business in the town and those who sell their goods in the town without maintaining such fixed place of business; that the city may impose on the latter a higher license tax, so long as all bear some proportion of the tax burden and it does not appear that the rate imposed on one class is unreasonable, or that it was exacted solely as a tariff or penalty to protect local merchants from the competition of those conducting their business from other localities. Sivertsen v. City of Menlo Park, 17 Cal.2d 197, 109 P.2d 928; Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884, 109 A.L.R. 895; Town of St. Helena v. Butterworth, 198 Cal. 230, 244 P. 357; Ex parte Haskell, 112 Cal. 412, 44 P. 725, 32 L.R.A. 527; Continental Baking Co. v. City of Escondido, 21 Cal.App.2d 388, 69 P.2d 181; E. A. Hoffman Candy Co. v. City of Newport Beach, 120 Cal.App. 525, 8 P.2d 235. The rule approved in Sivertsen v. Menlo Park, supra [17 Cal.2d 200, 109 P.2d 930], was stated as follows: "The rule in this state must now be taken to be settled that for the purpose of fixing and imposing license taxes merchants having fixed places of business within a city and other merchants may be separately classified and license taxes in different amounts may be laid upon those in the two classifications, so long as a tax is actually imposed upon both classes, and provided that the tax on one class is not so disproportionately heavy as to demonstrate that the classification is 'a mere subterfuge for legislation directed against a particular group of taxpayers.'" The conclusion in that and other cases is that the classification is not violative of any constitutional right so long as there is a reasonable basis to support it. The cases relied upon by the plaintiff, followed in Bueneman v. City of Santa Barbara, supra, are distinguished in Sivertsen v. City of Menlo Park, supra, because it appeared in each of those cases that the tax involved was arbitrary and unreasonable, and exacted solely for the purpose of protecting local merchants from the competition of businesses conducted outside the city limits.

[2, 3] The plaintiff contends that his complaint shows that he conducts his business in the same manner as do the local merchants selling similar merchandise and that he should therefore be classed with them for the purposes of the license tax. But the manner of doing business as alleged by the plaintiff is not the sole basis for the classification. The classification is between the merchants who maintain a fixed and regular place of business in the town and thereby contribute to the tax burden in other ways, and the merchants who do not maintain a fixed place of business in the town. Under the authorities above cited, the latter may be classified and taxed at a higher rate.

The rate of the license tax imposed on merchants having no fixed or regular place of business in the Town of Antioch does not appear to be so unreasonable or excessive as compared with the rate imposed on the merchants who maintain regular places of business therein as to be constitutionally objectionable.

The judgment is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; TRAYNOR, J.; EDMONDS, J.; CARTER, J.

18 Cal.2d 169

HENRY COWELL LIME & CEMENT CO. v. STATE et al.

S. F. 16121.

Supreme Court of California.

June 24, 1941.

1. Appeal and error 🔑1009(2)

In corporation's action to enjoin defendants from entering on certain realty, judgment for plaintiff on trial court's finding, supported by sufficient evidence, that plaintiff and its predecessors in interest acquired title to realty by adverse possession, must be affirmed on appeal.

2. Adverse possession 🔑7(2), 8(1), 9

Where land held by state or subdivision thereof has been actually reserved for or dedicated to specific public use, there can be no adverse holding thereof which can give title to adverse claimant, but if land so held is not so reserved or dedicated and may be alienated by owner, title may be wrested therefrom by adverse possession

3. Dedication 🔑44

In action to enjoin city and others from entering on realty to which plaintiff claimed title by adverse possession, evidence that city had specifically reserved right to revoke purported dedication of area including such realty as city slip and that area was never used as such, but that buildings were erected thereon almost immediately after city's sale of portion of lots therein, including realty involved, which plaintiff's predecessors in title acquired at such sale, was sufficient to support trial court's finding, implied from its decision for plaintiff, that there had been no valid "dedication" of city slip in such area.

See Words and Phrases, Permanent Edition, for all other definitions of "Dedication".

4. Dedication 🔑45

Whether there has been valid dedication of, or revocation of offer to dedicate, land to public use is ordinarily a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Appeal and error 🔑1009(2)

In action to enjoin city and others from entering on realty to which plaintiff claimed title by adverse possession, trial court's conclusion in plaintiff's favor on implied finding, supported by evidence, that there had been no valid dedication of area including such realty as city slip, cannot be disturbed on appeal from judgment granting permanent injunction.

6. Adverse possession 🔑9

Parties in possession of land under claim of title as purchasers at sale by city under ordinance subsequently held void for over ten years before legal dedication of area adjoining building on such land as public street by statute excluding any portion of land from area dedicated acquired title to all of land by "adverse possession", in absence of prior valid dedication of city slip in water-covered area including such land. St.1863–64, p. 138.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Possession".

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the Henry Cowell Lime & Cement Company against the State, P. W. Meherin and others for an injunction against entering on certain realty. From a judgment granting a permanent injunction, defendants Meherin and others appeal.

Affirmed.

Earl Warren, Atty. Gen., Lucas E. Kilkenny, Deputy Atty. Gen., and W. T. Sweigert, of San Francisco, for appellants.

Thelen & Marrin, of San Francisco, for respondent.

PER CURIAM.

The defendants appeal from a judgment rendered on June 27, 1938, by which they were permanently enjoined from entering upon certain real property in the city of San Francisco, on which the Cowell building now stands. The building has a frontage on the northerly line of Market street between Sacramento street and the Embarcadero and a frontage along the westerly line of the Embarcadero extending from Market to Commercial street.

The question before the trial court was whether the Cowell building encroaches on the Embarcadero to the extent of a narrow, triangular strip of land referred to as the "sliver" area, which is five feet wide at Market street and tapers to nothing at Commercial street.

The defendant Board of State Harbor Commissioners contends that the boundaries of the Embarcadero (formerly East street) became fixed on January 30, 1866, when the board of city engineers' map became effective, and that according to such map the area delineated as the Embarcadero shows such encroachment. The plaintiff contends that East street was first dedicated as a public street and its boundaries fixed on March 5, 1864, Stats. 1863-64, page 138, and that long prior thereto its predecessors in title and interest had been in uninterrupted and continuous possession and had acquired title to all the land on which the Cowell building now stands. The plaintiff further contends that the provisions of the Act of March 5, 1864, specifically excluded from the area dedicated as East street all the land on which the Cowell building is constructed.

[1] The trial court based its decision in favor of the plaintiff principally on the finding that prior to the Act of March 5, 1864, the plaintiff and its predecessors in interest had acquired title by adverse possession to all the land on which the Cowell building now stands. If there was evidence sufficient to support such finding the judgment must be affirmed. Dreyer v. Cole, 210 Cal. 339, 292 P. 123; Balzer v. Caler, 11 Cal.2d 663, 82 P.2d 19; Vol. 1, Cal.Jur. 10-Yr.Supp., p. 557.

The evidence disclosed the following facts: In 1853 the state of California granted to the city of San Francisco for a period of ninety-nine years the use and occupation of certain property along the San Francisco waterfront, which area was then covered with the waters of the bay. By the conveyance it was contemplated that the lots should be filled in and utilized for the purpose of business and industry. See People v. Southern Pacific Co., 177 Cal. 555, 559, 171 P. 294; People v. California Fish Co., 166 Cal. 576, 585, 138 P. 79; United States v. Mission Rock Co., 189 U.S. 391, 405, 406, 23 S.Ct. 606, 47 L.Ed. 865; Pacific Gas Imp. Co. v. Ellert, C.C., 64 F. 421, 431-434. Thereafter, and in December, 1853, the city sold into private ownership a large portion of the lots, and the area was soon occupied by buildings. The land on which the Cowell building is situated was acquired at the sale by the plaintiff's predecessors who went into possession in January, 1854, and erected a frame building on pilings, beneath which the tide ebbed and flowed. It may here be said, parenthetically, that there was abundant evidence adduced at the trial, which was uncontradicted, to show that the frame building referred to was erected on the same area and within the same boundaries as the space which is now occupied by the Cowell building. About a year after the city sold the lots it was determined that the ordinance authorizing the sale was void, due to irregularity in its enactment (see Pimental v. City of San Francisco, 21 Cal. 351, 361; Satterlee v. San Francisco, 23 Cal. 314, 318) and that the purchasers of the lots had acquired no valid title thereto. However, the plaintiff's predecessors remained in possession of the property they had purchased, claiming title and right to possession. The easterly line of the frame building (which corresponds to the line of the Cowell building fronting on the Embarcadero) then lay along an open area which was used as a public street, and known as East street. However, such area had not been legally dedicated as a public street prior to the Act of March 5, 1864. At that time the legislature dedicated East street in such manner as to exclude from the area dedicated any portion of the land (including the "sliver" area) on which the frame building was then standing. The plaintiff's predecessors had then been in possession of the property for a period in excess of ten years.

The defendants contend, however, that the plaintiff's predecessors could not have acquired title by adverse possession against either the state or the city during the period referred to because prior to the sale of the lots the area which was sold had been dedicated as a public dock, or city slip.

[2-5] The rule with respect to the acquisition of title by adverse possession as against a governmental agency is set forth in Richert v. City of San Diego, 109 Cal. App. 548, 553, 554, 293 P. 673, 676, as follows: "Where land held by the state or any of its subdivisions has been actually reserved for or dedicated to some specific public use, there can be no adverse holding thereof which can give title to the adverse claimant." But the court went on to say, "The law is likewise clear that, if land held by the state or any of its subdivisions is neither reserved for nor dedicated to some public use and may be alienated by its owner, title may be wrested from it by adverse possession." See also Ames v. City of San Diego, 101 Cal. 390, 393, 394, 35 P. 1005; People v. Banning Co., 167 Cal. 643, 649, 140 P. 587; Board of Education v. Martin,

92 Cal. 209, 213, 28 P. 799; San Francisco v. Straut, 84 Cal. 124, 24 P. 814; Orack v. Powelson, 3 Cal.App. 282, 285, 85 P. 129. In City and County of San Francisco v. Calderwood, 31 Cal. 585, 589, 91 Am.Dec. 542, it was held that there had been no legal dedication of the area here involved as a city slip; that such area had never been used as a public dock, and that an ordinance purporting to dedicate some of the waterfront lots as a city slip amounted merely to an "offer to dedicate". The court therefore ruled, in an action for ejectment brought by the city against one of the purchasers at the city sale, that the defendant was entitled to rely on the defense of adverse possession. The same ruling was made in McCracken v. City of San Francisco, 16 Cal. 591, pages 633, 640. See, also, 26 Cal.Jur. p. 594; People v. Williams, 64 Cal. 498, 502, 2 P. 393; Pacific Gas Improvement Co. v. Ellert, C.C., 64 F. 421, 431–434. Although those decisions would not necessarily be controlling in the present case, it was said in the decision last cited, where reference was made to many of the early cases involving the sale of the water lots, including the Calderwood case, that such cases "cover a period of 40 years, and have become a rule of property, and the foundation of many titles." The same comment was made in United States v. Mission Rock Co., 189 U. S. 391, 406, 23 S.Ct. 606, 47 L.Ed. 865. But aside from the import of those decisions there was evidence before the trial court in the present case to support the implied finding that there had been no valid dedication of a city slip in the water lot area. The evidence showed that the city had specifically reserved the right to revoke the purported dedication. It also showed that the area was never used as a city slip, but, instead, and almost immediately after the sale, buildings were erected throughout the area. The question whether there has been a valid dedication or revocation of an offer to dedicate is ordinarily one of fact. Sacramento v. Clunie, 120 Cal. 29, 52 P. 44; City of Yuba v. Mausoleum Syndicate, 207 Cal. 587, 279 P. 427; City of Los Angeles v. Kysor, 125 Cal. 463, 465, 58 P. 90. There being evidence to support the implied finding of lack of dedication, the conclusion of the trial court thereon cannot be disturbed.

[6] It follows from the foregoing that prior to March 5, 1864, the plaintiff's predecessors had acquired title by adverse possession to all the land on which the Cowell building is now situated, and that no part of the "sliver" area was ever a part of the Embarcadero.

In view of our conclusion thereon, other questions raised by the parties need not be discussed.

The judgment is affirmed.

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18 Cal.2d 114

HOWALDT et al. v. SUPERIOR COURT.

S. F. 16550.

Supreme Court of California.

June 18, 1941.

1. Courts 🔑202(5)

With the exception that an appeal will lie from an order granting or denying motion for new trial in those proceedings in probate in which the motion is proper, the rule is that an appeal does not lie from an order made after final judgment in probate proceedings.

2. Courts 🔑202(5)

An order directing administrator of an estate to withhold distributive shares of heirs who were residents of German Reich because of war conditions prevailing in the Reich was appealable, and hence proceedings in Supreme Court to review the order would not lie. Probate Code, § 1240; Code Civ.Proc. § 1068.

3. Certiorari 🔑5(1)

A proceeding in review will not lie if the order sought to be reviewed is appealable. Code Civ.Proc. § 1068.

4. Certiorari 🔑5(1)

Certiorari cannot be made a substitute for an appeal. Code Civ.Proc. § 1068.

◆

Proceeding by Marie Sophie Howaldt and others against the Superior Court to review an order of the Superior Court which directed an administrator of an estate to withhold distributive shares of certain heirs who were residents of the German Reich.

Proceeding dismissed.

I. F. Chapman and Tom F. Chapman, both of San Francisco, for petitioners.

Henry F. Boyen, and Frank J. Fontes, both of San Francisco, for respondent.

SHENK, Justice.

This is a proceeding to review an order of the respondent Superior Court in the matter of the Estate of Fritz Benthien, deceased.

Through the office of the public administrator of the city and county of San Francisco, the matter of the administration of the estate of the decedent proceeded to distribution whereby, by decree of date January 21, 1941, the estate of $7,233.58 in cash was ordered distributed one-sixth to Anna Wiese Struck, one-sixth to Minna Wiese, one-third to Marie Sophie Howaldt, one-ninth to Wilhelmina Reszel, one-ninth to Wilhelm Benthien, and one-ninth to Dorthea Guern.

On the following day, January 22, 1941, the respondent court made an "Order directing administrator to withhold distributive shares of non-resident heirs". The order recited that the distributees, Marie Sophie Howaldt, Wilhelmina Reszel, Wilhelm Benthien and Dorthea Guern, "are all residents of the German Reich, and that at the present time said German Reich is in a state of war", and "that by reason of said war condition prevailing in said German Reich, wherein said heirs reside, distribution of their shares in said estate be made subject to the express condition that said administrator shall not pay or transfer any part of said distributive shares to said heirs residing in said German Reich until the further order of this court".

On January 24, 1941, this application for the writ of review was filed. The petitioners, who are the heirs residing in the German Reich, contend that the direction to the administrator to withhold payment or transfer of any part of their distributive shares until the further order of the court was contrary to the provisions of the treaty between the United States and Germany, signed December 8, 1923, and proclaimed October 14, 1925. Articles IV and XXIV of said treaty, volume 44, Stats. at Large 2135, 2153, part 3, recognize the property rights of nationals of the high contracting parties, the right of nationals of one high contracting party residing in the other to dispose of property, and provide for the transfer of property to nationals of one high contracting party who are heirs, devisees or legatees of a deceased resident of the other. Attention is also directed to article VI of the Constitution of the United States providing that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby * * *."

The record does not indicate whether the decedent, Fritz Benthien or his heirs, residing in the German Reich were or are German "Nationals" within the meaning of the treaty provisions. The respondents cite decision (see In re Muckl's Estate, 174 Misc. 35, 19 N.Y.S.2d 1009; In re Ramberg's Estate, 174 Misc. 306, 20 N.Y.S.2d 619; In re Weidberg's Estate, 172 Misc. 524, 15 N.Y.S.2d 252), to the effect that the function of the court sitting in probate is to see that the decedent's property is distributed in accordance with the intent expressed in the will, or in accordance with the laws of succession, and to make appropriate regulations to that end and if necessary (see, also, Prob.Code, sec. 530), even to the extent of directing that property be withheld for the time being if existing conditions so require.

[1-4] However, the appealability of the order sought to be annulled disposes of the present proceeding. Before 1935 it was recognized that an order instructing or directing an executor or administrator was not an appealable order because such an order was not specified in section 1240 of the Probate Code. In re Emerson's Estate, 139 Cal.App. 571, 34 P.2d 800. In 1935, Stats. 1935, p. 1972, the legislature amended that section by including therein as an appealable order an order "instructing or directing an executor or administrator". With the exception that an appeal will lie from an order granting or denying a motion for a new trial in those proceedings in probate in which the motion is proper, the rule is that an appeal does not lie from an order made after final judgment in probate proceedings. Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368; Lilienkamp v. Superior Court, 14 Cal.2d 293, 93 P.2d 1008; Estate of Grussing, 15 Cal.App.2d 11, 59 P.2d 152. The reason for the rule was stated to be that such an order was not made expressly appealable by section 1240 of the Probate Code. Adherence to the rule is dependent upon whether the order is one not included in section 1240 as an appealable order. Since the order in question is one directing

the administrator, it is an order specified in said section as an appealable order and must be so considered for the purpose of the present matter. A proceeding in review in this state will not lie if the order sought to be reviewed is an appealable order. Sec. 1068, Code Civ.Proc. "Certiorari cannot be made a substitute for an appeal." Erickson v. Municipal Court, 219 Cal. 737, 29 P.2d 192, 193; Ivory v. Superior Court, 12 Cal.2d 455, 85 P.2d 894, and cases cited.

The proceeding is dismissed.

We concur: GIBSON, C. J.; CURTIS, J.; TRAYNOR, J.; EDMONDS, J.; CARTER, J.

18 Cal.2d 146

JAFFE v. STONE et al.

S. F. 16539.

Supreme Court of California.

June 23, 1941.

1. Malicious prosecution 🔑16

Necessary elements of an action for "malicious prosecution" are a judicial decree favorably terminated, lack of probable cause and malice.

See Words and Phrases, Permanent Edition, for all other definitions of "Malicious Prosecution".

2. Pleading 🔑350(3)

A motion for judgment on the pleadings admits the facts alleged for the purpose of the motion.

3. Malicious prosecution 🔑36

In determining whether element of favorable termination of proceeding necessary in order to maintain malicious prosecution action is satisfied by dismissal of the criminal proceeding for lack of evidence by the committing magistrate, such dismissal is not a bar to another prosecution for felony. Pen.Code, § 1387.

4. Criminal law 🔑224

In criminal prosecution for felony where the proceeding is by information, accused is entitled to preliminary examination or hearing before a magistrate. Pen.Code, § 858 et seq.

5. Criminal law 🔑223

The purpose of a preliminary examination of an accused is to determine whether a public offense has been committed and whether there is sufficient cause to believe the accused guilty thereof, and if sufficient showing is made, the accused is held to answer for trial in the superior court. Pen. Code, § 858 et seq.

6. Criminal law 🔑223

The purpose of a preliminary hearing before a magistrate is to weed out groundless or unsupported charges of grave offenses and to relieve accused of the degradation and expense of criminal trial. Pen. Code, § 858 et seq.

7. Malicious prosecution 🔑34

The theory underlying requirement of favorable termination of a prosecution in order to entitle accused to maintain malicious prosecution action is that it tends to indicate innocence of accused, and coupled with other elements of lack of probable cause and malice, establishes the "tort", that is, the malicious and unfounded charge of crime against the innocent accused.

See Words and Phrases, Permanent Edition, for all other definitions of "Tort".

8. Malicious prosecution 🔑34

Where criminal proceeding which is subject of malicious prosecution action goes to trial, it is generally necessary, as foundation for the malicious prosecution action, that the plaintiff have been acquitted.

9. Malicious prosecution 🔑35(1)

If dismissal or other termination of criminal proceedings against accused is of such a nature as to indicate his innocence, it is a "favorable termination" sufficient to satisfy rule requiring favorable termination in order to entitle accused to maintain malicious prosecution action.

See Words and Phrases, Permanent Edition, for all other definitions of "Favorable Termination".

10. Malicious prosecution 🔑36

An abandonment by prosecuting officers of criminal proceeding against accused because of defect in complaint or doubt concerning jurisdiction of the offense, with intention of bringing a new proceeding in proper form or before a proper court, is not a "favorable termination" of the proceeding in favor of accused necessary in order to entitle him to maintain a malicious prosecution action, regardless of whether the abandonment takes place before the committing magistrate or at the actual trial itself.

11. Malicious prosecution 🔑35(1)

If an accused manages to thwart the efforts of officials by suppression of evidence, flight from jurisdiction, or other act of like nature, the abandonment of the prosecution resulting in a dismissal of the complaint cannot be used by the accused as the basis of an action for malicious prosecution.

12. Malicious prosecution 🔑35(1)

Where prosecuting officials press criminal charge before the committing magistrate, and accused does not seek improperly to prevent a fair hearing and the complaint is dismissed for failure to produce a case against the accused, there is a "favorable termination" sufficient to form basis of an action by the accused for malicious prosecution.

13. Malicious prosecution 🔑35(1)

Dismissal of felony charge against accused by the committing magistrate after hearing for insufficiency of evidence, on motion of accused, was a "favorable termination" of the prosecution upon which malicious prosecution action could be based. Pen.Code, § 858 et seq.

14. Malicious prosecution 🔑36

In order to entitle an accused to maintain malicious prosecution action, the criminal proceeding must have been finally terminated, and there has been a "final termination" if the proceeding has passed through some such stage as preliminary hearing and dismissal, trial and acquittal or abandonment by prosecuting authorities.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Termination".

15. Pleading 🔑34(4)

The doctrine that allegations of a pleading will be most strongly construed against the pleader has long been repudiated in California.

16. Malicious prosecution 🔑36

In order that there may be a sufficient "final termination" of a criminal prosecution, so as to entitle the accused to maintain malicious prosecution action, it is sufficient that the particular proceeding is terminated, and it is immaterial whether the termination is a bar to any further prosecution for the same offense or whether accused may be charged and tried anew, and only if the new proceeding is already instituted, can the accused be precluded from suing for malicious prosecution.

17. Malicious prosecution 🔑36

Dismissal of felony charge against accused by committing magistrate, for insufficiency of evidence, on motion of the accused, was sufficient "final termination" of the prosecution to entitle the accused to maintain malicious prosecution action. Pen. Code, § 858 et seq.

18. Pleading 🔑67

The salutary rule of pleading frowns upon averments negativing or anticipating defenses, and requires that such matters be left to the answer.

19. Malicious prosecution 🔑53

In action for malicious prosecution, the complaint was not required to allege that no new criminal proceedings had been instituted before filing of the malicious prosecution action, and if such proceedings had in fact been commenced, the defendants were required to so plead in their answers.

20. Pleading 🔑9

Complaint in malicious prosecution action which pleaded the actual facts concerning final termination of criminal proceeding, in a clear and understandable manner, alleging that the proceeding was "dismissed", was not defective for failure to allege that the dismissal was "final", since the finality was a matter of legal effect, and to insist that the word "final" or "finally" be added to the pleading would simply require plaintiff to plead a "conclusion of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

21. Malicious prosecution 🔑56

"Public policy" favors apprehension and punishment of criminals and limits the person complaining of criminal charges by placing upon him burden of proving the basic elements of tort of malicious prosecution.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

22. Malicious prosecution 🔑38, 47

Where the difficult burden of proof resting on plaintiff in a malicious prosecution

action is met, recovery is allowed and the established rights of the plaintiff may not be defeated by inventing new limitations on the substantive right or by adopting stricter requirements of pleading than warranted by general rules of pleading.

23. Malicious prosecution ⟹56

The "public policy" in favor of apprehension and punishment of criminals, which limits plaintiff in malicious prosecution action by placing on him burden of proving basic elements of the tort, has properly served over many years to crystallize limitations on the tort and the defenses available to defendant, and having served that purpose should not be pressed further to extreme of practical nullification of the right of action for malicious prosecution, and consequent defeat of the important policy which underlies it, of protecting the individual from the damage caused by unjustifiable criminal prosecution.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Aaron L. Jaffe against Richard K. Stone and others for malicious prosecution. From a judgment for the defendants, plaintiff appeals.

Reversed.

Prior opinion, 106 P.2d 946.

Albert Picard, Werner Olds, and E. Coke Hill, all of San Francisco, for appellant.

Morris, Jaffa & Sumski and Jaffa & Sumski, all of San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiff appeals from a judgment entered after defendants' motions for judgment on the pleadings were granted.

The action was brought for damages for malicious prosecution. Defendants filed demurrers to the complaint, which were overruled, but later each defendant moved for judgment on the pleadings, on the ground that the complaint failed to state a cause of action. This ground embraced two points: first, that it failed to allege facts showing a final termination of the former criminal prosecution in favor of plaintiff herein in such manner as not to be legally susceptible of revival; and second, that it appeared on the face of the complaint that the criminal complaint charging a felony had been dismissed by a justice of the peace on motion of the accused. The motions were granted, and judgment thereupon rendered in favor of defendants.

The complaint alleged in substance that the defendants, maliciously and without probable cause, obtained a complaint charging plaintiff with grand theft, a felony, and secured a warrant of arrest from a justice of the peace with whom the complaint was filed; that plaintiff was thereupon arrested and a preliminary hearing was had at which witnesses were examined; that plaintiff made a motion for dismissal of the proceeding on the ground that there was no evidence to prove his guilt, and that the motion was granted and the proceeding dismissed. Allegations of general and special damages followed.

[1-3] The complaint thus alleges the necessary elements of an action for malicious prosecution: (1) a judicial proceeding favorably terminated; (2) lack of probable cause; and (3) malice. The motion for judgment on the pleadings was directed at the sufficiency of the allegations of favorable termination, and the specific point urged is that the complaint fails to show a final termination of the prosecution in such a manner as to be incapable of revival. The issue, phrased in the language of pleading, is whether the complaint sufficiently pleads favorable termination when it alleges that the criminal proceeding was dismissed by the magistrate at the preliminary hearing for lack of evidence. But, since the motion for judgment on the pleadings, like a general demurrer, admits the facts alleged for the purpose of the motion, the real issue is one of substantive law: whether the element of favorable termination is satisfied by a dismissal of the criminal proceeding by the committing magistrate, or whether the termination must be in such a manner that the accused cannot again be charged with that particular crime. Dismissal by a committing magistrate for lack of evidence is, of course, not a bar to another prosecution for felony. Pen.Code, sec. 1387.

1. Dismissal by magistrate as favorable termination.

[4-6] In a criminal prosecution for felony where the proceeding is by information, the accused is entitled to a preliminary examination or hearing before a magistrate. The purpose of this hearing is to determine whether a public offense

has been committed, and whether there is sufficient cause to believe the defendant guilty thereof. If a sufficient showing is made, the defendant is "held to answer" for trial in the superior court. Pen.Code, sec. 858 et seq. The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed. The more unwarranted the charge, the more reckless and malicious the motives which inspired it, the less likelihood there is of its surviving this initial scrutiny by a judicial officer. Thus frequently the most objectionable and unwarranted prosecutions, which most clearly call for redress, are those which are terminated by dismissal by the magistrate for lack of evidence.

[7-9] It is not enough, however, merely to show that the proceeding was dismissed. The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person. If the accused were actually convicted, the presumption of his guilt or of probable cause for the charge would be so strong as to render wholly improper any action against the instigator of the charge. The thought has also been expressed that the tort action under such circumstances would involve a collateral attack on the criminal judgment. Hence, if the criminal proceeding goes to trial, it is ordinarily necessary, as a foundation for a malicious prosecution suit, that the plaintiff should have been acquitted. See generally, Prosser on Torts, p. 867; Harper on Torts, p. 584. The same fundamental theory is applied in testing a dismissal or other termination without a complete trial on the merits. If it is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination.

[10, 11] Thus, the accuser or the prosecuting officers may abandon the proceeding because of the defects in the complaint, or doubts as to the jurisdiction of the offense, with the intention of bringing a new proceeding in proper form or before a proper court. Whether this abandonment takes place before the committing magistrate or at the actual trial itself, the dismissal cannot be regarded as a favorable termination in favor of the accused. See Rest., Torts, sec. 660, pp. 401, 399. Similarly, if the accused manages to thwart the efforts of the officials by suppression of evidence, flight from the jurisdiction, or other acts of this nature, the abandonment of the prosecution resulting in a dismissal of the complaint cannot be used by him as the basis of an action for malicious prosecution. See Halberstadt v. New York Life Ins. Co., 194 N.Y. 1, 86 N.E. 801, 21 L.R.A., N.S., 293, 16 Ann.Cas. 1102; Prosser on Torts, p. 869; Rest., Torts, sec. 660, p. 400.

[12, 13] On the other hand, where the prosecuting officials press the charge before the committing magistrate, the accused does not seek improperly to prevent a fair hearing, and the complaint is dismissed for failure to produce a case against the defendant, there is a favorable termination sufficient to form the basis of a tort action. See Harrelson v. Johnson, 119 S.C. 59, 111 S.E. 882; Empire Gas & Fuel Co. v. Wainscott, 91 Okl. 66, 216 P. 141; Graves v. Scott, 104 Va. 372, 51 S.E. 821, 2 L.R.A., N.S., 927, 113 Am.St.Rep. 1043, 7 Ann.Cas. 480; Robbins v. Robbins, 133 N.Y. 597, 30 N.E. 977; Southern Car & Foundry Co. v. Adams, 131 Ala. 147, 32 So. 503; Stewart v. Blair, 171 Ala. 147, 54 So. 506, Ann.Cas.1913A, 925; Sasse v. Rogers, 40 Ind.App. 197, 81 N.E. 590; Rest., Torts, sec. 659; Harper on Torts, p. 585; Prosser on Torts, p. 868; see, also, cases applying the same rule where the prosecuting attorney at the trial enters a nolle prosequi for lack of evidence. Snead v. Jones, 169 Ala. 143, 53 So. 188; MacLaughlin v. Lehigh Valley R. Co., 93 N.J.L. 263, 108 A. 309; Dickerson v. Atlantic Refining Co., 201 N.C. 90, 159 S.E. 446; Hobbs v. Illinois Cent. R. Co., 182 Iowa 316, 165 N.W. 912; see note, 43 Harv.L. Rev. 500, criticising contrary Massachusetts rule.

The distinction is summed up in Halberstadt v. New York Life Ins. Co., supra [194 N.Y. 1, 86 N.E. 803, 21 L.R.A.,N.S., 293, 16 Ann.Cas. 1102], as follows: "* * * Where a criminal proceeding has been terminated in favor of the accused by judicial action of the proper court or official in any way involving the merits or propriety of the proceeding or by a dismissal or discontinuance based on some act chargeable to the complainant as his consent or his withdrawal or abandonment of his prosecution, a foundation in this respect has been laid for an action of malicious prosecution. The other and reverse rule is that, where the proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties, or solely by the procurement of the accused as a matter of favor or as the result of some act, trick, or device preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of such an action. The underlying distinction which leads to these different rules is apparent. In one case the termination of the proceeding is of such a character as establishes or fairly implies lack of a reasonable ground for his prosecution. In the other case no such implication reasonably follows."

2. Necessity of "final" termination.

[14] In stating the requirement of termination, courts often say that the proceeding must be "finally" terminated. Such a statement is entirely accurate if the ordinary reasonable meaning of the words is taken. The proceeding must be finally terminated; that is, the particular criminal proceeding commencing, for example, by complaint and arrest, must have passed through some such stage as preliminary hearing and dismissal, or trial and acquittal or abandonment by the prosecuting authorities. When this has occurred, that proceeding is finally terminated. If the termination was such as not to constitute a bar to a new prosecution, the accused may be charged and tried again for the same offense; but this will be a new proceeding, with a new court number, new pleadings, new judge and jury, and a new judgment.

Occasionally, however, the statement is taken to mean that the proceeding must be "incapable of revival", and that "final termination" means termination which is a bar to any further prosecution for the offense, so that the accused is forever safe from prosecution. As will be seen hereinafter, this view has no substantial support in authority and is unsound in principle. But it has found expression in certain recent decisions of the District Court of Appeal, following a dictum in an early opinion of this court, and we shall proceed first to examine the language and holding of these cases.

[15] The origin of this view may be traced to the case of Carpenter v. Nutter, 127 Cal. 61, 59 P. 301. The complaint alleged that plaintiff was charged with grand larceny, arrested, and at the preliminary examination was held to answer for trial in the superior court, and two informations were filed. It was then alleged that subsequently "the plaintiff was released and discharged from custody, and said informations dismissed, by the Hon. Joseph H. Budd, judge of the said superior court, on the ground that there was no evidence, cause, or probability that a crime had been committed, or that plaintiff was in any way connected with the crime * * *". A demurrer was sustained and the ruling upheld on appeal. The opinion states that there was no allegation that plaintiff was discharged by any order of the court, for it did not appear that the judge named in the pleading was the judge before whom the informations were pending, or that he was acting with authority as a court. The conclusion reached was that "it must, in the face of the demurrer, be conclusively presumed that the informations are still pending, unless it is made to appear by direct averment, or by a statement of facts which show the necessary legal conclusion, that the prosecution has finally ended and terminated in favor of plaintiff. There is no allegation that the plaintiff was acquitted of the charges contained in the informations. It might have been alleged that he was discharged by an order of the court in which the prosecutions were pending, but this was not done". The opinion also declares that the allegations of a pleading will be most strongly construed against the pleader, a doctrine long repudiated in this state. See Mix v. Yoakum, 200 Cal. 681, 254 P. 557; Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474.

It will be observed that this case presents a problem quite distinct from that before us here, for in Carpenter v. Nutter, supra, the accused was not dismissed by the magistrate, but actually held to answer for trial. The main defect in the pleading, as pointed out in the opinion, was not merely a failure to allege final termination, but a failure to allege any valid termination. The equivocal statement that plaintiff was "released and discharged from custody", and the informations "dismissed" by a judge, did not satisfy the court in the malicious prosecution suit that the proceedings had been validly terminated by proper authority. Later on in the opinion it is briefly observed, with no citation of authority, that "If it had been alleged that the information was dismissed by the court, the facts would have to be alleged in such manner as to show that the dismissal was an end of the prosecution". This dictum cannot be deemed authority for a point to which it was not even addressed, namely, that all possible new prosecutions for the particular offense would have to be barred. That this point was not presented to nor deemed relevant by the court is clear from the fact that the opinion makes no attempt to lay down any new law, but purports to state the rule on termination which "has always prevailed both in England and in this country". In view of the well established law at that time and now that termination of the particular prosecution was sufficient (see infra), it is impossible to believe that the court intended to declare an exactly opposite rule without discussing a single case.

The idea next appears in Wilson v. Troy, 19 Cal. App.2d 156, 64 P.2d 1141, 1142, where the complaint alleged that plaintiff "was tried" on the charge, that the prosecution "terminated" in his favor and that the charge was thereupon "dismissed". Here, again, the plaintiff was actually held to answer for trial, and the nature and reasons for dismissal at the trial were in no way disclosed. The court discusses this defect, and then adds: "But, if under the order made, a new indictment or information may be filed, the order does not terminate the proceedings." The only authority cited is Carpenter v. Nutter, supra. To the same effect is White v. Brinkman, 23 Cal. App.2d 307, 317, 73 P.2d 254, 259. The complaint alleged dismissal by the justice of the peace, and the court declared that it "falls short of pleading a complete and final determination of the proceeding in favor of the accused beyond susceptibility of revival". No authority at all is cited on this supposed requirement. Taylor v. Parsons, 41 Cal.App.2d 315, 106 P.2d 638, likewise holds that a dismissal at a preliminary hearing does not constitute a final termination on the authority of Wilson v. Troy, supra.

The explanation for these holdings lies in a curious misconception of the notion of "finality". Mistaken emphasis is placed upon the idea of "final" rather than "favorable" termination; and the offense is confused with the proceeding. When we look at the problem in the light of the background of the tort and the purpose of the requirement of favorable termination, we perceive that freedom of the accused from new prosecutions is not involved in all cases. Such freedom may be assured by an acquittal at the trial, or by some other termination at the trial to which jeopardy attaches. But where the proceeding is dismissed by a magistrate, there is no jeopardy, and no bar to a new prosecution until the statute of limitations runs on the offense. In the case of the usual felony, this is three years in California (Pen. Code, sec. 800), but in a few instances (murder, embezzlement of public money, falsification of public records) there is no limitation, and the prosecution is never barred. Pen. Code, sec. 799. Consider, then, the effect of this doctrine upon the rights of a plaintiff who is wrongfully and maliciously accused of a felony, arrested and brought before a magistrate, and is discharged because no case against him is made. He must ordinarily wait three years before he may sue for malicious prosecution. In some instances, he must wait longer; and in others it would seem that he cannot sue at all because the statute of limitations does not run on the offense. There is no rational basis for this result, nor any justification for it in policy.

This view would, moreover, introduce a new and disturbing problem of accrual of the cause of action for malicious prosecution. If in cases where the termination is not a bar to a new prosecution for the offense, the cause of action were postponed until the statute of limitations had run on the liability for the crime, the accrual of the cause of action in the civil suit would depend upon difficult questions of law as to the effect of the termination of the criminal proceeding. The result would be to permit and require one kind of malicious prosecution suits (those based on acquittals or other such final judgments) to be brought promptly; while others (those based on dismissals or abandonments or other terminations not constituting a bar) could not be brought until years afterwards, if at all, to the manifest disadvantage of the defendant as well as the plaintiff.

One more fallacy in this view may be noted. If the test were whether the termination was a bar to a new prosecution, we would expect to find that every termination which did constitute a bar would be a "final termination" sufficient for a malicious prosecution suit. Yet there are situations where the plaintiff may show malice, lack of probable cause, and final termination which precludes any further prosecution for the offense, and still be unable to recover. These are the situations where after indictment or information the district attorney enters a nolle prosequi, formally and finally abandoning the proceedings, but does so, for example, as a result of acts of the accused preventing the procurement of evidence, or the impracticability of bringing the accused to trial. The accused is finally free from any prosecution for the offense, but his innocence has not been indicated; though finally terminated, the proceeding was not favorably terminated. See Rest., Torts, sec. 660, and discussion therein; and cases cited supra.

[16] The correct rule is set forth in the Restatement of Torts, sec. 659, Comment a, as follows: "In order that there may be a sufficient termination in favor of the accused it is not necessary that the proceedings should have gone so far as to preclude further prosecution on the ground of double jeopardy. Hence, although the quashing of an indictment does not preclude the initiation of new proceedings for the same offense or for other charges growing out of the same misconduct on the part of the accused, it constitutes a termination of the original proceedings in favor of the accused unless such new proceedings have been initiated before the trial of the civil action * * *." In the same section, Comment b, it is said: "One against whom criminal proceedings have been instituted may be discharged by a magistrate at a preliminary hearing because the evidence produced against him is not such as to warrant his being held for further proceedings to determine his guilt or innocence. In such a case, the discharge is a final termination of the proceedings in favor of the accused, unless it appears that further proceedings growing out of the same misconduct on his part have been instituted." In other words, whether the proceeding is dropped by the magistrate or in the superior court, it is sufficient that the particular proceeding is terminated. It is immaterial whether the termination is a bar to any further prosecution for the same offense, or whether the accused may be charged and tried anew. Only if the new proceeding is already instituted can the accused be precluded from suing for malicious prosecution. This view is supported by the great weight of authority. See Southern Car & Foundry Co. v. Adams, supra; Graves v. Scott, supra; Brooks v. Super Service, 183 Miss. 833, 183 So. 484, 185 So. 202; Moreau v. Picard, 54 R.I. 93, 169 A. 920; Harrelson v. Johnson, S.C. supra; 34 Am. Jur. 721, sec. 31; 38 C.J. 442, sec. 92; 14 Harv.L.Rev. 223; Newell, Malicious Prosecution, p. 349.

Hurgren v. Union Mutual Life Ins. Co., 141 Cal. 585, 75 P. 168, the only California case which discusses the principles involved, unqualifiedly supports the general rule. The suit was brought for malicious prosecution of a civil action, but the court treated the issue as identical with that which would arise from a criminal prosecution, and said (page 587 of 141 Cal., page 168 of 75 P.): "* * * it is now the well-established rule that a verdict or final determination upon the merits of the malicious civil suit or criminal prosecution complained of is not necessary to the maintenance of an action for malicious prosecution, but that it is sufficient to show that the former proceeding had been legally terminated. The fact that such legal termination would not be a bar to another civil suit or criminal prosecution founded on the same alleged cause is no defense to the action for malicious prosecution * * *." The court then reviewed a number of authorities and approved the following statement from the syllabus in Apgar v. Woolston, 43 N.J.L. 57: "The law requires only that the particular prosecution complained of shall have been terminated, and not that the liability of the plaintiff for prosecution for the same offense shall have been extinguished, before the action for malicious prosecution is brought. Consequently, the refusal of the grand jury to file an indictment, a nolle prosequi, or any proceeding by which the particular prosecution is disposed of in such a manner that it cannot be revived, and that the prosecutor, if he intends to proceed further, must institute proceedings de novo, is a sufficient termination of the prosecution to enable the plaintiff to bring his action." Whether the court had in mind the dictum in its former opinion in Carpenter v. Nutter, supra, does not appear; but it is significant that in the Hurgren case, where the point was squarely raised and fully considered, the opinion declares (page 589 of 141 Cal., page 169 of 75 P.) that "There are no decisions of this court to the contrary".

[17] It may be noted that until Wilson v. Troy, supra, was decided, a large number of cases were decided in this state in which judgments for plaintiff for malicious prosecution were upheld following dismissal of the charges by the committing magistrate. See Russell v. Dennison, 45 Cal. 337; Williams v. Casebeer, 126 Cal. 77, 58 P. 380; Murphy v. Davids, 181 Cal. 706, 186 P. 143; Burke v. Watts, 188 Cal. 118, 204 P. 578; Fleischhauer v. Fabens, 8 Cal.App. 30, 96 P. 17; Auener v. Norman, 39 Cal.App. 425, 179 P. 219; Braga v. Ponte, 50 Cal.App. 94, 194 P. 514; Krauskopf v. Brooking, 59 Cal.App. 683, 211 P. 469; Pickering v. Havens, 70 Cal. App. 381, 233 P. 346; Robinson v. McKnight, 103 Cal.App. 718, 284 P. 1056; Green v. Stewart, 106 Cal.App. 518, 289 P. 940; Gooding v. McAlister, 114 Cal. App. 284, 299 P. 774; Mills v. Friedman, 119 Cal.App. 74, 5 P.2d 901; Carroll v. Pacific Coast Auto Ass'n, 123 Cal.App. 568, 11 P.2d 660; Diggs v. Arnold Bros., Inc., 132 Cal.App. 518, 23 P.2d 71; Davidson v. De Sousa, 20 Cal.App.2d 311, 66 P.2d 740; Wood v. Lehne, 30 Cal.App.2d 222, 85 P. 2d 910. They add further strength to the conviction that the dictum in Carpenter v. Nutter was laid at rest by the square holding of the Hurgren case, and that its revival in the decisions mentioned above was unjustified. These decisions must therefore be disapproved.

3. The pleading requirement.

[18, 19] It has been suggested that apart from the questions of substantive law the complaint has two serious defects of pleading. First, it is said that since the commencement of new criminal proceedings before the filing of the malicious prosecution suit would be a defense to the action (see supra), the complaint should allege that no such proceedings have been commenced. The answer to this contention is obvious. If such subsequent proceedings have, in fact, been commenced, defendants may so plead in their answers. But, like other defenses, this should be raised in the answer, not anticipated in the complaint. It would not involve a positive averment of fact, an element of plaintiff's cause of action; plaintiff would be simply negativing an exception to, or a qualification upon, these elements of his cause of action; he would have to single out that particular exception among others that might be raised as defenses. But the salutary rule of pleading frowns upon averments negativing or anticipating defenses, and requires that such matters be left to the answer. Canfield v. Tobias, 21 Cal. 349, 350; Munson v. Bowen, 80 Cal. 572, 574, 22 P. 253; Weinberger v. Weidman, 134 Cal. 599, 601, 66 P. 869. Accordingly we are satisfied that such an allegation cannot be deemed an essential element of the cause of action.

[20] Second, it is urged that the complaint is defective in failing to plead that the proceeding was "finally" dismissed. As we have seen, the substantive law merely requires proof of the final termination of the particular proceeding. The complaint pleads the actual facts in a clear and understandable manner, alleging that the proceeding was "dismissed". "Dismissal" was the facts; its finality is a matter of legal effect and involves a question of law. To insist that the plaintiff add the word "final" or "finally" to his pleading would simply require him to plead a conclusion of law. There is no justification for such a rule.

4. Considerations of public policy.

[21-23] It is finally urged in support of the judgment that malicious prosecution suits are not favored. The frequency with which this statement is made in these cases calls attention to the need of some explanation. Properly applied, it means that public policy is in favor of the apprehension and punishment of criminals, and limits the person complaining of criminal charges by placing upon him the burden of proving the basic elements of the tort. These elements, viewed on the other side, furnish full defenses to the public spirited accuser or prosecutor. But where the difficult burden of proof is met by the plaintiff, recovery is allowed. This being true, we should not be led so astray by the notion of a "disfavored" action as to defeat the established rights of the plaintiff by indirection; for example, by inventing new limitations on the substantive right, which are without support in principle or authority, or by adopting stricter requirements of pleading than are warranted by the general rules of pleading. In brief, the public policy involved has properly served, over many

years, to crystallize the limitations on the tort, and the defenses available to the defendant. Having served that purpose, it should not be pressed further to the extreme of practical nullification of the tort and consequent defeat of the other important policy which underlies it of protecting the individual from the damage caused by unjustifiable criminal prosecution. See Graves v. Scott, 104 Va. 372, 51 S.E. 821, 822, 2 L.R.A.,N.S., 927, 113 Am.St. Rep. 1043, 7 Ann.Cas. 480; Rest., Torts, vol. 3, p. 380, Introductory note; Harper on Torts, sec. 268.

The judgment is reversed.

We concur: TRAYNOR, J.; CURTIS, J.; EDMONDS, J.; CARTER, J.; SHENK, J.

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18 Cal.2d 117

JENTICK et al. v. PACIFIC GAS & ELECTRIC CO.

S. F. 16525.

Supreme Court of California.

June 18, 1941.

Rehearing Denied July 17, 1941.

1. Master and servant 🔑333

Where an employer's liability for negligence rests upon principle of respondeat superior, a verdict exonerating employee exonerates employer.

2. Appeal and error 🔑882(1)

Under doctrine of "invited error", a party cannot successfully take advantage of error committed by trial court at his request.

See Words and Phrases, Permanent Edition, for all other definitions of "Invited Error".

3. Appeal and error 🔑882(8, 12, 17)

On appeal, a litigant cannot object to admission of incompetent evidence offered by him, or complain of error in instructions requested by him, or challenge a finding of the trial court made at his instance.

4. Appeal and error 🔑882(12)

On defendant's appeal, defendant could not attack a verdict resulting from an erroneous instruction which defendant prompted.

5. Trial 🔑296(1)

Questionable and incomplete instructions may be rendered innocuous if it is clear, when they are read and considered with other instructions, that jury was not misled.

6. Trial 🔑296(1)

The error in a misleading or incomplete instruction is not removed by other correct instructions when the record clearly indicates that jury was confused on the matter covered by the erroneous instruction and followed such instruction in reaching its verdict.

7. Appeal and error 🔑882(12)

Complete identity of requested and given instructions is not essential to an application of the principle of "invited error" with respect to instructions, and error is invited if the two instructions are substantially the same in meaning.

8. Appeal and error 🔑882(12)

On defendant's appeal, defendant could not avoid application of doctrine of "invited error" with respect to erroneous instruction by asserting that error was not deliberately or willfully induced, where defendant's acts, regardless of whether deliberate, were responsible for instruction and verdict, the good faith of defendant being immaterial.

9. Appeal and error 🔑882(12)

Counsel must propose instructions which do not mislead jury into bringing in an improper verdict.

In Bank.

Appeal from Superior Court of City and County of San Francisco; Maurice T. Dooling, Judge.

Action by Joseph Jentick and another against the Pacific Gas & Electric Company and others for injuries in a gas explosion. From a judgment for plaintiffs against the Pacific Gas & Electric Company, the Company appeals.

Affirmed.

Prior opinion, 105 P.2d 1005.

Thos. J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, for appellant.

Francis Gill, John Langer, and Glikbarg, Wolf & Selig, all of San Francisco, for respondents.

TRAYNOR, Justice.

The city of San Francisco awarded a contract for the widening of a section of Nineteenth avenue to Charles Harney. In performing the work, Harney's employees ripped up the pavement with a scarifier and removed the broken fragments with a steam shovel. The Pacific Gas and Electric Company maintained pipes and conduits in the avenue for the supply of gas to abutting residences. Throughout the project the Pacific Gas and Electric Company's employees, including Alvin Parkhurst and John McGrath, marked the location of pipes on the surface of the street, laid temporary surface mains, excavated certain pipes, and made connections or disconnections as the situation required. These operations were performed under the direction of Frank English, the company superintendent of construction.

After scarifying the street surface adjacent to the premises at 1563 Nineteenth avenue, the scoop of the steam shovel while removing a load of broken pavement caught and bent a feeder pipe maintained by the Pacific Gas and Electric Company for the supply of gas to those premises. Employees of the company immediately examined the pipe but discovered no leak or break. Some fifteen minutes later, however, a gas explosion occurred within the basement of 1563 Nineteenth avenue, injuring plaintiffs Jentick and Austin who were standing on the sidewalk in front of the premises. A subsequent examination revealed that the shovel in catching and bending the feeder pipe had torn it loose from the riser pipe serving these premises. Escaping gas from this break caused the explosion.

Plaintiffs brought suit against Harney, the Pacific Gas and Electric Company, English, Parkhurst, and McGrath, charging them in general terms with negligence. At the conclusion of the trial the court granted a motion for a directed verdict in favor of defendant McGrath. After being fully instructed by the court on the law applicable to the case, the jury returned verdicts of $2,000 and $4,000 in favor of plaintiffs Jentick and Austin respectively against defendant Pacific Gas and Electric Company and of $1 each against defendants English and Parkhurst. Defendant Harney was held not liable. The trial court pointed out to the jury that its verdicts were inconsistent because it could not impose a lesser liability upon English and Parkhurst than upon the other defendant after having found them all negligent. The members of the jury thereupon stated that they were confused as to whether or not they could find a verdict in favor of English and Parkhurst and against the Pacific Gas and Electric Company. At this point counsel for the defendant Gas Company stated to the court: "If the court please, I think the difficulty the jury is having is whether or not they must find a verdict against Parkhurst and English in order to find a verdict against the Pacific Gas and Electric Company and I think that should be made clear to them, that they don't have to find it against the individual." The court then again instructed the jury that the Pacific Gas and Electric Company could be held liable under the doctrine of respondeat superior only if English and Parkhurst as employees were found to be negligent and held equally liable, but that if the Pacific Gas and Electric Company were found to have been negligent independently of the acts of English and Parkhurst, it could be held liable and English and Parkhurst exonerated if they were found not to have been negligent. A short time after the jurors received this instruction and just as they were about to retire once more to the jury room, the counsel for the defendant Gas Company made the following request to the court: "Now, before the jury is sent back, I would like to ask the court to instruct the jury that it is not necessary to find a verdict against the individuals Parkhurst and English in order to render a verdict against the defendant Pacific Gas and Electric Company." Whereupon the court stated: "I will so instruct the jury at the request of Mr. Briare, that they need not return a verdict against either of the personal defendants in order to render a verdict against the Pacific Gas and Electric Company." The jury then went out and within five minutes returned with a verdict holding the Pacific Gas and Electric Company liable for damages to plaintiffs Jentick and Austin in the amount of $2,000 and $4,000 respectively and exonerating defendants English and Parkhurst entirely. The Pacific Gas and Electric Company has appealed from this judgment after denial of its motions for a directed verdict, judgment notwithstanding the verdict, and a new trial.

[1] Defendant contends it is entitled to judgment in its favor because there is no evidence of negligence on its part independent of the acts of its employees, English

and Parkhurst, and since its liability as employer depends upon the existence of negligent conduct by them, the verdict of the jury finding them free from negligence exonerates it from liability. Where an employer's liability for negligence rests upon the principle of respondeat superior, it is well established that a verdict exonerating the employee exonerates the employer. Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171. In the present case, however, the inconsistent verdicts in favor of the employees and against the employer resulted from the erroneous instruction given to the jury just before it retired that "* * * they need not return a verdict against either of the personal defendants in order to render a verdict against the Pacific Gas and Electric Company". This instruction led the jury to believe that it could properly hold the Pacific Gas and Electric Company for the conduct of English and Parkhurst and at the same time acquit those employees of liability. It immediately returned with a verdict releasing the employees and holding the employer after having previously brought in a verdict finding the employees guilty of negligence and after having expressed doubt as to whether the employees could be exonerated from liability and the employer held liable for damages. The inconsistent verdicts clearly resulted from an erroneous instruction given to the jury at the request of the counsel for defendant.

[2-4] Under the doctrine of "invited error" a party cannot successfully take advantage of error committed by the court at his request. Thus, on appeal a litigant cannot object to the admission of incompetent evidence offered by him. See cases cited in 2 Cal.Jur. 848. He cannot complain of error in instructions requested by him. Gray v. Ellis, 164 Cal. 481, 129 P. 791; Walsh v. Standart, 174 Cal. 807, 164 P. 795; Rigall v. Lewis, 1 Cal.App.2d 737, 738, 37 P.2d 97. Nor can he challenge a finding of the trial court made at his instance. Snow Mountain Water & Power Co. v. Kraner, 191 Cal. 312, 216 P. 589; McCann v. Children's Home Society of California, 176 Cal. 359, 168 P. 355. In the present case, therefore, defendant cannot attack a verdict resulting from an erroneous instruction which it prompted. Benoit v. Perkins, 79 N.H. 11, 104 A. 254; Frascone v. Louderback et al., 153 App.Div. 199, 138 N.Y.S. 370.

[5, 6] Defendant contends that the instruction is not erroneous when read with the prior and correct instruction. The prior instruction informed the jury that the employees could be exonerated and the employer held liable if the latter were independently negligent in some respect. Defendant maintains that the jury's verdict was based upon a finding of such independent negligence, but denies that there was sufficient evidence to support such a verdict. Questionable and incomplete instructions may be rendered innocuous if it is clear, when they are read and considered with the other instructions, that the jury was not misled. James v. Frazee, 209 Cal. 456, 288 P. 784; Hurtado v. San Diego Electric Ry. Co., 204 Cal. 446, 268 P. 620. The error in a misleading or incomplete instruction, however, is not removed by other correct instructions when, as in the present case, the record clearly indicates that the jury was confused on the matter covered by the instruction and followed the erroneous instruction in reaching its verdict.

[7] Defendant claims that the instruction given differs materially from the one requested and that it therefore did not invite the error. There is, however, no essential difference between the two instructions. The requested instruction was that the jury need not hold "the individuals English and Parkhurst * * *". The court's instruction was that the jury need not hold "either of the personal defendants * * *". Complete identity of the two instructions is not essential to an application of the principle of invited error. The error is invited if the two are substantially the same in meaning. Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 186 P. 772; Chase v. Southern Pac. Co., 119 Cal. App. 341, 6 P.2d 540.

[8, 9] Defendant may not avoid the application of the doctrine by asserting that the error was not deliberately or wilfully induced. The good faith of defendant is immaterial. It is incumbent upon counsel to propose instructions which do not mislead a jury into bringing in an improper verdict. Whether deliberate or not, defendant's action was responsible for the erroneous instruction and verdict. Defendant must therefore accept them as correct.

The judgment is affirmed.

We concur: GIBSON, C. J.; SHENK, J.; CURTIS, J.; CARTER, J.; EDMONDS, J.

S. & G. GUMP CO. v. CITY AND COUNTY OF SAN FRANCISCO.

S. F. 15997.

Supreme Court of California.

June 19, 1941.

Rehearing Denied July 17, 1941.

1. Taxation ⚿79, 85

Consigned property may be assessed to its owner, but it may also be assessed to its lawful possessor. Pol.Code, §§ 3628, 3629, 3639.

2. Taxation ⚿85

Even where assessor knows that personalty does not belong to possessor to whom it is assessed, the assessment is valid in absence of specific information to assessor regarding the owner since assessor has no other recourse than to assess property to the possessor. Pol.Code, §§ 3628, 3629, 3639.

3. Taxation ⚿335

Where dealer filed statement with assessor without segregating property held on consignment from merchandise owned by dealer, assessor was not required to comply with dealer's request, made long after the statement was filed, to assess the consigned property to dealer as bailee for various owners and to record assessment of property separately from property owned by dealer, and the failure to make the assessment in accordance with the request, which was not made under oath, did not affect validity of assessment. Pol.Code, §§ 3628, 3629, 3639.

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In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by S. & G. Gump Company against the City and County of San Francisco to recover taxes paid under protest. From an adverse judgment, plaintiff appeals.

Affirmed.

Charles A. Christin and T. J. Keegan, both of San Francisco, for appellant.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondent.

EDMONDS, Justice.

In 1936, the appellant paid under protest taxes upon personal property which was held by it on consignment and subsequently sued to recover the amount of such payment. There is no dispute concerning the facts and the judgment in favor of the respondent is based upon a construction of the applicable statutes.

At the time the assessment was made, the appellant was a dealer in art goods and merchandise and had in its possession certain goods entrusted to it for sale. It filed with the assessor of the City and County of San Francisco a statement or declaration of taxable personal property owned by it on the first Monday of March. In this statement the property held on consignment was not segregated from the merchandise owned by the appellant. Later, the appellant requested the assessor to assess the consigned property to it as bailee for the various owners and to record the assessment of such property separately from that of the property owned by the corporation. This request was not made under oath but in the form of a letter in which the appellant offered to furnish the names of the consignors and bailors, together with a list showing the items of personal property owned by each one of them. The assessor refused to change the assessment theretofore made.

By the provisions of section 3629 of the Political Code as then in effect (See secs. 441 et seq., Revenue and Taxation Code), the assessor was required to exact from each person a statement under oath setting forth "all the real and personal property not exempt from taxation owned by such person, or in his possession, or under his control, at twelve o'clock meridian on the first Monday in March". The preceding section required the assessor to "assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was" at that time. Section 3639 of the Political Code provided: "When a person is assessed as agent, trustee, bailee, guardian, executor, or administrator, his representative designation must be added to his name, and the assessment entered on a separate line from his individual assessment."

The appellant contends that the assessment levied upon the goods which it held on consignment was void because it was not separately assessed in accordance with the statutory requirement. In support of the judgment, the city takes the position that the appellant's offer to give the assessor the names of the various owners and the particular items of personal property owned by each one with its value was not a statement under oath, and, for that reason not entitled to consideration. It also declares that as property may be assessed to one not its owner, and as the appellant did not apply to the board of equalization for relief, no recovery may be had.

[1, 2] Although consigned property may be assessed to its owner, it may also be assessed to its lawful possessor. RCA Photophone, Inc. v. Huffman, 5 Cal.App.2d 401, 42 P.2d 1059; Thompson v. Board of Supervisors, 13 Cal.App.2d 134, 56 P.2d 571. And even when the assessor knew that certain property did not belong to the person to whom it was assessed, the assessment was upheld because in the absence of specific information as to the owner, "the assessor had no other resource than to assess the property to the plaintiff * * * as agent or trustee of parties unknown to him which he in effect did." Title Guaranty, etc., Co. v. Los Angeles County, 3 Cal.App. 619, 621, 86 P. 844, 845. In another case, an investment company refused to disclose to the assessor the names of the owners of bonds and interim certificates left with it for safekeeping, and the assessment to the company was upheld. S. W. Straus & Co. v. Los Angeles County, 128 Cal.App. 386, 17 P.2d 757.

[3] It is true that in neither of these cases did the assessor know the names of the owners of the property, whereas the appellant here offered to supply that information. But the offer was made long after the appellant filed the formal statement required by law and in correspondence denying liability for the assessment as it stood on the assessor's books. Under these circumstances, the assessor was not required to comply with the appellant's request. Moreover, it did not choose to apply to the board of equalization for a modification of the assessment to show the names of the owners of the property in controversy. This could have been done either before or after payment. Title Guaranty, etc., Co. v. Los Angeles County, supra; S. W. Straus & Co. v. Los Angeles County, supra. But the failure to make the assessment in accordance with the appellant's request did not affect its validity and the appellant was liable therefor.

The judgment is affirmed.

We concur: GIBSON, C. J.; TRAYNOR, J.; CARTER, J.; SHENK, J.

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18 Cal.2d 123

WINDER v. WINDER.

L. A. 17855.

Supreme Court of California.

June 19, 1941.

1. Executors and administrators 🔑234

The disqualification of executor who was claimant against estate, in regard to receiving and acting upon his own claim, did not extend to his co-executor. Probate Code, § 570.

2. Executors and administrators 🔑234, 429

Where there were two executors, the claim of one of the executors against the estate was properly presented to the other executor and upon rejection action was properly brought against him as executor. Probate Code, §§ 570, 573, 703, 711, 714.

3. Frauds, statute of 🔑138(4)
Limitation of actions 🔑50(2)

Where continuous personal services are performed under an express agreement for compensation upon termination thereof, and the agreement is unenforceable because it is not in writing, the reasonable value of the services may be recovered and the statute of limitations does not commence to run until termination of the services which is usually upon the death of the promisor. Civ. Code, § 1624; Code Civ.Proc. § 1973.

4. Executors and administrators 🔑206(1)

In order to support a claim for services made by a child or relative of a decedent, who remains with the decedent after majority, the circumstances must show either an express contract or that compensation was in the contemplation of the parties.

5. Work and labor 🔑7(2)

Intention to pay and expectation of compensation, in case of an adult child living with parent and rendering services, may be inferred from conduct, where equity and justice require compensation, as well as from direct communications between the parties.

6. Work and labor 🔑7(2)

To warrant finding of an "implied contract" to pay for services rendered by adult child living with his parent, the elements of intention to pay on the one hand and expectation of compensation on the other must be found to exist, but such elements may be inferred from the relation and situation of the parties, nature and character of services rendered, and any other facts or circumstances which may reasonably be said to throw any light upon the question at issue.

> See Words and Phrases, Permanent Edition, for all other definitions of "Implied Contract".

7. Executors and administrators ⚿206(1)

The right and justice of a claim for compensation of an adult child living with his parent for services rendered may be considered, but only as tending to aid in ascertaining intention and expectation of parties in relation to question of compensation for services in controversy.

8. Executors and administrators ⚿221(5)

Evidence sustained judgment for reasonable value of services rendered by adult son who took care of and maintained his mother who suffered from cancer, on ground that services were rendered under an agreement by mother to leave property to the son and that the services were performed in accordance with the agreement.

9. Appeal and error ⚿1071(6)

Where facts found precluded a finding against plaintiff on issue of statute of limitations, failure of trial court to find specifically on that issue did not require reversal.

10. Executors and administrators ⚿424

Where action on claim against estate was properly brought by claimant who was an executor, against the co-executor, the fact that in the original complaint the claimant also named himself as defendant in his official capacity as executor was not fatal, and the addition of the claimant's name was no more than "surplusage", especially in view of subsequent amendment omitting the claimant's name as a defendant.

> See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

In Bank.

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action by Jerome E. Winder against John R. Winder, executor of the estate of Ray Elizabeth Winder, deceased, on a claim against the estate for services rendered for the deceased. From an adverse judgment, defendant appeals.

Affirmed.

For prior opinion, see 108 P.2d 681.

William Ellis Lady, of Los Angeles, for appellant.

W. Neil Randolph and Percilla Lawyer Randolph, both of Los Angeles, for respondent.

SHENK, Justice.

The plaintiff, Jerome E. Winder, and John R. Winder, named as the defendant executor, are the surviving sons of Ray Elizabeth Winder, deceased. They were appointed co-executors in her will, wherein she left her entire estate to her grandchildren. After the will was admitted to probate, the plaintiff presented to his co-executor a claim against the estate in the sum of $6,500 as the reasonable value of services rendered to the decedent from 1918 to the date of her death on February 12, 1938. The defendant executor rejected the claim and the plaintiff brought the present action thereon within the period limited by section 714 of the Probate Code. The plaintiff had judgment for the sum of $2,700. The defendant appealed.

The first question to be considered is whether the claim was properly presented to the defendant co-executor and the action properly brought against him on the rejected claim.

Section 703 of the Probate Code provides: "If the executor or administrator is a creditor of the decedent, he shall file his claim with the clerk, who must present it for allowance or rejection to the judge. * * * If the judge rejects the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who shall appoint an attorney, at the expense of the estate, to defend the action. If the claimant fails to recover, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court."

The defendant contends that the claim was improperly presented to him as co-executor and that the court had no jurisdiction of the action in the absence of a presentation in compliance with said section 703. The plaintiff contends that where there are two executors, the provisions of the probate code are satisfied if the claim of one co-executor is presented to the other, and upon rejection an action is brought thereon naming the other co-executor as defendant.

Section 711 of the Probate Code provides that when a claim is presented to the executor or administrator before filing, he must endorse thereon his allowance or rejection. If the claim is allowed, it must be presented to the judge, who must endorse upon it his rejection or approval. Section 714 provides that when a claim is rejected and written notice is given to the claimant, suit must be brought against the executor or administrator within the specified time. Section 570 of the Probate Code provides: "When two or more executors or administrators have been appointed and one or more are absent from the state, or legally disqualified from serving, the act of the other or others shall be effectual for all purposes * * *."

[1] Admittedly the plaintiff, as a claimant against the estate, was disqualified from acting in the capacity of executor for the purpose of receiving and acting upon his own claim. But this disqualification did not extend to his co-executor whose acts, by the express provisions of section 570, were made effectual for all purposes. Speaking of the foregoing provisions, then a part of the Code of Civil Procedure, the court in the case of Gallivan v. Jones, 9 Cir., 102 F. 423, 429, said: "These provisions clearly cover and apply to cases where there is more than one executor or administrator, and one of them is a creditor of the estate; for in all such cases there is a qualified representative of the estate, capable of acting, and who is by the statute required to act, on the claim. But the legislature of the state recognized the fact that there might be cases in which there would be but one executor or administrator, who himself might have a claim against the estate * * *" and as to which special provision was made for presentation of the claim and action thereon, if rejected. In the Gallivan case the court approved the filing of the action on the claim naming the co-executor rather than the estate as defendant. See, also, Prob.Code., § 573; 11 Cal.Jur. 698, 773; 11A Cal.Jur. 772; 11B Cal.Jur. 315. The defendant's contention that it would open the door to fraud and collusion between co-executors to permit one executor to present his claim to his co-executor is without merit. The provisions of the code requiring that any claim approved by an executor or administrator must be presented to the judge for approval or rejection, and that any interested person may contest the validity of the claim, cannot be overlooked.

[2] We conclude that the plaintiff's claim was properly presented to the defendant as co-executor, and that the action thereon was properly brought against him as such.

The defendant also contends that the findings and conclusions of the trial court are not supported by the evidence. Particularly he points out that the plaintiff and the decedent sustained to each other the relation of parent and child and that in such a case the presumption is that the services of the child were not performed for compensation or reward. The defendant also relies upon his plea of the statute of limitations.

The decedent, Ray Elizabeth Winder, was born in Shropshire, England. Her sons, the plaintiff and the defendant, were born in this country. Before 1926 the decedent lived in San Diego. She and her husband were divorced. Shortly thereafter she sold some real estate received in the property settlement with her husband and removed to Los Angeles county. She commenced the construction of a home at 104 East Adams street in Alhambra. Her son, Jerome E. Winder, had lived with her. There is evidence that during its construction the mother induced Jerome to continue to live with her upon her promise to leave that property to him. Upon its completion Jerome took up his residence in the new home with her, took care of her and the premises, furnished household expenses, automobile upkeep and the cost of pleasure trips taken by them. The defendant was married and maintained his own household. In May, 1933, the plaintiff married and lived away from his mother's home until September of that year, when he returned.

The plaintiff and his wife were precluded from testifying by reason of the provisions of section 1880 of the Code of Civil Procedure. It appeared from the testimony of the defendant that in September, 1933, the brothers discussed the question of the care of their mother, who was suffering from cancer, and the desirability of hiring an attendant or companion for her at their joint expense. Instead of following that course, Jerome returned to his mother's home with his wife, and with the latter's assistance resumed the care and maintenance of the mother until her death, paid to her $25 per month as rent, furnished her with board and personal care, and paid all other expenses except medical, special nursing, and hospitalization. There is evidence that in September, 1933, when the plaintiff resumed the care of his mother, the latter reaffirmed her promise to leave the home to the plaintiff in return for his services. The court found the existence of that understanding between the mother and the plaintiff and that the plaintiff performed the services in accordance therewith. The mother did not compensate the plaintiff, but left all of her estate to be divided equally among one child of the plaintiff and two children of the defendant.

[3-7] It is the settled law of this state that when continuous personal services are performed under an express agreement for compensation upon termination thereof, which agreement is unenforceable because not in writing (§ 1624, Civ.Code; § 1973, Code Civ.Proc.), the reasonable value of the services may be recovered, and that the statute of limitations does not commence to run until the termination of the services, which, in such cases, is usually upon the death of the promisor. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146; Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Morrison v. Land, 169 Cal. 580, 147 P. 259; Estate of Rohrer, 160 Cal. 574, 117 P. 672, Ann.Cas. 1913A, 479; De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522; Burr v. Floyd, 137 Cal.App. 692, 696, 31 P.2d 402; Warder v. Hutchison, 69 Cal.App. 291, 231 P. 563; Mayborne v. Citizens' T. & S. Bank, 46 Cal.App. 178, 188 P. 1034. The relationship between the parties may repel the idea of contract (Murdock v. Murdock, 7 Cal. 511; Briggs v. Estate of Briggs, 46 Vt. 571, 577), and in order to support a claim for services made by a child or relation who remains with his parent or kin after majority the circumstances must show either an express contract or that compensation was in the contemplation of the parties. Long v. Rumsey, supra; Estate of Rohrer, supra; Friermuth v. Friermuth, 46 Cal. 42; § 210, Civ.Code; Briggs v. Estate of Briggs, supra; Ellis v. Cary, 74 Wis. 176, 42 N.W. 252, 4 L.R.A. 55, 17 Am.St.Rep. 125; Wainwright Trust Co. v. Kinder, 69 Ind.App. 88, 120 N.E. 419, 420. In the case last cited it was said: "The intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation, as well as from direct communications between the parties. * * * [The] expectation of compensation may coexist with higher motives prompted by affection or the sense of duty, and * * * the existence of the latter does not necessarily exclude the idea of pecuniary compensation. * * * To warrant the finding of such contract, the elements of intention to pay on the one hand, and expectation of compensation on the other, must be found to exist; but such elements, like other ultimate facts, may be inferred from the relation and situation of the parties, the nature and character of the services rendered, and any other facts or circumstances which may reasonably be said to throw any light upon the question at issue.

"The right and justice of the claim for compensation, or the wrong and injustice, if any, attending such claim, may be considered, but only as tending to aid in ascertaining the intention and expectation of the parties in relation to the question of compensation for the services in controversy. 9 Cyc. pp. 242–243. * * *

"In this case it was a question for the trial court to determine from the evidence whether the facts and circumstances shown thereby were sufficient to rebut the presumption that the services of appellee were rendered gratuitously."

[8] The foregoing is in harmony with the statutes and decisions of this state, and we conclude that the evidence fully supports the findings and judgment of the trial court. The reasonableness of the amount adjudged by the court to be due to the plaintiff is not open to question.

[9, 10] The failure of the court to find specifially on the issue of the statute of limitations does not require a reversal. The facts otherwise found preclude a finding against the plaintiff on that issue. The fact that in the original complaint the plaintiff also named himself as defendant in his official capacity as executor is not fatal. As the action was properly brought against John R. Winder as executor, the addition of the name of the co-executor was no more than surplusage, especially in view of an amendment omitting his name as a co-defendant.

The judgment is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; TRAYNOR, J.; EDMONDS, J.; CARTER, J.

LA LAGUNA RANCH CO. v. DODGE et al.

L. A. 16911.

Supreme Court of California.

June 20, 1941.

Rehearing Denied July 19, 1941.

1. Mines and minerals ⚷79(1)

The term "overriding royalty" is applied generally in the oil industry to such fractional interests in the production of oil and gas as are created from the lessee's estate, regardless of whether the royalty is created by reservation when original lessee transfers his interest by a sub-lease, or whether it is created by grant when original lessee conveys a fractional share to a third person.

See Words and Phrases, Permanent Edition, for all other definitions of "Overriding Royalty".

2. Mines and minerals ⚷79(1)

The term "royalty" is generally applied to fractional interests in production of oil and gas, created by landowner either by reservation, when an oil and gas lease is entered into, or by direct grant to a third person.

See Words and Phrases, Permanent Edition, for all other definitions of "Royalty".

3. Mines and minerals ⚷47

A landowner does not have an absolute title to the oil and gas in place as corporeal real property, but rather has the exclusive right to drill for oil and gas on his premises.

4. Mines and minerals ⚷73

Where the owner of land enters into an oil and gas lease which grants to an operating lessee the privilege of entering upon the land for the purpose of producing oil and gas, the interest created in lessee is a "profit a prendre", that is, an "incorporeal hereditament" or "interest in real property".

See Words and Phrases, Permanent Edition, for all other definitions of "Incorporeal Hereditament", "Interest in Real Property" and "Profit a Prendre".

5. Mines and minerals ⚷79(1)

Where, after entering into an oil and gas lease which grants to an operating lessee the privilege of entering upon land for the purpose of producing oil and gas, the lessor assigns to third persons fractional interests in the royalties which he has reserved to himself, the holder of such fractional interests acquires an "interest in real property", or "incorporeal hereditament", analogous to the right to receive future rents of real property.

6. Mines and minerals ⚷73, 79(1)

The California cases dealing with oil leases and overriding royalty interests under the potential possession doctrine are no longer controlling.

7. Mines and minerals ⚷79(1)

The interest created by an agreement for royalty or overriding royalty in oil and gas produced depends on intention of the parties involved.

8. Mines and minerals ⚷79(1)

A landowner lessor may grant a fractional interest of his reserved royalty with intent that interest shall not endure beyond limits of existing lease, and in such case the grantee acquires an "interest in real property" but the grant is not the grant of a "profit a prendre".

9. Mines and minerals ⚷74, 79(1)

An operating lessee under an oil and gas lease may assign an interest in his profit a prendre with intent to make assignee a tenant in common of entire leasehold estate, or he may retain in himself the operating rights and convey to the assignee merely a fractional share of the oil and gas produced in the form of an "overriding royalty".

10. Mines and minerals ⚷79(1)
Tenancy in common ⚷3

The court will not construe royalty interests created for duration of a specific oil and gas lease as granting the right to enter upon the land for purpose of carrying on oil production or as creating a tenancy in common in the profit a prendre for that purpose, in absence of a clear indication that such was intent of the parties.

11. Tenancy in common ⚷3

Where agreement creating overriding royalty interest recited that operating lessees were required to commence drilling of an oil well and indicated that grantees of the overriding royalty interest were to furnish capital but were not to enter upon the land for purpose of drilling for oil and gas, no tenancy in common was created in the profit a prendre of the operating lessees.

12. Mines and minerals ⚷79(1)

Overriding royalty interests created by operating lessees without intent that grantees should become tenants in common of the

lessees' profit a prendre, were "interests in real property" which were limited to duration of existing lease, and termination of lease by lessees' voluntary surrender of leasehold by quitclaim deed as permitted by lease terminated the overriding royalty interests created thereunder, notwithstanding that forfeiture provisions in lease were allegedly not complied with.

CARTER, J., dissenting.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by the La Laguna Ranch Company against E. G. Dodge, etc., and others, to quiet title to certain real property. Judgment for plaintiff, and Hugo D. Newhouse and another appeal.

Affirmed.

Russell P. Tyler, of San Francisco, for appellants.

Wirt Francis, of San Diego, and Leland Crawford, of Santa Barbara, for respondent.

Percy C. Black, of Los Angeles, for Continental Oil Co.

Martin J. Weil, of Los Angeles, for General Petroleum Corporation of California.

Salisbury, Robinson & Himrod, of Los Angeles, for Gilmore Oil Co.

Frederick T. Fuller, of Los Angeles, for Milburn & Hamilton and others.

Robert E. Paradise, of Los Angeles, for Richfield Oil Corporation.

Frederick D. Anderson and Bertram L. Linz, both of Los Angeles, for Seabord Oil Co.

C. La V. Larzelere, of Los Angeles, for Signal Oil Co.

McCutchen, Olney, Mannon & Greene, of Los Angeles, for Shell Oil Co., Inc.

Pillsbury, Madison & Sutro, of San Francisco, and Lawler, Felix & Hall, of Los Angeles, for Standard Oil Co. of California.

Charles C. Stanley and R. K. Barrows, both of Los Angeles, for Texas Co.

W. F. Kiessig, of San Francisco, and Harrison Guio, of Los Angeles, for Tide Water Associated Oil Co.

Paul Gregg and L. A. Gibbons, both of Los Angeles, for Union Co. of California.

Ralph F. Forch, of Los Angeles, for Wilshire Oil Co.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for Honolulu Oil Co.

GIBSON, Chief Justice.

The plaintiff commenced this action in the superior court of Santa Barbara county to quiet title to certain real property situated in that county. Defendants Hugo D. Newhouse and Arthur A. Newhouse appeal from a judgment in favor of the plaintiff. The facts are for the most part undisputed. Prior to October 18, 1935, plaintiff was the owner in fee of the property in question. On or about that date an oil and gas lease was entered into between plaintiff, as the lessor, and C. C. Boatright and A. M. Meacham, as lessees. The lease was to continue for a period of five years and for so long thereafter as drilling operations were being conducted or oil and gas were being produced in paying quantities. The lessor was to receive a sum equal to one-eighth of the market price of the oil and gas produced as a royalty, or if no oil was sold, the royalty was to be paid in kind. After the expiration of one year a rental of a stipulated price per acre per year was provided in lieu of continuous drilling and development by the lessees. The lessees were required to commence the drilling of a well within sixty days of the date of the lease and the first well was to be completed within one year. Breach of any of the terms of the lease and the failure to remedy such breach within thirty days after written notice from the lessor gave the lessor the option to forfeit all rights of the lessees.

In November, 1935, the lessees entered into a written agreement by which they assigned to the defendants herein a fractional interest, therein termed an "overriding royalty", in all petroleum, oil, or gas thereafter produced under the terms of the lease. Defendants' claim of an interest in the real property here involved is founded upon this assignment of a fractional interest in the oil to be produced. On or about May 19, 1936, after the president of the plaintiff company had indicated that it was about to declare a forfeiture of the lessees' interest for failure to commence the drilling of a well within the sixty-day period, quitclaim deeds were executed from the lessees and their successors in interest to the lessor, La Laguna Ranch Co. Each deed contained a clause indicating that the lessees had been unable to comply with the terms of the lease. The superior court found that the lessees had forfeited all their right and interest in the land, that the claim of the defendants, Hugo D. Newhouse and Arthur A. Newhouse, was without merit and that neither of the defendants had any right, title or estate in the real property in question. On the basis of these findings a decree was rendered quieting title in favor of the plaintiff, and from this judgment defendants have appealed.

The question thus presented for our determination may be stated as follows: Does the interest of the holder of a fractional share in the production of oil, which is created out of the estate of the operating lessee, survive after the lessee's voluntary surrender of the leasehold by a quitclaim deed?

[1-6] The term "overriding royalty" is applied generally in the industry to such fractional interests in the production of oil and gas as are created from the lessee's estate. This is true whether the overriding royalty is created by reservation when the original lessee transfers his interest by a sub-lease or whether it is created by grant when the original lessee conveys a fractional share to a third person, as in the instant case. Similarly, the term "royalty" is generally applied to the fractional interests in the production which are created by the owner of the land either by reservation when an oil and gas lease is entered into or by direct grant to a third person. The legal attributes of such royalty interests have been considered in recent opinions of this court. The case of Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871, examined the nature of the various interests created under oil and gas leases in California and must be regarded as the starting point in considering the problems here presented. Thus, it is now established that the owner of land does not have an absolute title to the oil and gas in place as corporeal real property, but rather has the "exclusive right" to drill for oil and gas upon his premises. Callahan v. Martin, supra, 3 Cal.2d page 117, 43 P.2d page 792, 101 A.L.R. 871. Where the owner of land enters into an oil and gas lease which grants to an operating lessee the privilege of entering upon the land for the purpose of producing oil and gas, the interest thus created in the lessee is a profit a prendre, that is, an incorporeal hereditament or interest in real property. Callahan v. Martin, supra, 3 Cal.2d pages 118–122, 43 P.2d 788, 101 A.L.R. 871. Where, after entering into such an oil and gas lease, the lessor assigns to third persons fractional interests in the royalties which he has reserved to himself, the holder of such a fractional interest acquires an interest in real property, an incorporeal hereditament analogous to the right to receive future rents of real property. Callahan v. Martin, supra, 3 Cal.2d page 124, 43 P.2d 788, 101 A.L.R. 871; Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 651, 52 P.2d 237. The court did not determine the nature of the fractional interests in production which are created out of the lessee's estate. It was held, however, that the prior cases dealing with such "overriding royalty" interests on the theory that the assignments transferred personal property of which the lessee had potential possession could no longer be considered controlling in view of the abolishment of the "potential possession" doctrine in California. Callahan v. Martin, supra, 3 Cal.2d page 128, 43 P.2d page 797, 101 A.L.R. 871; Schiffman v. Richfield Oil Co., 8 Cal.2d 211, 225, 226, 64 P.2d 1081. It is clear, therefore, that the line of California cases dealing with oil leases and overriding royalty interests under the potential possession doctrine can no longer be considered controlling. See, for example, Western Oil, etc., Co. v. Venago Oil Corp., 218 Cal. 733, 24 P.2d 971, 88 A.L.R. 1271; Brookshire Oil Co. v. Casmalia, etc., Co., 156 Cal. 211, 103 P. 927; Smith v. Drake, 134 Cal.App. 700, 26 P.2d 313; Merrill v. California Pet. Corp., 105 Cal.App. 737, 288 P. 721; Black v. Solano Co., 114 Cal.App. 170, 299 P. 843; Jones v. Pier, 124 Cal.App. 444, 12 P.2d 646.

The question whether the overriding royalty interest of the defendants herein survived despite the quitclaim deeds by which the operating lessees surrendered their interest to the lessor has not been answered by the decisions of this court. A similar problem was presented, however, in the case of Payne v. Callahan, 37 Cal. App.2d 503, 99 P.2d 1050. The court in that case attempted to apply the principles laid down in Callahan v. Martin, supra, to the facts there involved. In Callahan v. Martin, supra, after recognizing that the interest of an operating lessee under an oil and gas lease was in fact a profit a prendre, it was determined that the lessor had attempted to convey a fractional interest which was to endure, not merely for the period of the existing lease, but after a termination of the lease as well. Thus, the lessor was held to have created a fractional interest not only in his own reserved royalty interest throughout the pending lease, but to have granted in addition a fractional interest in the reversion. See Schiffman v. Richfield Oil Co., supra, 8 Cal.2d page 223, 64 P.2d 1081; Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d page 651, 52 P.2d 237. The court held that the assignee of such an interest became, in effect a tenant in common of the landowner's exclusive right to drill for oil and gas after the existing lease had terminated. Callahan v. Martin, supra, 3 Cal.2d page 125, 43 P.2d 788, 101 A.L.R. 871. The holder of such an interest, after the termination of the existing lease, was held to possess a right of entry to go on the land and drill for the oil, or, in other words, to have been granted a profit a prendre similar to the interest held by the ordinary operating lessee under an oil and gas lease. In Payne v. Callahan, supra, the District Court of Appeal reasoned that if the lessor's assignment of a portion of his royalty interest had created in the assignee a profit a prendre in Callahan v. Martin, supra, then the assignment of an overriding royalty by an operating lessee should be held to create a profit a prendre in his assignee. Payne v. Callahan, supra, 37 Cal.App.2d page 516, 99 P.2d 1050. Similarly, the court said that if the lessor's assignment in Callahan v. Martin, supra, had made the assignee a tenant in common of the profit a prendre, the operating lessee's assignment should be held to have made the assignee a tenant in common in the lessee's profit a prendre. Payne v. Callahan, supra, 37 Cal.App.2d page 517, 99 P.2d 1050. Relying upon the decision in Payne v. Callahan, supra, defendants urge that the overriding royalty granted to them by the operating lessees herein made them tenants in common in the lessees' profit a prendre. Therefore, it is contended, as tenants in common of an interest in real property, defendants hold an interest which survives despite the asserted cotenants' attempt to quitclaim the entire interest back to the landowner-lessor.

[7, 8] The position urged by defendants in this appeal is one which is supported by the case of Payne v. Callahan, supra. We are convinced, however, that the position there taken by the District Court of Appeal is based upon a misconception of this court's holding in Callahan v. Martin, supra. In that case we recognized that the interest created in any case depended upon the intention of the parties involved. Under the facts there presented, we found that the landowner-lessor had intended to grant a fractional interest in the reversionary interest as well as a fractional share of his reserved royalty during the existence of the pending lease. See Schiffman v. Richfield Oil Co., supra, 8 Cal.2d page 223, 64 P.2d 1081; Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d page 651, 52 P.2d 237. But it is clear that the landowner-lessor does not intend in every case to make his assignee a cotenant in his exclusive right to drill for gas and oil. He may grant merely a fractional interest in his reserved royalty, an interest which is not intended to endure beyond the limits of an existing lease. Such a limited interest creates in the holder an interest in real property, an incorporeal hereditament Callahan v. Martin, supra, 3 Cal.2d pages 123, 124, 43 P.2d 788, 101 A.L.R. 871; Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d page 651, 52 P.2d 237, but it does not contemplate the grant of a profit a prendre. The assignee does not intend to attempt operation himself and is given no right of entry for such purpose. Those rights are held by the operating lessee, and the holders of royalty interests contemplate nothing more than the receipt of their share of the oil and gas production.

[9-11] Similarly, while the operating lessee may assign an interest in his profit a prendre which is intended to make the assignee a tenant in common of his entire leasehold estate, he may, on the other hand, intend to retain in himself the operating rights contained in the profit a prendre, conveying to the assignee merely a fractional share of the oil and gas produced in the form of an overriding royalty. See Schiffman v. Richfield Oil Co., supra, 8 Cal.2d pages 224, 225, 64 P.2d 1081. Thus, in so far as Payne v. Callahan, 37 Cal.App.2d 503, 99 P.2d 1050, holds that the fractional interests created either by the lessor or the operating lessee constitute a tenancy in common in a profit a prendre as a matter of law, it is expressly disapproved. In any case, the intention of the parties is controlling, and in the absence of a clear indication that such was the intent, the court will not construe royalty interests created for the duration of a specific oil and gas lease as granting the right to enter upon the land in question for the purpose of carrying on oil production or as creating a tenancy in common in the profit a prendre

for that purpose. The instrument creating the overriding royalty interests of the defendants herein evidences no intent that defendants were to become tenants in common of the lessees' profit a prendre. The instrument recites the fact that the operating lessees were required to commence the drilling of an oil well and indicates that the defendants' only function was that of furnishing capital for this purpose. All actual operation was left in the hands of the lessees and it is clear that the parties contemplated no right of entry in the defendants for the purpose of drilling for oil and gas. It follows that no tenancy in common was created in the profit a prendre of the operating lessees.

This court in Schiffman v. Richfield Oil Co., supra, 8 Cal.2d page 225, 64 P.2d 1081, did not define the nature of the interest created by the assignment of such overriding royalty interests as are present here. It was assumed, however, that no interest in the operating lessee's profit a prendre was intended to be conveyed. In Callahan v. Martin, supra, 3 Cal.2d pages 123, 124, 43 P.2d 788, 101 A.L.R. 871, similar rights to share in the production of oil and gas were held to be interests in real property when created by the lessor. That holding was based upon the analogy drawn between the right to receive future rents from real property and the right to receive oil royalties reserved by the lessor in an oil and gas lease. Callahan v. Martin, supra, 3 Cal.2d page 123, 43 P.2d 788, 101 A.L.R. 871, 884, 886 (1936); Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d page 651, 52 P.2d 237; Schiffman v. Richfield Oil Co., supra, 8 Cal.2d page 223, 64 P.2d 1081. A similar conclusion may be reached where the lessee, not intending to operate the oil wells himself, makes a sub-lease and reserves an overriding royalty for himself. Again the analogy between rents and the reservation of oil royalties justifies the classification of such oil royalties as incorporeal interests in real property. Where, however, the landowner grants an oil "royalty" without having previously leased the land to another (see Denio v. Brennecke, 6 Cal.App.2d 678, 45 P.2d 229); or where the operating lessee grants an "overriding royalty", it is clear that the interest thus created cannot be fitted into the category of rent. This court has recently referred to the fact that the traditional categories of real property interests crystallized long before interests such as these found their way into the courts. Callahan v. Martin, supra, 3 Cal.2d page 115, 43 P.2d 788, 101 A.L.R. 871. The law relating to such oil rights has been said to be in a formative stage and the interests thus created have been considered sui generis. Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d pages 650, 651, 52 P.2d 237; Schiffman v. Richfield Oil Co., supra, 8 Cal.2d page 226, 64 P.2d 1081. Thus, although only a portion of the oil royalties here considered can actually be compared to rent in the traditional sense, the purpose and scope of all such royalty interests are so similar that all should be considered equally to be incorporeal interests in real property, subject to the same requirements and protected by the same safeguards. See Spath v. Seager, 39 Cal.App.2d 10, 14, 102 P.2d 350; Fairbairn v. Eaton, 6 Cal.App.2d 264, 268, 43 P.2d 1113; Denio v. Brennecke, 6 Cal.App.2d 678, 680, 45 P.2d 229; 3 Summers, Oil & Gas (1938), § 556, p. 332, et seq.; [1938] 26 Calif.L.Rev. 480–486; [1940] 13 So.Calif.L.Rev. 393, 410–422; [1938] 11 So.Calif.L.Rev. 319, 326; [1937] 25 Calif.L.Rev. 220.)

[12] Defendants' overriding royalties were, therefore, interests in real property. Cf. Phillips Petroleum Co. v. Taylor, 5 Cir., 116 F.2d 994, 995; Rowan v. Harburney Oil Co., 10 Cir., 91 F.2d 122, 124; King v. Gant, 77 Okl. 105, 186 P. 960; Tennant v. Dunn, 130 Tex. 285, 110 S.W.2d 53. The interests thus created were not unlimited but were determinable interests limited to the duration of the existing lease. Termination of the oil and gas lease would result in the termination of the interests created under it. See Phillips v. Bruce 41 Cal.App.2d 404, 106 P.2d 922. Defendants do not contest the general principle involved, but it is contended that the lease in the present case was not lawfully terminated since the forfeiture provisions in the lease were not complied with. Ordinarily, however, such oil and gas leases contain clauses permitting the lessee to cease operations and to surrender the lease if he no longer considers it possible to continue operations profitably. The lease here involved provided: "5. Lessee may at any time * * * quitclaim the said premises, or any part thereof, to the Lessor. * * * Upon the quitclaiming of any part of the land to the Lessor, his successors or assigns, all rights and obligations of the parties * * * shall cease and determine. * * *" It follows that the surrender of the leasehold interest by the lessees consti-

tuted a termination of the profit a prendre and the leasehold. Defendants, as holders of the overriding royalty interests, had knowledge of the terms of the original lease incorporated by reference into the instrument creating the overriding royalties. Defendants contemplated the purchase of a speculative interest in real property which they intended should be determinable by the lessees. Failure to meet the conditions of the lease might result in forfeiture. Continued drilling might prove that no oil could be produced from the land in question. Any of these contingencies would result in the termination of defendants' interest. We do not see how the surrender of the leasehold by the lessees imposes any uncontemplated risk upon the holder of the overriding royalty. No contention was made that the surrender of the lease was a fraudulent act or that others were unjustly enriched at the expense of the overriding royalty holders. If fraud or inequity were present, the courts would stand ready to provide redress for the injured party. In the present case, however, the surrender of the leasehold by quitclaim deeds operated to terminate the interests of the defendants, as well as the interest of the lessees, in plaintiff's land.

The judgment is affirmed.

We concur: SHENK, J.; CURTIS, J.; TRAYNOR, J.; EDMONDS, J.

CARTER, Justice (dissenting).

I dissent.

The facts of the controversy presented in this action are simple. Plaintiff, the owner of real property, leased its property to Meacham and Boatright for oil and gas drilling and production purposes. As rental or consideration for the right thus granted, the lessees agreed to pay to the lessor one-eighth of the market price of the oil and gas removed from the property and sold, or one-eighth of the oil and gas so removed if the same were not sold. Thereafter, the lessees, for valuable consideration, assigned to appellants fractional interests in the oil and gas to be recovered from the leased property. The lessor had notice of the assignment. The lease contained a provision giving to the lessees the option of terminating the lease, surrendering the premises and ceasing operations whenever they chose, and thus be freed of any further liability or obligation under the lease. After the assignment and without the consent of the appellants, assignees, the lessees exercised that option and terminated said lease by delivering a quitclaim deed of the premises to the lessor. The lessor in this action obtained the judgment here appealed from quieting its title against the interests and rights of the assignees.

Briefly stated, the issue is whether a lessee may surrender his lease to the lessor, and thereby cut off the rights of partial assignees of the lessees. To propound the issue is to answer it in the negative, unless all principles of equity and justice are to be ignored.

It is conceded by the majority opinion that the right of lessees in the oil and gas lease is an interest in real property, attaining the status of a profit a prendre. Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871. Therefore, it must necessarily follow that the interest of which assignee of the entire leasehold obtains is an interest in real property, an incorporeal hereditament, a profit a prendre. See Callahan v. Martin, supra; Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237. Under such circumstances the law is clear that a lessee cannot defeat his assignee's interest by surrendering or abandoning the lease. Payne v. Callahan, 37 Cal.App.2d 503, 99 P.2d 1050; 32 Am.Jur. 345, 715; Thompson on Real Property, Perm. Ed., vol. 3, p. 778. By a partial assignment of the entire leasehold the lessee and the assignee become tenants in common of the profit a prendre, an interest in real property. Payne v. Callahan, supra. But for some undisclosed reason the majority opinion stops there. When the assignment by the lessee is of what might be termed a portion of the proceeds of the oil to be produced from the property under the lease and the lessee is to develop and operate the oil production enterprise, then the majority opinion determines that the assignee in such an assignment does not acquire a portion of the profit a prendre, or portion of the leasehold. It does cling, however, to the idea that such an assignee acquires an interest in real property but that that interest does not assume the status of a profit a prendre. Why such shift in position is made is not clear. If it is with reluctance, as it apparently is, that the majority opinion denominates the right of an assignee as an interest in real property of any dignity, then it must be that the motive therefore is to protect in some manner the interest of such assignee. That protection sought to be obtained must be to qualify the assignment for recordation, and thereby give constructive notice to subsequent assignees of the lessee that their rights are inferior to the fractional assignment. With the accomplishment of that protection, I am fully in accord. But why stop there? The majority opinion holds that the assignee has an interest in real property, and I see no reason for not carrying the reasoning from that premise to its logical conclusion. The assignee has an interest in real property, namely, an interest in the leasehold. Therefore the rule comes into operation that the lessee cannot defeat that interest by a voluntary surrender of the leasehold or by exercising his option to terminate the lease. The liabilities of the assignee that may flow from such a conclusion should not deter the court in securing to the assignee the rights to which he is entitled. He should assume the burdens along with the benefits and if he desires to limit them he may do so in many instances by appropriate agreement. For these reasons I find no sound basis for disapproving the case of Payne v. Callahan, supra, which is based on the same reasoning and is decisive of the conclusion I have reached.

Even if we assume that the majority opinion is correct in concluding that the interest assigned by the lessees in this case is not a profit a prendre or other type of interest in real property, because the right to enter and extract the oil is not included therein, as the assignees are interested in merely a share of the oil produced or the proceeds thereof, and intend to have the lessees operate the property rather than themselves, it must be conceded that the assignee does have an interest that is entitled to equitable protection. In Schiffman v. Richfield Oil Company, 8 Cal.2d 211, 64 P.2d 1081, this court felt obligated to protect the interest of the assignees of the lessee because they had such an interest as deserved and required protection. This result was accomplished without regard to whether those assignments were considered a transfer of an interest in the oil to be produced from the property or in the proceeds from such oil, and notwithstanding the fact that the assignees had no power to enter upon the property and extract the oil. In the case last cited, this court said at page 225 of 8 Cal.2d, at page 1088 of 64 P.2d:

"We are of the view that whether or not the royalty assignments in this case transferred to the holders thereof an interest in the leasehold, that is, in the profit a prendre to produce oil, in any event they vested in the holders a right to share in the proceeds of oil produced during the continuance of the lease by an assignee of the lease with notice. We prefer to place our decision on this ground without determining the question of interest in the leasehold estate as such, for the reason that a decision as to that matter might have important consequences as to problems such as that of liability under instruments of this type which are not directly presented in the instant case." And again at page 226 of 8 Cal.2d, at page 1088 of 64 P.2d:

"The rights of the holders of royalty assignments to an interest in the proceeds of oil produced by an assignee of the leasehold should not depend on whether the assignment is of a percentage of the oil 'to be produced, saved, and sold,' as in Western Oil etc. Co. v. Venago Oil Corp., supra, or is of a percentage of the net proceeds as in the instant case. Purchasers of royalty interests are generally investors who are not prepared to accept delivery of oil in kind, or to market their interest in the output of the well. Under the instruments in the Venago Case assigning percentages of the oil to be produced, saved and sold, the lessee clearly had the right to market the oil, returning to the royalty holder a money payment. This likewise was the obligation of the lessees herein.

"The holders of royalty interests from the lessee are not adequately protected unless they have a claim upon the proceeds of oil produced by one to whom the lessee has transferred the lease with notice of the royalty assignments. The purchaser of royalty assignments makes a highly speculative investment. The well may never be brought into production, or may soon fail. In consideration of investing his funds in an enterprise with a high risk of total loss, the purchaser of a royalty interest receives an assignment of a percentage of the oil to be produced, or the proceeds therefrom, which is expressly, as in the Venago Case, supra, or impliedly, as in the instant case, for the continuance of the lease. It is certainly not within the contemplation of the royalty holder that in addition to the other risks involved, the lessee may at any time terminate the royalty holder's interest by assigning the lease, and leave the royalty holder either remediless or with a claim for a share of the price received by the lessee for the transfer of the leasehold, or a claim for monetary damages. In view of the impossibility of estimating the life of the well, which may be for a long period of years, the amount of oil to be produced therefrom, and the market price over a long term, to give the royalty holder a present money claim in the event of an assignment of the lease manifestly would be inadequate. He has bargained for an interest in the oil produced during the term of the lease, or in the proceeds therefrom, and that is what he should receive. The law is not powerless to protect him through a lack of exact precedent."

Surely that interest should be protected whatever may be the name attached to it. There is no magic in a name. The assignees, although they may have contemplated that the operation of the property would be left to the lessee, certainly did not consider their interest so tenuous and uncertain that it could be surrendered at the whim of the lessees, their assignors. If they had had such understanding they would never have given anything of value for the assignment. If the aim of the fractional assignment or assignment of the proceeds or oil to be produced is to furnish capital for the operation and development of the property, then it is contemplated that the property will be operated and, of course, in order for such operation to occur, the lessees must not be permitted to surrender the property and terminate the lease. It must be remembered that as between the lessor and lessees the right to terminate the lease is a right pertaining solely to the lessees. It is an option they may exercise without regard to the lessor's desires. We are not therefore concerned with the interests of the lessor, and it might well be said that the only issue is one of the authority of the lessee to surrender the lease. If he has no such authority because of the assignment, then any assumed exercise of that power is nugatory. There is no violation of equitable principles. The lessor is not injured in any respect by the requirement that the lessee may not terminate the lease without the consent of the assignees for the reason that he has no legal right to compel any such termination or surrender. It is a matter solely within the discretion of the lessee. It is not a case wherein the lessor is terminating the lease for a breach by the lessee, an instance in which the right is his and not the lessee's. I am firmly convinced that every consideration of justice and equity in this case weighs heavily on the side of the assignees. As I see the situation which is presented in this case, on the one hand we have the lessor who is bound to keep the lease in force and has no legal right to compel the lessees to exercise the option of termination. In other words, he has no legal interest in the matter. He has granted the lease and has therein granted the right to the lessee to terminate it and to assign it. He must, therefore, contemplate that there will be an assignment. On the other hand, we have the assignee who has in good faith invested his money on the assumption that he will receive a return from the oil produced, that the lessee will develop and drill the property, and that he will not without justification terminate the lease and thus wipe out all of his rights. The lessee owes these duties to the assignee. The majority opinion in concluding that the assignees intended to take the risk of a termination by the lessees because of the provision for termination in the lease is based neither on sound reason nor founded on natural human tendencies. True, the assignees knew of that provision, but they also must have contemplated when investing their money that the lessees could not destroy their entire right at the lessees' whim or caprice. To me it is a sad commentary on our system of jurisprudence to concede that this court is so impotent that it cannot give protection to the assignees in a case of this kind when to do so is to injure no one, violate no rule of law, but on the contrary is to grant a remedy justly deserved. I positively refuse to give my assent to such a doctrine.

The circumstance that the lessor was about to declare a forfeiture of the lease for an alleged breach by the lessees when the surrender was made, is of no importance. The fact remains that no forfeiture had been declared, and from all that appears from the record there may have been many valid defenses to such action, or it may have been a case justifying equitable relief from forfeiture.

In my opinion the judgment should be reversed.

DAVIS v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11529.

District Court of Appeal, First District, Division 2, California.

June 19, 1941.

Rehearing Denied July 19, 1941.

Hearing Denied Aug. 14, 1941.

1. Trial 🔑253(9)

Litigants proposing a formula instruction must include the essential requirements which would make a verdict favorable to them proper.

2. Carriers 🔑306(1)
Street railroads 🔑85(4)

Right of way alone is not the determining factor as to liability of two different street car systems for injuries sustained by passenger in collision of two street cars, where evidence discloses independent negligence of operators of both cars.

3. Carriers 🔑306(1)
Street railroads 🔑85(4)

As respects liability of two different street car systems for injuries sustained by passenger in collision of two street cars, operator of one car cannot blindly and negligently proceed forward into intersection and cause a collision with another car merely because operator had a statutory or regulatory right of way.

4. Carriers 🔑306(1)
Street railroads 🔑85(4)

As respects liability of two different street car systems for injuries sustained by passenger in collision of two street cars, operator of one car exercising the right of way cannot excuse his negligence on that ground alone, but such right is available to him only in those instances where he has himself proceeded without negligence.

5. Trial 🔑244(4), 253(4)

In action for injuries sustained when municipally owned street car in which passenger was riding collided with privately owned street car, refusal to give privately owned street car company's proposed formula instruction, which was restricted to single claim that operator of municipal car refused to yield right of way, was proper as attempting to stress a specific part of evidence on which reliance was made and as ignoring other negligence on part of operators of both street cars.

6. Carriers 🔑320(21)
Evidence 🔑598(1)

Where testimony of witnesses was conflicting, it was function of jury to determine which of the witnesses spoke the truth and to weigh all the evidence for the purpose of determining which was the true story of the circumstances causing street car collision out of which litigation arose, and the number of witnesses was not material.

7. Appeal and error 🔑989

The function of appellate court on appeal from judgment on verdict of jury is not to examine all the testimony and determine wherein is the preponderance of the evidence, but is to determine whether evidence supports verdict when viewed in the light most favorable to respondent.

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by Leonard R. Davis against the City and County of San Francisco and others for injuries sustained by the plaintiff while riding as a passenger in a collision between two street cars. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Hearing denied; CURTIS, J., dissenting.

John J. O'Toole, City Atty., Henry Heidelberg, Deputy City Atty., and Walter E. Trefts, Jr., all of San Francisco, for appellants City and County of San Francisco and others.

Wm. M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants Market Street Ry. Co. and Hegarty.

Clayton H. Garvey, James M. Hanley, and Herbert Chamberlin, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sustained injuries while riding as a passenger on a westbound street car operated by defendant City and County of San Francisco. At the intersection of Market, Jones and McAllister streets a collision occurred between the car upon which plaintiff was riding and another westbound street car operated by the defendant Market Street Railway Company. The collision occurred a little beyond a safety zone maintained on Market street a little easterly of the intersection of the above named streets and at a point where it was necessary for the car operated by the

Market Street Railway Company to turn to its right northwesterly and across the westbound track of the municipal line in order to continue its course into and upon McAllister street. The testimony of the witnesses as to the circumstances leading to the collision was in sharp conflict. One group of witnesses testified that the municipal car did not stop at the safety zone or passenger station but proceeded directly into the intersection after the car of the Market street line had started from the safety zone. Another group of witnesses testified that the municipal car stopped at the passenger station and then proceeded into the intersection ahead of the other car. The witnesses are agreed that when the Market Street car took the switch and began to operate the turn, the municipal car was proceeding over the intersection in such a way that the fender and right front corner of the Market Street car crashed into the side of the municipal car striking the latter at about its middle. The two corporation defendants were joined with the operators on each of the two cars and the case went to the jury which returned a verdict in favor of plaintiff against all the defendants. These defendants have appealed from the judgment but the arguments have been presented by the Market Street Railway Company and the municipality separately.

[1-5] The Market Street Railway Company proposed an instruction which read in part: "If you find from the evidence that at the time and place in question the motorman of the K car of the Municipal Railway (City and County of San Francisco) violated any rules in reference to the operation of street cars, and if you further find that at the time and place in question the outbound McAllister street car had the right of way it was the duty of the motorman of the K car to give the outbound McAllister street car such right of way and that solely in consequence of the act of the motorman of the K car in failing so to do * * * the plaintiff * * * sustained the injuries * * * I instruct you that your verdict must then be in favor of the Market Street Railway Company. * * *" The refusal to give this proposed instruction is the only error assigned by the Market Street Railway Company and its motorman on this appeal. They argue that this presented the theory of their case and state that it was not covered by other instructions. Since these appellants proposed a formula instruction it was incumbent upon them to include the essential requirements which would make the verdict favorable to them proper. The proposal here under consideration was incomplete in the very important item of negligence on the part of these appellants notwithstanding the failure of the operator of the municipal car to yield the right of way. To have told the jury that the failure of the operator of the municipal car to give the other the right of way would in itself relieve the latter of liability would have caused confusion in the minds of the jurors. Right of way alone is not the determining factor when the evidence in the case discloses independent negligence of both parties. It is the settled rule that one may not blindly and negligently proceed forward into an intersection and cause a collision with another merely because he had a statutory or regulatory right of way. The cases discussing this subject point out that one exercising the right of way may not excuse his negligence on that ground alone but that the right is available to him only in those instances where he has himself proceeded without negligence. Thus the proposed instruction was restricted to the single claim that the operator of the municipal car refused to give the right of way, and in this respect it attempted to stress a specific part of the evidence upon which reliance was made and for that reason it was properly refused. 24 Cal.Juris. p. 843; Stuart v. Preston, 2 Cal.App.2d 310, 322, 38 P.2d 155, 39 P.2d 441; Jessie v. Giguiere, 24 Cal.App.2d 160, 165, 74 P.2d 310.

[6, 7] The appeal of the City and County of San Francisco and its employees presents a single issue: "Was the verdict of the jury against the preponderance of the evidence?" This is not a debatable question on an appeal of this character. The case was tried to a jury and witnesses were called by the plaintiff and by the two groups of defendants. There was a conflict in the testimony of these witnesses relating to the time when each of these two street cars approached the safety zone, as to whether one or both came to a stop, as to the time when each started, and as to the speed of each car immediately preceding the collision. In respect to the number of witnesses called, the theory advanced by the municipality was more generally supported and it appears that the greater number of these witnesses sought to put the blame of the collision upon the employees of the Market Street Railway Company. There were, however, a number of witnesses who tes-

tified to the opposite view. It was the function of the jury to determine which of these witnesses spoke the truth and to weigh all the evidence for the purpose of determining which was the true story of the circumstances causing the collision. The number of witnesses is of no matter, all that we can determine on this appeal is whether the evidence supports the verdict when viewed in the light most favorable to the respondent. But these appellants do not contend that there is not substantial evidence in support of the jury's verdict. It is their contention that this court should examine all the testimony and determine wherein is the preponderance of evidence. This of course is not the function of an appellate court. Bowman v. Carroll, 120 Cal.App. 309, 312, 7 P.2d 734.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

45 Cal.App.2d 423

HEYWOOD v. SOOY.

Civ. 11672.

District Court of Appeal, First District,
Division 2, California.

June 18, 1941.

Rehearing Denied July 18, 1941.

Hearing Denied Aug. 14, 1941.

1. Attorney and client 🔑30

Where each member of law partnership, on dissolution of the partnership by mutual consent, agreed, with respect to the unfinished business allotted to him, to conclude such business within a reasonable time and to collect and account for the fees received, the language presupposed the existence of a duty on the part of the partnership to perform the services necessarily involved in the completion of such unfinished business.

2. Attorney and client 🔑30

Where each member of law partnership, on dissolution of the partnership by mutual consent, agreed, with respect to the unfinished business allotted to him, to conclude such business within a reasonable time and to collect and account for the fees received, the duties imposed on each partner by the agreement were similar to the duties imposed by law on a surviving partner when a partnership is dissolved by the death of the other partner.

3. Attorney and client 🔑30

The test of what constitutes "unfinished business" of a law partnership, on dissolution by mutual consent is whether there existed, at time of dissolution, any contract of employment between the partnership and its clients for the performance by the partnership of the services thereafter claimed to be unfinished business.

See Words and Phrases, Permanent Edition, for all other definitions of "Unfinished Business".

4. Attorney and client 🔑30

Where no duty to perform legal services rests on partnership at time of dissolution of the partnership by mutual consent, such services as may thereafter be performed by either of the former partners under contracts of employment subsequently made with former clients cannot be considered "unfinished business" of the partnership at time of dissolution within meaning of agreement of the partners at time of dissolution to conclude the unfinished business allotted to them.

5. Attorney and client 🔑30

Where each member of law partnership, on dissolution of partnership by mutual consent in 1927, agreed, with respect to unfinished business allotted to him, to conclude such business within a reasonable time and to collect and account for fees received, and in 1928 one of the former partners was asked by bank which had formerly been represented by partnership for an annual retainer fee covering advice on all matters not involving litigation, to recommend counsel in another state, and former partner did recommend counsel in another state, and counsel in the other state on receiving a fee from the bank sent former partner a check for $2,500 as a "forwarding fee", so-called "forwarding fee" did not represent payment for services included in "unfinished business" of partnership.

See Words and Phrases, Permanent Edition, for all other definitions of "Forwarding Fee".

6. Attorney and client 🔑30

Where each member of law partnership, on dissolution of partnership by mutual consent in 1927, agreed, with respect to unfinished business allotted to him, to conclude such business within a reasonable time and to collect and account for fees received, and in 1928 trustee, who had engaged partnership before its dissolution, sent to the former partners a check to cover the balance of their fees and certain future services enumerated in letter, and thereafter, when trustee was sued for alleged misrepresentation in reference to the trust, trustee employed one of the former partners to defend the action, a service which was not mentioned in letter, fee which such former partner received did not represent payment for services included in "unfinished business" of partnership at time of dissolution.

7. Attorney and client ⚷30

Where each member of law partnership, on dissolution of partnership by mutual consent in 1927, agreed, with respect to unfinished business allotted to him, to conclude such business within a reasonable time and to collect and account for fees received, and in 1928 a guardian, who had employed partnership prior to dissolution to give advice in guardianship proceedings and for preparation and settlement of annual account, employed one of the former partners to represent him in an action to quiet title, fee received by former partner in the action to quiet title did not represent payment for services included in "unfinished business" of the partnership at time of dissolution.

◆

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action for an accounting by John Guthrie Heywood against Charles H. Sooy. From certain judgments and orders, or from certain portions thereof, the parties appeal.

Judgments and orders reversed, with directions.

Hearing denied; CARTER, J., dissenting.

G. G. Sanders, of San Francisco, for plaintiff.

J. H. Sapiro, Gregory Harrison, and A. A. Heer, all of San Francisco, for defendant.

SPENCE, Justice.

In this action for an accounting, a final judgment was entered in favor of plaintiff on June 11, 1937. A motion for a new trial was made by defendant which motion was denied on July 26, 1937, but the order denying the motion for new trial was accompanied by an order for the modification of the findings of fact, conclusions of law and judgment of June 11, 1937. Thereafter, and on August 4, 1937, the trial court signed an instrument entitled "Order and Judgment and Decree". It was ordered therein that the judgment of June 11, 1937, and so much of the order of July 26, 1937, as attempted to modify said judgment of June 11, 1937, be vacated and set aside and that the clerk enter nunc pro tunc as of July 25, 1937, "the following as the final and only judgment and decree in this action * * *." This judgment was entered on August 5, 1937. The nature of the various judgments and orders will be hereinafter discussed.

The defendant took an appeal from the judgment of June 11, 1937, from the order of July 26, 1937, and from the judgment of August 5, 1937. Plaintiff took an appeal from certain portions of the order of July 26, 1937, and thereafter took an appeal from certain portions of the judgment of August 5, 1937. The appeal of defendant is presented on one transcript and the appeals of plaintiff are presented on another transcript but all of said appeals have been consolidated.

There is no dispute concerning the material facts out of which this controversy arose. Plaintiff and defendant were attorneys at law and they engaged in the general practice of law as partners for several years. On December 31, 1927, the partnership was dissolved by mutual consent, the office files were allotted to the respective partners by agreement and there appears to have been an understanding with respect to which of the two partners would thereafter receive each of the retainers previously received by the firm and would perform the required services therefor. The partners further agreed, as found by the court, to "divide and allot as between themselves the said firm's unfinished business, and each of them thereupon mutually agreed at his own separate expense to liquidate and conclude said business allotted to him diligently and within a reasonable time, and to collect money due and to become due thereon, and to account to the other concerning all said matters within a reasonable time". The parties apparently concede that said finding was in accord with their agreement as no attack is made thereon. The parties do, however, attack the application made by the trial court of this provision of their agreement to the various matters which are the subject of this controversy.

[1, 2] Before proceeding to a discussion of these matters and to the contentions of the parties with respect thereto, it appears appropriate to discuss generally the nature of the rights and duties of the parties under the above-quoted provision of their agreement. It seems clear from the provision quoted that the term "unfinished business" was used by the parties to designate such pending and uncompleted business as had been undertaken by the partnership under contracts of employment with their clients. Each partner agreed, with respect to the "unfinished business" allotted to him, to "conclude said business" within a reasonable time and to collect and account for the fees received. This language presupposes the existence of a duty on the part of the partnership to perform the services necessarily involved in the completion of such "unfinished business". As we view the situation, the duties imposed upon each partner by said provision of the agreement were similar to the duties which are imposed by law upon a surviving partner when a partnership is dissolved by the death of the other partner. The rights and duties of such surviving partner were discussed at some length in Little v. Caldwell, 101 Cal. 553, 36 P. 107, 40 Am. St.Rep. 89. It was there said at page 561, of 101 Cal., at page 109 of 36 P., 40 Am. St.Rep. 89: "While it is certainly true when a professional partnership between attorneys at law is dissolved by the death of one, the survivor is entitled to his own future earnings, and is not required to make an allowance in the settlement of the partnership accounts for what may be termed the goodwill of the partnership, or for the profits of such future business as may be intrusted to him by former clients of the firm, still, in regard to unfinished business intrusted to the firm, * * * and which the client permits the surviving partner to complete, such a contract [of employment], although not capable of assignment, is still to be viewed by a court of equity as an asset of the partnership."

[3, 4] We are of the opinion that the test of what constitutes "unfinished business" of a partnership upon dissolution within the meaning of the rules set forth in Little v. Caldwell, supra, and within the meaning of the agreement of the parties here is whether there existed, at the time of the dissolution, any contract of employment between the partnership and the clients for the performance by the partnership of the services thereafter claimed to be "unfinished business". It will be noted that the cited case refers to the "contract [of employment]" and states that such contract is to be viewed by a court of equity as an asset of the partnership. It will be further noted that the cited case repudiates the notion that a partner is accountable after dissolution for any allowance for what may be termed the "good will" of the partnership which may result in contracts of employment after dissolution. While the cited case did not involve the precise points presented here, we believe that it clearly indicates the line of demarcation between "unfinished business", being business covered by contracts of employment at the time of dissolution, and other matters, not covered by contracts of employment, but which thereafter become the subjects of contracts of employment through the goodwill previously existing between the partnership and the clients. As to the "unfinished business", a duty to perform services rests on the partnership at the time of dissolution and continues thereafter to rest on the partners or the surviving partner. As to the other matters, no duty to perform services rests on the partnership at the time of dissolution and no duty continues thereafter to rest on the partners or surviving partner. And where no duty to perform the services rests on the partnership at the time of dissolution, such services as may thereafter be performed by either of the former partners under contracts of employment subsequently made with former clients cannot be considered "unfinished business" of the partnership at the time of the dissolution. In the light of the views which we have expressed, we may now proceed to a consideration of the three matters which are the main subjects of controversy on these appeals.

Roman Checa Matter

This matter had its origin in the representation by the partnership of the Pacific National Bank, which bank paid to the partnership an annual retainer fee covering advice on all matters not involving litigation. At the time of the dissolution, the retainer fees covering the period of the existence of the partnership were divided and Mr. Sooy thereafter continued as general counsel for the Pacific National Bank upon an annual retainer. Mr. Heywood concedes that he had no interest in this retainer after the dissolution.

Long prior to the dissolution of the partnership, Roman Checa became indebted to the bank upon a guaranty of the indebtedness of the Eagle Steamship Company, which indebtedness had not been paid. Roman Checa had made certain assignments to the bank of his stock and of his participating interest in the Creole Syndicate as security. The bank, without consulting the partnership, had employed New York counsel to institute an action on behalf of Roman Checa against the Creole Syndicate. That litigation had been pending for some time before the advice of the partnership was sought on any phase of this matter. Before said New York action had been brought to a successful conclusion, Roman Checa was adjudicated an involuntary bankrupt in the United States District Court in New York. After the dissolution of the partnership and early in 1928, the Creole Syndicate paid to Roman Checa's trustee in bankruptcy the sum of $175,000 in settlement of the action brought by Roman Checa in New York. Thereafter the general creditors of Roman Checa challenged the priority of the bank's claim and other persons claimed to have priority over the bank by reason of prior assignments from Roman Checa. The bank became alarmed and sent one of its officers to New York to look out for its interests. Before said officer left San Francisco, and on March 12, 1928, Mr. Sooy was asked to recommend counsel in New York to represent the bank in its controversy with the trustee and the other creditors of Roman Checa. Mr. Sooy did recommend other counsel in New York and on March 12, 1928, gave said officer of the bank a letter of introduction to such counsel. Said New York counsel accepted employment by the bank, concluded the matter by a substantial recovery for the bank in 1930, received a fee from the bank of $10,000 and thereafter sent Mr. Sooy a check for $2,500 as a "forwarding fee".

[5] Mr. Heywood contends that he has the right to share in said fee of $2,500 received by Mr. Sooy claiming that it represents the payment for services included in the unfinished business of the partnership at the time of the dissolution. We find no merit in this contention. It appears unnecessary to discuss the delicate question of the nature of a so-called "forwarding fee" or the question of whether it represents payment for services performed by the recipient thereof. It is a sufficient answer to Mr. Heywood's contention to point out that the partnership had no contract of employment at the time of the dissolution for the performance of any of the services for which the fee of $10,000 was paid to New York counsel and out of which the "forwarding fee" was paid to Mr. Sooy. If Mr. Sooy himself, rather than New York counsel, had entered into a contract of employment with the bank after dissolution for the performance of said services in the New York litigation, such contract could not have been treated as a partnership asset under the rules to which reference has been made. It necessarily follows that any fee received as a "forwarding fee" from other counsel, employed by the bank to perform such services, cannot be so treated.

Cohen Furniture Company Matter

This matter likewise appears to have had its origin in the representation by the partnership of the Pacific National Bank but the partnership had performed certain services and collected certain fees for these services in a trusteeship prior to the dissolution.

Mr. A. Cohen, doing business as A. Cohen Furniture Company, was indebted to the bank. He became involved in financial difficulties and was adjudicated a bankrupt in 1926. He made a composition with his creditors and, in connection therewith, a trust was created and Mr. Pitner, one of the officers of the bank, was named as trustee. Mr. Pitner employed the partnership as his attorneys as such trustee. This employment continued until the time of dissolution and the trustee had paid the partnership approximately $5,000 in fees up to that time. At that time, all that remained in the trustee's hands was a sum of money to be distributed and the affairs of the trust had been concluded except for the rendition of the trustee's final account. After the dissolution, a dispute arose with Mr. Pitner regarding the amount to be paid as the balance of the partnership's fees and the matter was referred to Mr. Mason, chairman of the board of the Pacific National Bank. He fixed the amount of the balance to be paid at $1,000 and this amount was paid by Mr. Pitner by a check made out to Sooy and Heywood on May 29, 1928. On that day Mr. Pitner addressed a letter to Sooy and Heywood stating that the check was being sent "agreeable to the settlement as to the balance of these fees". It was further stated therein that the check covered "the balance of your fees for services rendered in this matter, and include the following services still to be rendered. First, perusal of the trustee's final report as to its final form. Second, computation from the report of the trustee's fee". There is no controversy over the fees above mentioned.

In July, 1928, some of the creditors of the Cohen Furniture Co. brought an action against the bank and Mr. Pitner charging misrepresentation and fraud in bringing about the formation of the trust and a wrongful preference of the bank by Mr. Pitner in the proceedings. Said creditors sought the cancellation of the agreement, an accounting and a winding up of the affairs of the trust. The defense of this action was placed in the hands of Mr. Sooy, who appeared as counsel for the bank and who caused certain associates to appear as counsel for Mr. Pitner. For the services performed in the defense of this action, Mr. Sooy received a fee of $3,750.

[6] Mr. Heywood contends that he has the right to share in said fee of $3,750 claiming that it represents the payment for services included in the unfinished business of the partnership at the time of the dissolution. We find no merit in this contention. At the time of the dissolution, the litigation in which said services were rendered was not in contemplation of the parties. It is true that on December 31, 1927, the parties were under at least an implied contract to perform certain further services for the trustee. The exact nature of said further services was made clear by the acceptance of the $1,000 check on May 29, 1928, under the conditions set forth in the letter accompanying the same. The services performed in the defense of the new action filed in July, 1928, were not services for the performance of which the partnership was under a contract of employment at the time of the dissolution. The client was free to choose any counsel it saw fit for the defense of said action. Either of the former members of the partnership was free to accept or reject employment as counsel in the defense of said action. The contract of employment for the defense of said action was necessarily made after knowledge had been gained that the action had been filed in July, 1928, and the services performed pursuant to that contract was "new business" of one of the former members of the partnership rather than "unfinished business" of the partnership.

Shimizu v. Williams Matter

In April, 1926, the partnership was substituted for other counsel as attorneys for M. Shimizu, as guardian of the persons and estates of his minor daughters, Michic Shimizu and Masako Shimizu. An annual retainer was agreed upon to cover the preparation and settlement of the annual account of the guardian and for general advice concerning matters pertaining to the guardianship. The retainer fees up to the time of dissolution were divided and there is no dispute concerning Mr. Sooy's right to the retainer fees becoming due after the dissolution. The controversy in this matter arises over a fee of $5,000 received by Mr. Sooy in 1928 in a certain action brought by the guardian.

The estate of the minors consisted of certain real property in Signal Hill and a large sum of money accumulated from royalties derived from an oil lease with the Dabney Oil Syndicate covering said property. At the time of the substitution of the partnership as attorneys for the guardian in the guardianship proceedings, there was delivered to the partnership among other things a copy of certain pleadings in an action to quiet title brought by the guardian against one Williams and his wife who were the former owners of the property. Neither the Los Angeles attorneys who previously represented the guardian in the guardianship proceedings nor the partnership were ever attorneys for the guardian in said quiet title action prior to the dissolution of the partnership. Said action had been brought on behalf of the guardian by other Los Angeles attorneys, which last mentioned attorneys remained attorneys of record in said action until February 2, 1928, being more than one month after said dissolution.

In said quiet title action, the guardian alleged that in 1920, defendants Williams had sold the land in question to one Nakamura, who was then acting as guardian for said minors. It was also alleged that a deed had been delivered by defendants to Nakamura as guardian but that said deed had been lost or destroyed without being recorded. The minors sought in said action, brought by their subsequently appointed guardian, to quiet their title against the defendants. Defendants denied the execution of the deed and denied that said minors had any interest in the property and further alleged that the claimed contract of purchase and deed were in violation of the Alien Land Act. St.1921, p. lxxxiii. It does not appear that any further steps were taken by anyone in this litigation prior to the dissolution of the copartnership.

In the latter part of 1927, Shimizu wrote the partnership advising them that he had found the missing deed and was desirous of recording it. The Dabney interests were planning to do further drilling on the land and their counsel, desiring to clear the title before further money was expended, entered into negotiations directly with Williams in an attempt to get Williams to consent to judgment in favor of the minors upon payment by the Dabney interest to Williams of $3,000. Said counsel for the Dabney interests assured the partnership that said counsel's assistance in clearing the title would be without charge to the guardian or the minors. Some correspondence passed between the partnership and counsel for the Dabney interests in December, 1927, and a form for the substitution of the partnership as attorneys of record in the quiet title action was mailed to the partnership during that month by said counsel. Said form of substitution was signed by the partnership and returned to said counsel and Shimizu was requested by letter to call at the office of said counsel and sign the same. This he failed to do and it seems clear from the evidence that Shimizu took the position that his discovery of the deed obviated the necessity for any further litigation. He therefore did not employ the partnership to represent him in said quiet title action at any time prior to the dissolution on December 31, 1927, and did not sign the proposed substitution. Several letters were exchanged as a result of which Mr. Sooy went to Los Angeles on January 14, 1928, and at that time Shimizu finally employed Mr. Sooy to start a second action to quiet title against Williams and his wife and also against Nakamura, agreeing to pay Mr. Sooy a retainer fee in said litigation of $2,500 and further agreeing that any additional fee for said litigation should be fixed by the court in the guardianship proceeding. The substitution of attorneys in the first quiet title action was signed by Shimizu at that time and was subsequently signed by the original attorneys in that case. Said first quiet title action was thereafter dismissed by Mr. Sooy, the second quiet title was filed and prosecuted to judgment and Mr. Sooy collected a total fee of $5,000 in that litigation.

[7] Mr. Heywood makes the contention that he is entitled to share in said fee of $5,000 claiming that it represents the payment for services included in unfinished business of the partnership at the time of dissolution. Here again we find no merit in the contention. It seems entirely clear that prior to the dissolution, the partnership had not been employed by Shimizu for any purpose except to render services and to give advice in the guardianship proceedings under the retainer fee. Other counsel had been employed by Shimizu for the purpose of the quiet title action and it appears that Shimizu had done nothing to indicate any intention of employing the partnership for that purpose at any time prior to the dissolution. As late as January 6, 1928, Shimizu wrote Mr. Sooy stating: "I always thought this matter was settled while Mr. Geisler and Mr. Woolwine were taking care of this transaction * * *", and it was not until January 14, 1928, that any contract was made for the employment of Mr. Sooy in the quiet title action. It therefore appears that there was no contract of employment for the performance of the services in the quiet title action by the partnership at the time of the dissolution and that said litigation cannot be treated as unfinished business of the partnership.

The Judgments and Orders

The various judgments and orders may be briefly summarized. The controversy in the trial court involved several matters including the three matters which remain the subject of the controversy on this appeal.

In the judgment of June 11, 1937, the trial court decided in favor of plaintiff on all of the matters now remaining in controversy, holding that the Roman Checa matter, the Cohen Furniture Company matter and Shimizu v. Williams matter constituted unfinished business at the time of the dissolution. A money judgment in the sum of $7,185.29 was entered in favor of plaintiff and against defendant. The trial court further awarded to plaintiff a sum of money on deposit in one bank in the name of defendant and a sum of money on deposit in another bank in the name of Sooy and Heywood but provided that upon receipt of said sums by plaintiff certain credits should be given to defendant upon the above mentioned money judgment.

In the order of July 26, 1937, the trial court ordered an amendment of the findings of fact, conclusions of law and judgment, holding that the Roman Checa matter was not unfinished business and that Mr. Sooy was entitled personally to the fee therein and need not account therefor. The amount of the money judgment in favor of plaintiff was reduced accordingly to $5,968.63.

In the "Order and Judgment and Decree" of August 5, 1937, the trial court recited that judgment had been entered in June 11, 1937, and that the order had been entered on July 26, 1937; that the true judgment intended by the court was made obscure and uncertain by cross-references therein; that there were incorporated therein "determinations that may be in excess of and without the jurisdiction of this court in this action"; and that certain language was inadvertently and improperly included in said order of July 26, 1937; and that copies of said judgment and order had been served on certain banks and caused it to appear that a lien had been created on certain bank accounts thereby preventing the withdrawal of moneys from said accounts by defendant contrary to the intention of the court. It was therefore ordered, "in order that the final judgment in this case may be made to express the true intent of the court", that the judgment of June 11, 1937, and so much of the order of July 26, 1937, as attempted to modify said judgment of June 11, 1937, be set aside and that the clerk enter nunc pro tunc as of July 26, 1937, "the following as the final and only judgment and decree in this action * * *." The trial court then entered a new judgment in favor of plaintiff for the sum of $5,968.63 and eliminated all provisions awarding the sums of money in bank to plaintiff.

Appeals were taken by plaintiff and defendant as above indicated, plaintiff claiming that the trial court erred in holding that the Roman Checa matter was not unfinished business of the partnership at the time of the dissolution and defendant claiming that the trial court erred in holding that the Cohen Furniture Company matter and the Shimizu v. Williams matter were unfinished business of the partnership at the time of the dissolution. We have heretofore expressed the view that, upon the undisputed facts, none of said matters constituted unfinished business of the partnership at the time of the dissolution. It therefore becomes necessary to order a reversal and it appears appropriate to reverse with directions all of said judgments and orders.

The judgment of June 11, 1937, the order of July 26, 1937, and the "Order and Judgment and Decree" of August 5, 1937, are reversed with directions to the trial court to reframe its findings of fact and conclusions of law in accordance with the views expressed herein and to enter its judgment accordingly. The parties will bear their own costs on these appeals.

We concur: NOURSE, P. J.; STURTEVANT, J.

45 Cal.App.2d 468

LISSAUER et al. v. UNION BANK & TRUST CO. OF LOS ANGELES et al.

Civ. 6592.

District Court of Appeal, Third District, California.

June 19, 1941.

1. Evidence 🔑594

Where testimony is inherently improbable, trial court is under no obligation to accept testimony, although uncontradicted, but where testimony is not inherently improbable, and where there is nothing to indicate its improbability or untruthfulness, uncontradicted testimony cannot be ignored.

2. Reformation of Instruments 🔑45(10)

Evidence justified reformation of trust instrument so that trust property remaining at settlor's death would be distributed to children, on ground that agreement, by which the interest of each child was limited to a life estate in one-half of income only, was the result of a mistake.

3. Trusts 🔑21(2)

Where under one provision in a trust agreement neither beneficiary would ever have title to or possession of any part of the

trust principal, the interest of each beneficiary being limited to a life estate in one-half of the income only, and under a subsequent provision beneficiaries, consisting of settlor's children, were given the principal, their interest being vested as to title, but contingent as to time of enjoyment, provisions were so repugnant as to be ambiguous and render agreement unworkable. Civ. Code, § 1651.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Suit by Lottie Lissauer and others against the Union Bank & Trust Company of Los Angeles and others. From a judgment refusing to reform or terminate a trust, plaintiffs appeal.

Reversed with directions.

Horowitz & McCloskey and A. Ronald Button, all of Los Angeles, for appellants.

Loeb & Loeb and Paul J. Fritz, all of Los Angeles, for respondents.

PULLEN, Presiding Justice.

This is an appeal from a judgment refusing to reform or terminate a trust.

Dora Horn was the widow of Nathan Horn and the mother of Lottie Horn, who was at one time known as Lottie Starrels and now is Lottie Lissauer, and Harry Horn. When Nathan Horn died in 1927, his widow came into possession of approximately $55,000 as the beneficiary of certain policies of life insurance. She was inexperienced in business and could neither read nor write English. She had been born in Poland, and although could speak English, was accustomed to use the Yiddish language in communicating with others.

After the death of her husband she sought the advice of his business associate, P. H. Koolish, and it was decided to put the money in trust, and Mrs. Horn and Mr. Koolish went to the respondent Bank and there discussed the matter with Mr. Cameron, a trust officer of that institution.

The testimony as to what took place at the meetings concerning the trust arrangement is given largely by Mr. Koolish; Mr. Cameron, whose interest was only that of a trust officer, naturally not recalling the details of the meetings after a lapse of more than ten years.

Mr. Koolish testified that it was agreed the primary object of the trust was to protect Mrs. Horn during her life and to provide a modest income to care for her reasonable requirements, and a special provision to cover any emergencies. Having so provided for the mother, it was next to be determined what disposition should be made of the principal and income of the trust upon her death.

The original plan discussed, as Mr. Koolish testified, was a "permanent long time trust under which her money should be tied up not only during her lifetime but during the lifetime of the two children." But this plan was abandoned and Mr. Koolish then told Mr. Cameron, who was drafting the trust, "* * * that our discussion satisfied us that as long as Dora Horn was taken care of comfortably during her lifetime, and in view of the fact that Lottie was competent to take care of her own affairs, and Harry Horn had a separate trust which would take care of him for a number of years, that by the time Dora Horn passed away Lottie would be able to take care of herself with any funds that might be coming to her, and with this other trust which Harry had, it would not be necessary to protect that money beyond Dora Horn's death." On several occasions, so Mr. Koolish testified (and none of his testimony is contradicted), he told Mr. Cameron that the two children were to share alike in the ultimate distribution of any funds that might be left when Mrs. Horn died.

Mr. Cameron testified that in a conversation prior to the drafting of the trust agreement "Mr. Koolish told me that Mrs. Horn had funds with which she would like to create a trust for the benefit of herself and her children * * *." The document was drafted by Mr. Cameron, and then Mr. Cameron and Mr. Koolish undertook to explain to Mrs. Horn the document as prepared. At the time it was executed Mr. Koolish testified he presumed the trust agreement as prepared reflected Mrs. Horn's expressed intentions, and recommended to her that she execute it, which she did. She died in 1931.

The plan for the payment of principal and income of the trust fund after the death of Mrs. Horn, as provided in the agreement, was briefly, that upon the death of Mrs. Horn, one-half of the income of the trust was to be paid to each of the children during his or her lifetime; upon the death of either child, the trust should cease as to one-half thereof, and that proportion of the principal, together with any undistributed income, should be delivered by the trustee to the heirs at law of the deceased child, the income from the remaining one-half to be paid to the surviving child until its death; therefore the remaining principal and undistributed income to be delivered by the trustee to his or her heirs at law.

Immediately following the foregoing provisions appears this paragraph:

"This trust has been created by the trustor pursuant to a desire on her part to consummate a gift from her to Lottie Starrels and Harry Horn, her children, in consideration of the love and affection she bears to these beloved children. To this end, therefore, she has parted with all possession, title and rights of all kinds or description, in the property delivered to the trustee, except the reservation of the income as hereinbefore provided. Possession by the trustee of the assets of this trust as to principal, shall be for and on behalf of the beneficiaries, Lottie Starrels and Harry Horn, and their interests hereunder shall be construed to be vested as to title, and contingent merely as to the time of enjoyment."

In the first provision it would appear neither beneficiary would ever have title to or possession of any part of the trust principal, the interest of each being limited to a life estate in one-half of the income only. Under the latter paragraph the children are given the principal, their interest being vested as to title, but contingent as to the time of enjoyment. It is to be noted that the provisions of the first paragraph were a part of a printed trust form, but the latter section was not a form paragraph, but dictated by Mr. Cameron, the draftsman of the trust.

It is natural and usual in the creation of a trust to consider the beneficiaries as to their maturity, their characteristics as to being prudent and saving, or wasteful and extravagant, and their needs and relationship to the trustor. In this case such was done, and the testimony shows that Lottie, who was then married and known as Lottie Starrels, was perfectly able to take care of her own affairs and was a woman of business training and experience. Harry Horn was then still in college, and it was decided that a separate trust, sufficient to carry him for about eight or ten years, should be set up, which was done. That trust is not here an issue.

Upon the foregoing facts appellants claim the trust document contains two hostile and conflicting provisions and is therefore ambiguous; and by an amendment to the original complaint it is alleged the trustor, intending that her son and daughter should have the immediate distribution of the principal and income remaining at her death, executed the trust document in its existing form, mistakenly believing that it so provided, and that the provisions limiting the interests of the two children to the income were inserted by mistake.

Upon this latter allegation the court found it was not true that the Bank failed or omitted to follow the instructions of Dora Horn.

It is the contention of appellants that in so finding, the trial court did so contrary to the evidence. The evidence upon this subject is limited to that of Mr. Cameron and Mr. Koolish. Mr. Cameron testified that in a preliminary conversation Mr. Koolish told him "Mrs. Horn had funds with which she would like to create a trust for the benefit of herself and her children * * *." Mr. Cameron also recalled that he dictated the paragraph of the trust agreement which specifically provided that the title to the principal of the trust fund was to be presently vested in the two children, contingent only as to the time of enjoyment.

Mr. Koolish, a disinterested witness, was clear, positive and uncontradicted. He explained to the Bank the purposes of the trust and testified as to the conversations with Mr. Cameron. He told Mr. Cameron "the two children were to share and share alike in the ultimate distribution of funds," and "he was told they were to get a pro rata as between the two children Lottie and Harry," and when asked as to the pro rata of what, replied, "of any funds that might be left when Mrs. Horn passed away"; and again, "he (Mr. Cameron) was told after Dora Horn passed away the funds that might remain in the trust were to be distributed to Lottie Starrels and Harry Horn." This testimony is also corroborated by the dictated clause of the trust agreement, as well as by the testimony of Mr. Cameron, hereinbefore referred to.

Mrs. Horn could not read. Mr. Koolish read the agreement but did not ask Mr.

Cameron concerning its contents or to construe its meaning, and then told Mrs. Horn that she was protected. In regard to his understanding of the document at that time Mr. Koolish said: "I can only say this in that we told Don Cameron what we wanted in the trust, and at the time it was read and signed I presumed that it covered what our intent was."

It would seem that the uncontradicted testimony of Koolish, corroborated as it is by Mr. Cameron in part, and by the surrounding circumstances, such as the recognized business ability of Lottie Horn, and the creation of a separate trust to protect Harry Horn until he reached maturity, and the fact that there was then but one grandchild, and nothing to indicate the birth or survival of any more grandchildren, that the court was bound by the uncontradicted testimony in support of appellants. The grandchild was not an heir at law of the grandmother, and there was no legal or moral duty upon the grandmother to provide for him. The evidence is clear, comprehensive and credible. We can see nothing inherently untrue or unreasonable in the testimony of Mr. Koolish, a disinterested witness, and as pointed out, we do find corroboration in the testimony of Mr. Cameron, in the surrounding circumstances, and in the document itself.

[1] As said in Pene v. Mauk, 5 Cal.App.2d 428, 42 P.2d 697, 699: "Where the testimony is inherently improbable, the court is under no obligation to accept the same, although uncontradicted; but where the testimony is not such, where there is nothing to indicate its improbability or the untruthfulness thereof, the rule is well settled that uncontradicted testimony cannot be ignored." Citing, among other cases, Michaels v. Pacific Soft Water Laundry, 104 Cal.App. 349, 286 P. 165, 1071, and 10 Cal.Jur., p. 1143; Stewart v. Silva, 192 Cal. 405, 221 P. 191; Sun-Maid Raisin Growers v. Papazian, 74 Cal.App. 231, 240 P. 47.

[2] From the foregoing it would appear the trial court erred in finding there was no mistake in the drafting of the trust agreement.

[3] It would also appear that the instrument is so repugnant in its provisions as to be ambiguous and unworkable. This seems evident from a comparison of the two provisions already referred to, and particularly so in view of the effect to be given an original paragraph over a form paragraph as required by Section 1651 of the Civil Code.

By this latter provision it appears that the purpose was to make and describe a gift to two beloved children, Lottie Starrels and Harry Horn, who were the only beneficiaries. For them the trustee is to possess the principal of the trust, and their interests as to principal shall be construed to be vested as to title, and contingent merely as to the time of enjoyment.

If the contention of the trustee is correct, not one of the foregoing purposes is accomplished.

The judgment is reversed, and the trial court directed to make findings in accordance herewith and enter judgment in favor of plaintiffs.

We concur:

THOMPSON, J.; TUTTLE, J.

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45 Cal.App.2d 464

ITALIANI v. METRO-GOLDWYN-MAYER CORPORATION et al.

Civ. 6591.

District Court of Appeal, Third District, California.

June 19, 1941.

1. Literary property 🔑2

A moving picture scenario is designated in law as an "intellectual production", and as such is an "intangible incorporeal right", and exists separate and apart from the property in the paper on which it is written or the physical substance in which it is embodied.

See Words and Phrases, Permanent Edition, for all other definitions of "Intangible Incorporeal Right" and "Intellectual Production".

2. Limitation of actions 🔑20, 32(1)

The three year limitation statute, applicable to actions for taking, detaining or injuring goods and chattels, including actions for specific recovery of personalty, seeks to prescribe a limitation period for those actions which may be classed broadly under head of common law actions of trover, detinue and replevin and with the latter's statutory counterpart of claim and delivery. Code Civ.Proc. § 338, subd. 3.

3. Limitation of actions ⚷39(1)

An action for damages resulting from alleged plagiarism of moving picture scenario was an action sounding in "tort", to which the two year limitation statute was applicable, since the property forming basis of the action was "incorporeal" and was not "goods and chattels" nor "personal property" within the three year limitation statute. Code Civ. Proc. §§ 338, subd. 3, 339, subd. 1.

The term "goods and chattels" is not the equivalent of "personal estate" but is limited to visible, tangible, movable, personal chattels such as are objects of the senses, deliverable in specie, and does not include choses of action.

See Words and Phrases, Permanent Edition, for all other definitions of "Goods and Chattels", "Incorporeal", "Personal Estate", "Personal Property" and "Tort".

4. Limitation of actions ⚷39(1)

The word "liability" as used in two year limitation statute, applicable to actions on liability not founded upon instrument in writing, includes responsibility for torts and is applicable to all actions at law not specially mentioned in other portions of the statute. Code Civ.Proc. § 339, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Liability".

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by John Italiani against Metro-Goldwyn-Mayer Corporation and others for alleged plagiarism of a moving picture scenario which was the composition of the plaintiff. From a judgment of dismissal the plaintiff appeals.

Affirmed.

Arthur C. Webb, of Los Angeles, for appellant.

Loeb & Loeb, of Los Angeles, for respondents.

TUTTLE, Justice.

This action was brought to recover damages arising out of alleged plagiarism on the part of defendant, of a moving picture scenario which was the composition of plaintiff. A general demurrer to the amended complaint was sustained without leave to amend. This appeal is prosecuted from a judgment of dismissal thereafter entered against the plaintiff.

The sole question involved is whether or not the action is barred by the statute of limitations. Appellant contends that the action is governed by the three year period provided in section 338, subdivision 3 of the Code of Civil Procedure. If this is true, the action is not barred. Respondents contend that the action is barred by section 339, subdivision 1 of said code, which allows two years for the commencement of an action. If they are correct the judgment must be upheld, as the action is barred.

The complaint sets forth the fact that plaintiff is an author; that he wrote a scenario entitled "Johnny of the Circus"; that he submitted the same to defendant, Metro-Goldwyn-Mayer Corporation, but the latter rejected it as unsuitable for moving pictures, and returned it to plaintiff August 17, 1933; that within three years from the filing of the complaint "plaintiff is informed and believes and upon such information and belief alleges that the defendants and each of them, without the knowledge, consent or authority of or from the plaintiff, and continuously during said time, did deliberately and unlawfully appropriate and convert to their own use plaintiff's said literary composition and moving picture scenario, and said defendants did, for a profit, reproduce, sell, distribute and exhibit the same in a sound and talking motion picture photoplay entitled and designated 'O'Shaughnessy's Boy'. That defendants, and each of them, hold, use and represent to the public in advertising, publicity upon the screen and otherwise that said motion picture photoplay entitled 'O'Shaughnessy's Boy' is fully original with them and is their sole and exclusive property, but in truth and in fact the said motion picture photoplay entitled 'O'Shaughnessy's Boy' copies, appropriates and embodies plaintiff's said literary composition and moving picture scenario entitled 'Johnny of the Circus' and defendants and each of them have inextricably intermingled the same with other literary matters not found in plaintiff's said literary composition and moving picture scenario herein referred to, but which defendants have cunningly and shrewdly combined therewith;" that the said motion picture photoplay "O'Shaughnessy's Boy" was released and exhibited by defendants, and that they received profits therefrom in excess of $1,000,000.

Damages are prayed for, and an accounting demanded.

Said section 338, subdivision 3, supra, reads as follows: "Within three years: * * * An action for taking, detaining, or injuring any goods, or chattels, including actions for the specific recovery of personal property."

Section 339, subdivision 1, supra, provides: "Within two years: * * * An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision two of section three hundred thirty-seven of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder."

[1, 2] It is first necessary to determine the nature of the action. Appellant does not undertake to define it, other than to state that it is one "for misappropriation of literary property or conversion thereof", while respondents insist that the action sounds in tort. We believe that the position taken by respondents is sound. Frankel v. Irwin, D.C., 34 F.2d 142. The scenario is what the law designates as an "intellectual production". (In some instances this may be a misnomer.) As such, "it is an intangible incorporeal right, and exists separate and apart from the property in the paper on which it is written, or the physical substance in which it is embodied." 18 C.J.S., Copyright and Literary Property, § 5. The section relied upon by appellant refers to the taking, detaining or injuring any goods or chattels or the recovery of personal property. As we construe said section, it seeks to prescribe a statute of limitation for those actions which may be classed broadly under the head of the common law actions of trover, detinue and replevin—and with the latter's statutory counterpart of claim and delivery. All of these actions involve the concept of interference with possession of, or damage to, some specific tangible property, and are not concerned with intangible or incorporeal rights which may exist in connection with, or entirely apart from any particular piece of physical property. On page 557 of Ballentine's Law Dictionary, it is stated: "Goods and Chattels. This term is not the equivalent of 'personal estate', but is limited to visible, tangible, movable personal chattels—such as are objects of the senses—deliverable in specie and it does not include choses of action."

[3] The property which is the basis of this damage action is clearly incorporeal. As such it has no physical existence. Ballentine's Law Dictionary, page 628. It certainly does not come under the designation of "goods and chattels", and obviously the action is not one to recover personal property.

[4] Turning to the section relied upon by respondent, we believe that it is applicable to this tort action. It is said in Lowe v. Ozmun, 137 Cal. 257, 70 P. 87 (referring to said section): "There is no doubt that this provision includes the cause of action in the case at bar, unless the latter comes expressly within some other category of limitation. 'Liability,' as used in the section includes responsibility for torts, and 'is applicable to all actions at law not specially mentioned in other portions of the statute.' Piller v. [Southern Pacific] R. R. Co., 52 Cal. 42. See, also, Raynor v. Mintzer, 72 Cal. [585] 590, 18 P. 82; McCusker v. Walker, 77 Cal. [208] 212, 19 P. 382; Lattin v. Gillette, 95 Cal. 317, 30 P. 545, 29 Am.St.Rep. 115."

A similar holding appears in Lattin v. Gillette, 95 Cal. 317, 30 P. 545, 29 Am.St. Rep. 115.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

45 Cal.App.2d 401

PARK v. UNION MFG. CO. et al.

Civ. 12395.

District Court of Appeal, Second District, Division 1, California.

June 17, 1941.

Hearing Denied Aug. 14, 1941.

1. Partnership ⚷63

A "partnership" is not ordinarily regarded as a strict legal entity distinct from the individuals composing it, and having an independent existence, nor as a person, either natural or artificial.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership".

2. Partnership ⚷63

Regardless of whether a partnership is regarded as a distinct entity for all purposes, a "partnership" is frequently regarded with reference to particular rights and obligations and particularly in equity, as a body of itself with its own means appointed to its own debts.

3. Partnership ⚷63

In jurisdictions where the Roman law is the basis of the jurisprudence, the entity of the partnership is recognized and actions are allowed between the partner and the partnership.

4. Partnership ⚷63

Ordinarily, a "partnership" is not recognized as a legal entity like a corporation having as such a domicile or residence separate and distinct from that of the individuals constituting it.

5. Partnership ⚷63

A "partnership" may as a matter of fiction be treated as a quasi person or entity for certain purposes such as the keeping of partnership accounts and in marshaling assets. Bankr.Act, 11 U.S.C.A. § 1 et seq.

6. Partnership ⚷63

In most respects a "partnership" is not a person, either natural or artificial, but is a relation with no legal being distinct from the members who comprise it.

7. Partnership ⚷63

Under an exception to the rule denying the separate existence of two or more partnerships with an identical membership, such separate existence may be recognized under exceptional circumstances.

8. Partnership ⚷63

In California a partnership is not recognized as a separate entity distinct from the members who comprise it, apart from exceptional situations.

9. Partnership ⚷63
Workmen's compensation ⚷1434

Where injury sustained in course of employment by an employee of a partnership composed of husband and wife resulted from elevator accident in a building owned by spouses, and in which partnership business was conducted, evidence in employee's action against the husband was insufficient to sustain finding that partnership possessed an entity separate and distinct from that of the husband, so as to warrant recovery against husband, notwithstanding prior award of workmen's compensation against partnership. St.1929, p. 430, § 6; St.1931, p. 2370, § 26.

Appeal from Superior Court, Los Angeles County; G. P. Bullock, Judge.

Action by Fannie S. Park against the Union Manufacturing Company, etc., M. Harris, and others for injuries sustained by plaintiff while in the employ of the Union Manufacturing Company, and resulting from the fall of an elevator in a building owned by M. Harris. On motion of plaintiff, all defendants were dismissed with the exception of M. Harris. From a judgment in favor of plaintiff, M. Harris appeals.

Judgment reversed.

Lasher B. Gallagher, of Los Angeles, for appellant.

Jas. D. Randles, of Los Angeles, for respondent.

YORK, Presiding Justice.

On February 18, 1936, and for a long time prior thereto, respondent Fannie S. Park was employed as a garment worker by the Union Manufacturing Company, a copartnership composed of appellant M. Harris and his wife, Anna Harris. The business of said company was conducted in a seven story building owned by appellant and his said wife. On the date mentioned, while acting within the course of her employment with said copartnership, respondent sustained injuries when an elevator in said building dropped from the fifth to the first floor therein.

Prior thereto, appellant had procured a policy of workmen's compensation insurance for the benefit of his employees in which the employer was designated as "M. Harris dba Union Manufacturing Company".

Subsequent to the accident, respondent filed her application for compensation with the Industrial Accident Commission, in which Union Manufacturing Company was named as employer, and Pacific Employers Insurance Company was named the insurance carrier. In that proceeding an award was made in favor of respondent employee, and all parties were dismissed except the insurance carrier, in accordance with the provisions of the Workmen's Compensation Act (now embodied in the Labor Code).

Thereafter, on February 16, 1937, respondent initiated the instant action for damages on account of the injuries sustained by her in the accident, above referred to, against Union Manufacturing Company, a copartnership composed of M. Harris and Mrs. M. Harris, as well as against M. Harris and Mrs. M. Harris, individually, and also against Kurt Kunich, who was operating the elevator at the time the accident occurred.

At the beginning of the trial on motion of respondent, all defendants were dismissed with the exception of M. Harris. At the conclusion of the trial, judgment was rendered against M. Harris in favor of respondent employee for $2,500 damages and costs, the trial court having found, among other things, as follows:

"That the defendant, M. Harris, and his wife, Anna Harris, were copartners in the carrying on of a certain business in the M. Harris Building, under the fictitious firm name and style of Union Manufacturing Company.

"III. The court further finds the defendant, M. Harris, was the owner of the building located at 110 West 11th Street, Los Angeles, California, subject only to whatever community interest Anna Harris might have had in said building, by reason of the fact that she was the wife of the defendant, M. Harris; and the court finds that it is not true that, at all times mentioned in Plaintiff's Second Amended Complaint, the plaintiff herein was the servant or employee of this defendant, M. Harris, and the said Anna Harris, his wife, but, on the contrary, this plaintiff was the employee of the Union Manufacturing Company, a copartnership, possessing a separate and distinct entity from that of M. Harris, the defendant herein; and the court finds that it is not true that plaintiff's sole remedy is, or was, a proceeding before the Industrial Accident Commission of the State of California, pursuant to the provision of section 6 of the Workmen's Compensation Insurance and Safety Laws of the State of California, St. 1929, p. 430 (now section 3601 of the Labor Code, St. 1937, p. 269).

* * * * *

"Finally, the court finds that the defendant, M. Harris, was the owner and operator of the M. Harris Building; that he was not the employer of plaintiff on February 18, 1936, and that the Union Manufacturing Company, by whom plaintiff was employed at the time of the injury herein complained of, to-wit, on the 18th day of February, 1936, was a separate and distinct entity, and was the employer, as such, on the 18th day of February, 1936, of the plaintiff herein."

This appeal is prosecuted upon the grounds, (1) the evidence is insufficient to sustain certain of the findings; (2) the findings of fact do not support the conclusions of law or the judgment; (3) the trial court had no jurisdiction of the subject of the action and its judgment is a nullity.

Appellant states that the appeal is "predicated upon the contention of M. Harris that any person who is liable for the payment of workmen's compensation cannot be sued at law for damages by any person whose injury arises out of and in the course of his or her employment". In this connection, he argues that since section 26 of the Workmen's Compensation Act, St.1931, p. 2370, provides in part that "the claim of an employee for compensation shall not affect his claim or right of action for all damages proximately resulting from such injury or death against any person other than the employer" (now embodied in section 3852 of the Labor Code, St.1937, p. 273); and since section 6 of the said Act (now section 3601 of the Labor Code) provides that the liability for compensation is the exclusive remedy so far as the employer is concerned, "the decisive question here is whether M. Harris as one of the partners in the copartnership doing business under the firm name and style of Union Manufacturing Company was an employer of the plaintiff and could have been held liable for compensation".

Respondent urges that "employer" as used in said Act "should be strictly construed to include only those who, by the statute itself, are expressly described as employers, and should not include those engaged in activities not connected with the employment".

In order to answer the questions thus presented, it should first be determined whether the Union Manufacturing Company, a copartnership composed of M. Harris and Anna Harris, is an entity separate and distinct from M. Harris, as owner of the building in which the accident occurred.

Appellant, when called as a witness under section 2055 of the Code of Civil Procedure, testified that he was the owner of the seven story building, commonly known as the Harris Building, which was occupied by the Union Manufacturing Company except for the ground floor and three rooms on the third floor; that the Union Manufacturing Company in February of 1936 paid $1,800 per month rental to the M. Harris Building; that this rental was paid directly to him, said appellant. Later in the trial, said witness was asked by his attorney to explain to the court the manner or process by which payment of said rentals was made, whereupon said witness stated: "When I made a loan on the building, the company demanded a statement of how much the building is bringing in, and for that purpose we established the value of the rentals and how much that building is bringing in so I could make the loan, and not for any other reason. In fact, the lot that I purchased was purchased with money from the Union Manufacturing Company." He was then asked to explain what connection he had with the Union Manufacturing Company, to which he replied: "Well, the Union Manufacturing Company was in business for 15 years, and we needed larger quarters, and I took the money from the Union Manufacturing Company and purchased a lot; then I borrowed money for the Union Manufacturing Company to put up the building. As a matter of record, we have to keep books to know how much that building is bringing in and how much the business is bringing in, but it is being done by the same bookkeeper, by the same management." He also testified that no one except himself and his wife had any interest in the Union Manufacturing Company, and that the M. Harris Building stood in his name. Two policies of insurance were introduced in evidence, in one of which the named insured appears as "M. Harris, doing business as M. Harris Building"; and in the other as "M. Harris dba Union Manufacturing Company".

[1, 2] A search of authoritative sources upon the subject of the entity theory of partnerships discloses the following: "A partnership is not ordinarily regarded as strictly a legal entity distinct from the individuals composing it and having an independent existence nor as a person, either natural or artificial, nor as a being, or a legal being. However, there is some authority to the contrary, holding broadly that a partnership is an entity separate and apart from its members, or that it is a legal but not a social entity, and it has even been said that it is recognized in law as a person, or at least as a *quasi* person. Further, whether or not a partnership is to be regarded as a distinct entity for all purposes, the courts frequently have so regarded it with reference to particular rights and obligations, particularly courts of equity, and there is a general tendency at this day to complete the recognition of a partnership as a body of itself with its own means appointed to its own debts. So the entity of the partnership as such has frequently been recognized with reference to its ownership of property, the taxation of its property, its contracts with third persons, the rights of its creditors, including rights under insolvency and bankruptcy laws, the exemption of its property from execution for the debt of the partnership or of individual partners, and its liability for tort, although it cannot, as such be guilty of a crime." 47 Cor.Jur. 747, sec. 172.

[3-5] "The theory that a partnership is a legal entity distinct from and independent of the persons composing it has been repeatedly affirmed. In the Roman law the partnership was known as *'societas'*, and in those jurisdictions where the Roman law is the basis of the jurisprudence, the entity of the partnership is frankly recognized, and actions are even allowed between the partner and the partnership. It has been said that the notion that the firm is an entity distinct from its members has grown in popularity, and that the notion has been confirmed by recent speculations as to the nature of corporations and the oneness of any somewhat permanently combined group without the aid of law. Furthermore, the current authorities construing and applying the Bankruptcy Act of 1898, 11 U.S.C.A. § 1 et seq., agree that, in contemplation of that statute, a partner-

ship is a distinct separate entity from the individual partners who compose it, and that a proceeding in bankruptcy may be prosecuted against the partnership, and it may be adjudicated a bankrupt without any proceeding prosecuted against the individual members of the partnership and without their being adjudicated bankrupts individually, and similarly that the individual partners may be adjudicated without involving the partnership. On the other hand it has been asserted that the common law does not recognize a partnership as an entity, that a partnership should not be so considered, and that it is to be regretted that decisions on the marshaling of assets under the present bankruptcy law have led to a resurrection of the term. *Amid this conflict of authority the most approved opinion appears to be that which recognizes that a partnership is not an entity like a corporation and that it is not a legal entity,* having, as such, a domicil or residence separate and distinct from that of the individuals who constitute it. Although a partnership is not a person, it may, as a matter of fiction, be treated as a *quasi* person or entity for certain purposes such as the keeping of partnership accounts and in marshaling assets. In common law jurisdictions this entity for such purposes may be recognized, at least in courts of equity; and it must be conceded that in some jurisdictions the law recognizes a partnership as a person distinct from the individual members of the firm, for it has been held that partners are not directly liable on a debt of the partnership, but that their liability arises out of their connection with the firm, and that it is only traceable through the firm and must be established by a judgment against the firm." 20 R.C.L. 804, sec. 6. (Emphasis added.)

[6] "In most respects a partnership is but a relation, with no legal being distinct from the members who comprise it. It is not a person, either natural or artificial. Thus a partnership, as such, cannot be guilty of crime, but the guilt attaches to the delinquent member or members. But *for some purposes, a partnership is regarded as an entity.* One partner may verify an affidavit in the firm name, although a statute requires 'all partners' to make the affidavit. And for the purposes of section 388 of the Code of Civil Procedure allowing associates in business under a common name to be sued by it and their joint property bound by the judgment, a partnership is regarded as a legal entity, distinct from its members, against which judgment may be entered. This is true though the firm has in fact been dissolved after incurring the obligations sued on, and before commencement of the suit. Again, for the purpose of filing an insolvency petition, a partnership has been regarded as an entity and if it did business in the state and one of its members resided therein, the firm was considered to be a resident within the Insolvency Law, though one member resided abroad." 20 Cal.Jur. 680, § 3. (Emphasis added.)

[7] "Courts of jurisdictions denying the existence of a firm entity distinct from its component members, ordinarily deny the separate existence of two or more firms with an identical membership notwithstanding they may be conducting business under separate names. *But the rule has been so far relaxed as to permit recognition of separate existence under exceptional circumstances.*" 47 Cor.Jur. 750, § 174. (Emphasis added.)

A recapitulation of the authorities cited in the foregoing reveals that in the states of Iowa, Louisiana, Oklahoma, Pennsylvania, South Carolina, Tennessee and Vermont, a copartnership is regarded as a separate entity, distinct from the individuals of which it is comprised and that the courts of New York, Minnesota, Mississippi and Texas do not recognize a copartnership as an entity apart from exceptional situations.

In this latter category is the holding in Fidelity Phoenix Fire Ins. Co. v. Howard, 1938, 182 Miss. 546, 181 So. 846, to the effect that a partnership with identical partners under one partnership name is the same partnership when conducting some other portions of its business under another name, and the separation of bookkeeping and of all operations and details thereof is immaterial since ownership and ultimate control are still in the partners who compose the firm.

[8] That California follows the latter rule, i. e., non-recognition of the entity theory of partnerships, is evidenced by the opinion in Reed v. Industrial Acc. Comm., 10 Cal.2d 191, 73 P.2d 1212, 114 A.L.R. 720, in which case a policy of workmen's compensation insurance issued to an employer who subsequently entered into a partnership was held to cover an injury to an employee of the partnership, the court holding that the partnership was not a distinct entity apart from the members thereof, that an employee of the partnership was

an employee of each of the partners; that no individual partner could escape liability on the ground that the partnership only and not the individuals composing it could be held liable, and that since the partner who procured the insurance was liable for the injury to the employee of the partnership, the insurer was liable on its policy.

[9] Since it has not been shown to the satisfaction of this court that the circumstances present herein are exceptional, there appears to be no good reason, for a deviation from the rule announced in the Reed case, supra. Consequently, appellant's contention, that the evidence is insufficient to sustain the finding of the trial court to the effect that the Union Manufacturing Company possessed a separate and distinct entity from that of M. Harris, must be sustained.

For the reasons stated, the judgment appealed from is reversed.

We concur: DORAN, J.; WHITE, J.

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45 Cal.App.2d 450

WIECZOREK v. TEXAS CO. et al.

WIECZOREK et al. v. TEXAS CO.

Civ. 11690.

District Court of Appeal, First District,
Division 2, California.
June 19, 1941.

Hearing Denied Aug. 14, 1941.

1. Action ⇨6

Under statute authorizing trial court to refuse declaratory relief when a declaration is not necessary or proper, appellate court would not disturb a judgment denying declaratory relief except upon a showing of apparent breach of discretion by trial court. Code Civ.Proc. § 1061.

2. Appeal and error ⇨758(3)

Where it is contended that the evidence does not sustain trial court's findings, the burden does not rest upon the respondents to prove that such findings are sound, but the appellant must point out in his brief the evidence and must show wherein the evidence does not sustain the findings.

3. Mines and minerals ⇨77

In action for breach of provision of oil lease, requiring lessee to give written notice to lessor of the abandonment of any well and an opportunity to purchase the casing therein, evidence sustained finding that lessor at the time of the abandonment of each of five nonpaying wells had notice and knowledge of such abandonment, and at no time had any desire or intent to purchase any casing.

4. Trial ⇨36

Where lessor's complaint in action for breach of provision of oil lease, requiring lessee to give written notice to lessor of the intention to abandon any well, alleged that no notice of any kind had been given by lessee to lessor of the abandonment of any or all of five wells which had been abandoned, admission by lessor's attorneys in fact of receipt of written notice from lessee of abandonment of two of such wells would have justified a rejection by trial court of all testimony offered by lessor with respect to her lack of knowledge of abandonment.

5. Mines and minerals ⇨77

Under statute prohibiting a party in subsequent litigation from falsifying a declaration, act or omission whereby he intentionally led another to believe a particular thing true and to act upon such belief, by consenting to abandonment of oil wells without receipt of the written notice thereof required by lease to be given, and by continuing to receive large payments in royalties from lessee for several years after lessor admittedly had knowledge of such abandonments, lessor "waived" the formal notice required by lease and was "estopped" to assert a forfeiture of lease for failure to give notice. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive" and "Estop".

6. Judgment ⇨619

A party, having a defense to a pending cause of action, must present such defense in that action, or it will be deemed "waived", since it is the policy of the law that litigation shall not be had in piecemeal.

7. Judgment ⇨619

An adjudication that an agreement between lessor and lessee was a contract that lessee had fully performed all the obligations of an oil lease prior to the date of agreement, and that lease was forfeited by nothing which previously had occurred, "estopped" lessor in a subsequent action to assert a breach of lease for lessee's failure to give written notice of abandonment of nonpaying wells as required by lease, which wells were abandoned prior to date of agreement, regardless of whether lessor had knowledge of such abandonment when agreement was made, where lessor had such knowledge during prior litigation, but withdrew her cross-complaint seeking relief because of such abandonment.

8. Mines and minerals ⚷77

Lessor had no cause of action for damages for breach of oil lease on account of the abandonment of two nonpaying oil wells, where written notice thereof was given to lessor prior to such abandonment in accordance with terms of lease.

9. Limitation of actions ⚷46(6)

Action for damages for abandonment and destruction of certain oil wells without giving written notice thereof to lessor in accordance with terms of oil lease, which action was not commenced until some five to seven years after such wells were abandoned, was barred by four-year statute of limitations, since cause of action for such breach of terms of lease accrued at the time of abandonment. Code Civ.Proc. § 337, subd. 1.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Gertrud Wieczorek against the Texas Company and the Security First National Bank of Los Angeles for declaratory relief in respect to an oil lease and for damages for the alleged breach thereof, wherein the bank filed an answer admitting all the allegations of the complaint and joining with plaintiff in prayer for the same relief. From a judgment in favor of the Texas Company, plaintiff and the Security First National Bank appeal.

Judgment affirmed.

Victor Ford Collins, of Los Angeles, for appellants.

Charles C. Stanley, J. A. Tucker, R. K. Barrows, and E. S. Williams, all of Los Angeles, for respondent.

NOURSE, Presiding Justice.

The plaintiff sued for declaratory relief and for damages for the alleged breach of a written contract. The defendant Security-First National Bank of Los Angeles filed an answer admitting all the allegations of the complaint and joined with the plaintiff in a prayer for the same relief which she sought, the position of the bank being that of an assignee of a portion of the interest in the oil lease hereafter referred to. Judgment went for the defendant, The Texas Company, from which the plaintiff and the bank joined as appellants on one set of briefs. We will refer herein to Mrs. Wieczorek as the appellant.

On July 20, 1920, an oil and gas lease on land located at Santa Fe Springs was made by William A. Matern and Gertrud Matern, his wife, as lessors and owners to a corporation lessee the name of which was thereafter changed to The Texas Company. After the death of William A. Matern his wife succeeded to his interest in the property, married again, and is now known as Gertrud Wieczorek. Two other leases were executed between the same parties at the same time, but this litigation involved lease No. 3 only. This lease contained the following clause which is pertinent to the litigation: "In the event of the abandonment of any well or wells hereafter drilled upon the said premises, the lessee shall immediately notify the lessors of that fact, and shall not remove any casing therefrom without first affording the lessors the opportunity of purchasing said casing, or a portion thereof (it being understood that the lessee shall not be obligated to leave any portion in the well unless the balance of said casing can be removed in accordance with customary methods) and if the lessors desire to purchase the same they shall, within ten (10) days after receiving such notice, pay the lessee for the casing desired the market price of similar second hand casing of like size and gauge; and the lessors shall thereafter be entitled to the full and exclusive possession of such well."

The lessee promptly commenced drilling upon the premises and in the course of its operations five of sixteen wells which it had drilled were abandoned by the lessee. These wells were No. 1, No. 3, No. 6, No. 7 and No. 8. No. 3 was abandoned in 1926, No. 7 and No. 1 in 1927, No. 8 and No. 6 in 1928. At the time of the abandonment of each of said wells respectively the plaintiff had actual notice and knowledge of such abandonment and either expressly or by implication notified the lessee that she had no desire or intention to avail herself of the privilege of purchasing the casing or any portion thereof or of taking possession of any of the wells so abandoned. From the commencement of production on the lease the lessor kept a detailed written record of the daily production of each well. When well No. 3 was abandoned in 1926 the lessor wrote in red ink in the margin opposite the entry of that well in the production record the word "abandoned". This record as kept by the lessor disclosed that for several months prior to the date of abandonment the well showed a diminishing return. The stipulation of the parties filed herein discloses that the quantity of water produced from the well had increased so that the well was then cutting 93.2% prior to its abandonment. This well had been plugged back from 4,655 feet to 3,885 feet in an effort to avoid these unfavorable conditions and to render the well productive.

In the same record of daily production kept by the lessor a vanishing rate of production of wells No. 1 and No. 7 was shown for a considerable period prior to their abandonment in January, 1927, and the parties have stipulated that 90% of the fluid produced from well No. 1 was water and that 67% of that produced from well No. 7 was water. Prior to the abandonment of each of these wells the lessee contacted the lessor and inquired whether the latter desired to purchase the casing in either of those wells. The lessor thereupon informed the lessee that she did not desire to purchase such casing and that the lessee might proceed with the abandonment of both wells. In April, 1928, the lessee notified the lessor in writing of the intention to abandon wells No. 8 and No. 6 and inquired whether the lessor desired to purchase the casing in either of these wells. The lessor notified the lessee in writing that she did not desire to purchase such casing and thereupon the abandonment was completed in accordance with the terms of the lease. In the same record of daily production kept by the lessor well No. 6 did not show any production since September, 1927, and well No. 8 showed none since March, 1928. When each of the five wells was abandoned the regulations of the state mining bureau were complied with and in each instance the well was inspected and the abandonment approved by the state engineers. These wells were then reported as abandoned in the public records of the state mining bureau. After the abandonment of the five wells the lessee drilled and put into production a new well in the immediate vicinity of each of those abandoned and these were on production at the time of the trial.

On October 6, 1932, to settle controversies between the parties relative to lease No. 3 an agreement settlement was made in writing between the lessor and lessee covering all three leases to these premises. A consideration of $100,000 was paid to the lessor and in December, 1932, a similar agreement was made with the bank covering the latter's interest in lease No. 3. In this agreement the lessor acknowledged "full and complete performance by Lessee of all of the terms, obligations, conditions and provisions of said leases, express or implied, which have matured or should have been performed by Lessee prior to the date hereof. Lessor does hereby release and forever discharge Lessee of and from all claims and demands which have heretofore arisen or been asserted or which Lessor could or might assert growing out of any breach or alleged breach of any obligations, condition, liability or duty, express or implied, in connection with the operations under said leases, payment of royalties, drilling of wells, development of the leased premises, or any other matter or thing connected with said leases, and/or the operations of Lessee * * * upon the leased premises." Soon after this settlement was made the lessor again made demands upon the lessee claiming a forfeiture by reason of acts which had occurred long prior to the date of the settlement. Because of these demands the lessee on March 24, 1933, brought an action in declaratory relief, and in Texas Company v. Wieczorek, 36 Cal.App.2d 560, 98 P.2d 547, the District Court of Appeal held that the lessor had waived all right to make any claim of forfeiture by reason of acts committed by the lessee prior to the execution of the instrument and that through this instrument the lessor was estopped from thereafter asserting a right which had thus been waived.

The trial court herein found that the lessor had actual notice and knowledge of the abandonment of each well at the time it was done and that she had no desire or intent to purchase any of the casing from such wells at the time of abandonment or at any time thereafter. It found that the lessor did not at any time have or express any desire to take over possession of any one of the abandoned wells and that she expressly waived any duty or obligation on the part of the lessee to notify her in writing of the abandonment. It also found that none of these abandoned wells had any value whatever after April 4, 1933; that the lessor would not have made any profit out of them if she had had possession and that she was not injured or damaged in any respect through the operations of the lessee because each of said wells was exhausted and no longer capable of producing oil or gas in paying quantities. The trial court further found that the lessor was estopped to claim that the lessee did not notify her of the abandonment of each of these wells in all respects as required by the terms of the lease and that she was estopped to claim that the lessee had removed any casing from the wells before first affording her the opportunity of purchasing same. It was then found that plaintiff's action was barred by eight different sections or subdivisions of the Code of Civil Procedure relating to the limitation of actions. All these findings of fact find ample support in the evidence. There is no real contention to the contrary, the appellant merely stating that it is incumbent upon respondent on this appeal to bring forth the evidence upon which the findings are based.

The grounds raised by the appellant are: (1) That since the lease required notice of abandonment to be given in writing no other notice or knowledge may be taken as a substitute. (2) That the settlement agreement did not operate as a waiver of the claims herein advanced because "the cause of action" herein arose after the date of that agreement. (3) That the trial court erred in finding that the lessor was estopped to contend that notice of abandonment was not given and that it erred in holding that the action was barred by the statute of limitations.

The argument of respondent in brief is that notwithstanding the provisions of the contract requiring written notice of the abandonment the undisputed evidence is that the lessor had actual notice and knowledge long prior to the settlement agreement of October, 1932. It is also argued that the lessor led the respondent to believe that written notice would not be required when she notified the respondent in each instance that she did not desire to purchase the casing and had no objection to the abandonment.

The respondent argues the statute of limitations from the two alternatives left to the appellant in relation to the nature of her causes of action: (1) Either that notice of abandonment was given, in which event there was no default or breach of contract or (2) that the lessee did not notify the lessor of its intention to abandon, rip out or destroy the casing, and had closed the wells without affording the lessor opportunity to purchase the casing as required by the contract. In this event the respondent argues that there was a default or breach of contract at the time the acts were done and that since there is no allegation or proof of fraud, concealment or imposition of any kind the cause of action for damages for breach of contract arose at the time of the breach and is therefore barred by the statute of limitations.

[1] It would serve no useful purpose to discuss or to enumerate the many arguments advanced by appellant in her attack upon the judgment. She joined two causes of action—one for declaratory relief, and one for damages for breach of contract. The first being an action sounding in equity the attack must disclose an apparent breach of discretion on the part of the trial court in view of the provisions of section 1061 of the Code of Civil Procedure, which declares that the trial court may refuse the relief when a declaration "is not necessary or proper at the time under all the circumstances." The demand for damages for the breach of the contract is so clearly barred by the statute of limitations that the appellant scarcely makes any attempt to defend it. Under these circumstances we will confine our opinion to special reasons which compel an affirmance of the judgment, and will not indulge in the needless repetition of elementary principles of law.

[2] Conceding that the lease required notice of abandonment to be in writing the respondent proved by undisputed evidence that the appellant and her agents not only had actual knowledge of the intention to abandon, but in each case gave express notice that purchase of the discarded casings was not desired. Appellant's answer to this damaging state of the record is that it is sufficient for an appellant to merely state that the evidence does not support any finding of the trial court—that it then is incumbent upon the respondent to prove that every finding is sound. This is not in

accord with the accepted rule of practice. The rule to the contrary is found in 2 Cal. Jur. p. 730, where it is said: "When it is contended that the evidence does not sustain the findings, the appellant must point out in his brief the evidence, * * * and he must show wherein the evidence does not sustain the findings." In accord are Sutro Heights Land Co. v. Merced Irr. Dist., 211 Cal. 670, 687, 296 P. 1088; Erro v. City of Santa Barbara, 123 Cal.App. 508, 513, 11 P.2d 890; Glass v. City of Fresno, 17 Cal.App.2d 555, 559, 62 P.2d 765; Angelus Securities Corp. v. Ball, 20 Cal.App.2d 436, 438, 67 P.2d 158.

[3, 4] These principles apply particularly to the finding that "plaintiff at the time of and at all times from and after the abandonment of each of said wells respectively had notice and knowledge of such abandonment and at no time whatever had any desire or intent to purchase any casing in any of said wells. * * *" Appellant states that this finding is "not sustained by one iota of evidence". But two of her own witnesses gave positive evidence of their knowledge of each abandonment at the time made; the latter testified that he gave his consent and approval before the work of abandonment was commenced, and that he notified respondent that the lessor did not desire to purchase the casings. These two witnesses were attorneys in fact of the appellant, who had so designated them in writing to the respondent at a time when she notified respondent to deal with these agents exclusively in reference to all matters arising under the lease. In addition to this there is in evidence a written notice of intention to abandon two of the wells sent to her by registered mail, receipted for by her agent, and replied to by letter sent by one of her agents under a letter head displaying the names of the appellant and both of her agents all under the same address—that to which the written notice of abandonment had been mailed and received. In view of the allegations of the complaint that "no notice of any kind or character had been given from the said defendant, The Texas Company, to the plaintiff herein of the abandonment of said wells, or any of them; that at no time prior to March 27, 1933, did the plaintiff herein know that the said defendant had abandoned wells Nos. 1, 2, 3, 6, 7, and 8, or any, or all of them" this admission of the receipt of the written notice would have justified a rejection by the trial court of the adverse testimony offered by appellant.

[5] The evidence of oral notice of the intention to abandon wells Nos. 1, 3, and 7, and of the written notice covering wells Nos. 6 and 8, both followed by the expressed consent and approval of the appellant, fully sustains the judgment under both of the two related theories of waiver and estoppel. By consenting to the abandonment and notifying respondent that she did not desire to purchase the casings the plaintiff waived any written or formal notice in the terms of the lease. By consenting to the abandonment and permitting the respondent to close and obliterate the wells the appellant is estopped from now asserting to the contrary. This is the true purpose and meaning of subdivision 3 of section 1962 of the Code of Civil Procedure. On September 11, 1933, the appellant filed her answer and cross-complaint in Texas Company v. Wieczorek, supra. Therein she alleged in detail the exact date of abandonment of each of these five wells. She now concedes that she then had knowledge of these facts. The present action was commenced on November 20, 1935. The trial was held in April, 1938. After the admitted knowledge of abandonment and down to the time of trial, at least, the appellant continued to receive and accept from the respondent payment of large sums of money in royalties under the lease which she now claims to have been forfeited. The estoppel of the Code section needs no further elaboration.

On October 6, 1932, the appellant, for a consideration of $100,000 paid to her by the respondent, executed with respondent a written contract of release and settlement of all previous claims and controversies arising out of the operations under this same lease. Therein the lessor acknowledged "full and complete performance by Lessee of all of the terms, obligations, conditions and provisions of said leases, express or implied, which have matured or should have been performed by Lessee prior to the date hereof". In the litigation referred to, the District Court of Appeal said (pages 564, 565 of 36 Cal.App.2d, page 550 of 98 P.2d): "The agreement was a contract by the lessor that the lessee had fully and completely performed all of the terms, obligations, conditions and provisions of the lease, express or implied, which had matured or should have been performed by the lessee prior to the date thereof. This was a declaration that the lessee had not been under any duty to surrender the lease, or if the lessee had been, that duty now was released. * * * But the agreement of settlement declares and thereby contracts that the lessee has fully performed all terms and provisions. This contract provision also was a recognition that at that date the whole lease was in full force and effect and that by nothing which previously had occurred was the lease to be deemed defeated or forfeited in whole or in part."

[6, 7] The appellant answers the contention that this release was a complete estoppel in the present litigation by the argument that she did not know of the abandonment of these five wells, hence this controversy was not contemplated by the parties to the contract. The premise is as we have heretofore shown. But it is conceded that she did have knowledge when the complaint was served and she voluntarily withdrew her cross-complaint seeking relief because of such abandonment. The former action was one in declaratory relief to determine whether any act of the lessee had worked a forfeiture. If the appellant did not consider the allegations of her cross-complaint sufficient for that purpose she was at liberty to dismiss it. But by so doing she is now estopped from asserting the abandonment as a ground of forfeiture because she permitted the court at that time to assume that that particular defense was waived. It is the policy of the law that litigation shall not be had in piecemeal and that when a party has a defense to a pending cause of action it must be presented then, otherwise it will be deemed waived. For these reasons the decision of the District Court of Appeal that the agreement was a contract that the "lessee had fully and completely performed all of the terms * * * of the lease", and that it was a recognition that "by nothing which previously had occurred was the lease to be deemed defeated or forfeited" is a complete and binding adjudication that none of the acts now complained of was a violation of the terms of the lease.

[8, 9] On the issue of damages appellant's case rests squarely on a charge of breach of contract. In the former decision it was conclusively determined that all alleged breaches occurring prior to the settlement agreement were waived. If there is any merit in appellant's contention that these particular breaches were not contemplated in the agreement she is nevertheless barred by the statute of limitations to maintain the action. The alleged acts of abandonment and destruction of the five wells can be viewed in no other light than an alleged breach of the terms of the lease. As such these acts all occurred from five to seven years before the action was commenced. Well No. 3 was abandoned in January, 1926, well No. 7 and well No. 1 in January, 1927. The other two were not abandoned until after written notice had been given in accord with the terms of the contract. As to the latter, the appellant had no cause of action at any time. As to the three others, the cause of action accrued at the time of the alleged breach and is barred by subdivision 1 of section 337 of the Code of Civil Procedure.

The judgment is affirmed.

I concur: STURTEVANT, J.

EAGLE OIL & REFINING CO., Inc., v. PRENTICE. *

Civ. 12467.

District Court of Appeal, Second District,
Division 1, California.

June 20, 1941.

Rehearing Denied July 11, 1941.

Hearing Granted Aug. 18, 1941.

1. Sales 🔑359(1)

In action for balance due for goods, wares, and merchandise sold and delivered, record justified trial judge's conclusion that no definite arrangement for credit had ever been reached between the parties.

2. Judgment 🔑185

Where complaint alleged that defendant became indebted to plaintiff upon an open book account in a certain sum, and that no part thereof had been paid, and in his answer defendant failed entirely to mention that any credit on account was due him, and in his affidavit made no statement of the amount for which credit might be allowed, or reason therefor, the pleadings and affidavit did not present a "triable issue" in regard to amount due on the account between the parties and justified summary judgment for plaintiff. Code Civ.Proc. §§ 437c, 452.

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* Subsequent opinion 122 P.2d 264.

See Words and Phrases, Permanent Edition, for all other definitions of "Triable Issue".

3. Judgment ⚿185

In action on an account for goods, wares, and merchandise sold and delivered, to satisfy the trial judge that there was an arguable defense to any part of the account so as to justify denial of plaintiff's motion for summary judgment, it was necessary to furnish the judge with particulars of the amount for which credit was claimed and in connection with what shipment or shipments it arose. Code Civ.Proc. §§ 437c, 452.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by the Eagle Oil & Refining Company, Incorporated, against B. H. Prentice, etc., to recover for goods, wares, and merchandise sold and delivered. From a summary judgment for plaintiff, defendant appeals.

Affirmed.

B. H. Prentice, in propria persona.

Cobb, Campbell & Kelley, of Los Angeles, for respondent.

DESMOND, Justice pro tem.

Defendant, doing business as Smileage Company, appeals from a summary judgment by which the trial court awarded to plaintiff the sum of $2,879.87, with interest from the time plaintiff made demand for payment of that sum.

Section 437c of the Code of Civil Procedure, under which the judgment was entered, provides that upon motion and notice to the other party, an answer may be stricken out or a complaint dismissed and judgment entered, "in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact".

The record before us presents an affidavit filed by H. F. Nelson, president of the plaintiff corporation, in support of the motion for summary judgment, and in opposition, affidavits by defendant and N. Fisher. It appears from the Nelson affidavit that during the period March 9, 1939, to July 13, 1939, goods and merchandise in the form of gas and other hydrocarbon substances were delivered to the defendant for which invoices were furnished in an amount aggregating $32,364.44, and that the sum of $29,484.57 was paid thereon, leaving the balance for which suit is brought, namely, $2,879.87. It also appears from the affidavits on file that during the month of May, 1939, discussions took place between the parties relating to establishment of credit in favor of appellant. According to Mr. Nelson the defendant asked him to accept a trust deed on certain real estate in Los Angeles county, "as security for a note in the sum of Two Thousand Dollars to be credited upon his account. That affiant prepared a trust deed and note for said amount and submitted it to the defendant". Instead of executing the note and trust deed, it appears from the Nelson affidavit that the defendant returned it to Mr. Nelson, with a mortgage covering the same parcel of property, reciting that it was security for three thousand dollars. Certain objections to the form and amount of the mortgage were made by this affiant, who states that the defendant asked that a conference be had toward working out a form of payment with respect to his account, at which time defendant was advised that the mortgage was unsatisfactory, and the affiant further states that the mortgage was returned to the defendant, "who now has and holds the same". Mr. Nelson also states in his affidavit that neither he nor any of the officers of his corporation agreed to accept or retain the mortgage, "nor did they agree that said account should be paid in installments"; further, that the answer of the defendant to the complaint filed in the action "is false wherein it recites that on July 13, 1939, plaintiff entered into a further agreement with the defendant respecting the payment of any sum owing plaintiff by the defendant; one of the requirements of said agreement was the payment to plaintiff by defendant of the minimum sum of Two Hundred Dollars ($200.00) per month." The portion of the amended answer to which affiant refers reads as follows: "Furthermore, that on July 13, 1939, plaintiff entered into a further agreement with defendant, respecting the payment of any sum owing plaintiff by defendant, that one of the requirements of said agreement was the payment to plaintiff by defendant of the minimum sum of Two Hundred ($200.00) Dollars per month." Attached to the Nelson affidavit is a letter dated June 17, 1939, addressed to the defendant, in which no credit is mentioned, but the following demand is made: "We find it necessary to advise you that the account be paid in full at this time. Will you, therefore, kindly arrange to pay off the amount owing now, it being the amount of $3,163.81 as of June 16, 1939." Under date of July 3d, the defendant wrote Mr. Nelson saying that he did not believe it would be possible to pay him the entire sum of $3,000 in the next few days as requested. "We have, however, shown our good intentions by mailing you a check on account and presume that if your patience holds out that we will be continuing to do this from time to time until we have either wiped out the entire account in this matter, or until we have arranged with some other refinery to carry our gasoline purchase account for us on terms somewhat similar to that which we have with you. You may be assured that we will do all that can be reasonably expected of us to liquidate this account as soon as possible. We have no desire to pay interest to you on the sum involved. In the meantime, we want you to feel that as far as we are concerned that there are no hard feelings over the rather short business relationship between yourselves and ourselves. * * *" It is quite apparent from this letter that whatever discussions may have been had concerning the establishment of credit and the furnishing of security therefor prior to July 3d, came to naught. The following statements, however, concerning a meeting which took place at the office of the Eagle Oil & Refining Co. in Santa Fe Springs, on or about July 13th, are gleaned from the Fisher affidavit: "That there were present at that time a Mr. H. F. Nelson, Mr. B. H. Prentice, and Mr. Sterling, and this affiant; that the matter of the account of the Smileage Company was discussed for some two and one-half hours; that as a result of said discussion Mr. Sterling and Mr. Nelson agreed that the Eagle Oil and Refining Company would issue certain credits to Smileage Company to offset overcharges previously made against the Smileage Company; that Mr. Nelson agreed to draw a trust deed covering certain real property located in South Gate, California, and to also draw a chattel mortgage covering the improvements and equipment of the Smileage Refinery also located in South Gate; that Mr. Prentice stated he wanted the payment on the trust deed and chattel mortgage to be not more than $200.00 per month, and Mr. Nelson said this would be O.K.; that Mr. Prentice stated he wanted the chattel mortgage to be satisfied when he had paid the sum of $1,000.00. Mr. Nelson insisted that the chattel mortgage should not be satisfied until Mr. Prentice had paid $1,400.00 to the Eagle Oil & Refining Company. Mr. Prentice, after a long argument, stated this would be satisfactory. Mr. Prentice mentioned that both the mortgage and chattel mortgage would bear the same rate of interest as did the real estate mortgage then held by Eagle Oil and Refining Company, to which Mr. Nelson agreed; that it was further stated by Mr. Nelson that upon the execution of the trust deed and chattel mortgage the Eagle Oil and Refining Company would surrender to B. H. Prentice a certain real estate mortgage which had been previously executed and delivered by B. H. Prentice to the Eagle Oil and Refining Company, to which Mr. Prentice agreed."

Attached to Mr. Prentice's affidavit is a copy of a letter dated July 13, 1939, reading as follows:

"Eagle Oil & Refining Company,
"Santa Fe Springs, California,
"Gentlemen:

"Without conceding that there is any reason that we should give you any additional security for the amount owing you, *if you care to do so* we will exchange the mortgage you now hold for a trust deed on the same property and the improvements thereon as is described in the mortgage payable at a minimum of $200.00 a month, and at the same interest rate as the present mortgage; and as additional security we will give you a chattel mortgage on the equipment at your refinery located just west of Perry Road and just south of Firestone Boulevard, with the understanding that the chattel mortgage is to be satisfied when the first $1,400.00 has been paid on the principal of the mortgage first above referred to.

"Yours very truly,
"Smileage Company,
"B. H. Prentice, Manager."

(Emphasis added.)

Another exhibit attached to the Prentice affidavit is a copy of the following letter:

"August 22, 1939

"Mr. B. H. Prentice,
"4705 Firestone Boulevard,
"South Gate, California.
"Dear Sir:

"I am returning your check No. 5787 in the amount of $200.00 payable to the Eagle

Oil & Refining Company, Inc., due to the fact that you make the same conditional upon the same being under some agreement which Eagle Oil & Refining Company, Inc., dispute as having ever been entered into.

"Very truly yours,
"Cobb, Campbell & Kelley
"By Francis B. Cobb."

[1] The trial judge perusing these letters and considering particularly the conditional phrase in Mr. Prentice's letter which we have emphasized, "*if you care to do so*"; was justified, especially in view of the written reaction of plaintiff to the proposed monthly payment of $200, in concluding that no definite arrangement for credit was ever reached between the parties.

Whatever affiant Fisher may have heard at the meeting on or about July 13th concerning possible establishment of secured credit must be considered as of a preliminary nature, for Mr. Prentice's letter of that date, July 13th, stamps it as such. It failed to bear fruit in the form of an enforceable contract. A somewhat similar situation was disposed of in Warson v. Talpey-Arnold Syndicate, 202 Cal. 656, at page 659, 262 P. 716, at page 717, by the statement: "it is perfectly clear, from the facts alleged in the complaint, that the minds of the parties never met upon the details of such supplementary agreement." While in the instant case the clarity does not arise from the complaint, it appears from other documents in the record.

It remains now to determine whether a "triable issue" was presented by the pleadings or affidavits in regard to the amount due on the account between the parties. The complaint alleged that the defendant "became indebted to plaintiff upon an open book account in the sum of $2,879.87. That no part of said sum has been paid. That demand was made upon the defendant on the 21st day of July, 1939 for the payment of said sum, but the defendant has failed and refused to pay the same or any part thereof. That the entire sum of $2,879.87 remains now due, owing and unpaid from defendant to plaintiff".

The answer "Denies that defendant is indebted to plaintiff upon an open book account in the sum of $2,879.87. Furthermore, defendant denies that there is any sum now due, owing and unpaid which defendant has not offered to be paid". The Nelson affidavit states: "That no objection has been made by the defendant to said account, the invoices or the charges therein, and that said charges were the reasonable market value of said product so delivered and were the agreed prices of said items so delivered, and that all of said items were delivered to the defendant at his request."

By the Prentice affidavit, "Affiant denies that no objection was made to plaintiff in respect to the account and denies that the charges for merchandise furnished by plaintiff were the reasonable value thereof; on the contrary affiant alleges that objections were made to said account at various times, and particularly at a certain conference with said Nelson on or about July 13, 1939, and that plaintiff stated that affiant's objections were proper and well taken and that proper credit would be given affiant which credit never has been given to affiant's account."

We have already quoted the Fisher affidavit as follows: "That as a result of said discussion Mr. Sterling and Mr. Nelson agreed that the Eagle Oil and Refining Company would issue certain credits to Smileage Company to offset overcharges previously made against the Smileage Company".

[2, 3] Appellant concedes that his answer constitutes a negative pregnant but feels that, since pleadings are to be liberally construed under section 452 of the Code of Civil Procedure, any deficiency in the answer is supplied by the quoted excerpts from the Prentice and Nelson affidavits. This view we cannot accept, for section 437c provides that "The facts stated in each affidavit shall be within the personal knowledge of the affiant", and "shall be set forth with particularity". In his answer appellant failed entirely to mention that any credit on account was due him and in his affidavit made no statement of the amount for which credit might be allowed, or the reason therefor. To satisfy the trial judge that there was an "arguable defense" to any part of this account, it was necessary to furnish him with particulars of the amount for which credit was claimed and in connection with what shipment or shipments it arose. Neither the Prentice nor Fisher affidavit furnished any information on those subjects.

Judgment affirmed.

We concur: DORAN, Acting P. J., WHITE, J.

45 Cal.App.2d 502

In re BRAUE'S ESTATE.

Civ. 11636.

District Court of Appeal, First District,
Division 1, California.

June 23, 1941.

1. Wills 🔑289

In will contest upon proof of signatures of testator and of subscribing witnesses, a rebuttable presumption of due execution of will arose. Probate Code, § 50.

2. Wills 🔑289

Rebuttable presumption of due execution of will arises on proof of signature of testator and of subscribing witnesses, regardless of whether the will contains an attestation clause. Probate Code, § 50.

3. Wills 🔑386

In will contest, trial judge as trier of facts had power to pass on credibility of witnesses.

4. Appeal and error 🔑994(3)

Appellate court could not pass on credibility of witnesses.

5. Evidence 🔑597

A disputable presumption, whether contradicted by other evidence or not, will support a finding.

6. Evidence 🔑89

A disputable presumption does not go out of the case when contradicting evidence is introduced if the trier of the facts does not believe the contradicting evidence.

7. Wills 🔑303(3)

Where will contained an attestation clause and rebuttable presumption arose of due execution of will, the fact that attesting witnesses were all before the court and testified to facts which, if believed, would demonstrate that the will was not properly executed, did not preclude admission of will to probate. Probate Code, § 50.

8. Evidence 🔑89

A "presumption" is recognized as independent evidence which may be weighed against positive evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Presumption".

9. Evidence 🔑594

The trier of facts may generally disregard even uncontradicted evidence.

10. Witnesses 🔑317(1)

In will contest, where court found testimony of subscribing witnesses false on one point, the court was justified in looking with suspicion upon the balance of their testimony.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Proceeding in the matter of the estate of Arthur Bernard Braue, deceased, wherein Margaret Marie Braue and others contested the will offered for probate by Isabel Morrison Braue and others. From an order admitting will to probate, the contestants appeal.

Affirmed.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellants.

Rea, Free & Jacka, of San Jose, for respondents.

PETERS, Presiding Justice.

Contestants appeal from an order admitting a witnessed will to probate over their objection that it had not been properly executed as required by section 50 of the Probate Code. The other grounds of contest were dismissed at the trial.

Proponent is the wife of decedent, whom he married on February 20, 1936. The questioned document is dated April 8, 1936. Contestants are the sister of decedent, and one of his two daughters by a previous marriage. By the will he left his sister and each of the daughters $1, leaving the balance of the estate to his wife. The petition for probate alleged that the value of decedent's property did not exceed $3,000.

As shown by the evidence, the will was signed by the testator, and by three witnesses, Harry E. Pahl, C. J. Tracy and Irving L. Pahl. Opposite the signatures of the three witnesses on the typed will, is typed a complete attestation clause. The proponent, the wife of the deceased, testified that she typed the will at the deceased's request on the Sunday before it was executed, in Chico; that she used as a form a copy of an earlier will of her husband by which the bulk of his estate was left to the contesting sister; that on the date the will was executed her husband brought it home fully executed and gave it to her; that at the time she typed the will she also typed the attestation clause opposite the lines placed on the document for the signatures of the testator and of the attesting witnesses; that the attesting witness Irving L. Pahl, sometime after the will was executed, told her, in a "kidding" way, that he had witnessed her husband's will.

The testimony of the three attesting witnesses was taken by deposition. Harry E. Pahl testified that he was an automobile dealer in Chico; that at the time the will was executed decedent kept the accounts for the company; that the decedent remained with the witness' firm for six months to a year after the deceased married proponent; that after the marriage, the decedent began to drink to excess, and that this habit grew steadily worse. He identified the signature on the will as his. He could not positively state the circumstances under which he signed the document, but he did recollect that on or about the date the will was executed, the decedent brought him a paper which he now believes was the will in question so folded that only the words, "In Witness Whereof, I have hereunto set my hand and seal this 8th day of April, 1936", followed by the deceased's signature, appeared; that the decedent asked him to sign the document as a witness; that the witness protested against signing a document without knowing what it was; that the decedent assured the witness that the document was personal to the decedent and would not affect the witness in any way; that he was positive that there was no attestation clause on the document when he signed it; that the decedent did not inform him that the instrument was his will; that he signed the document in the presence of the testator, but that neither of the other two witnesses was present at the time.

The testimony of C. J. Tracy, who admittedly signed the document immediately below the signature of Harry E. Pahl, was substantially similar to that of the latter, except that the latter's signature was on the document as well as the signature of the testator, when he, the witness, affixed his signature. He was positive that there was no attestation clause on the document that he signed, and that the testator did not sign the document or declare it to be his will in the witness's presence, and that when the witness signed the document he and the testator were alone.

The third witness, Irving L. Pahl, admitted that the signature on the will was his, but testified that he had no recollection at all of signing the document, or of the circumstances under which it was signed. He stated that he signed many papers at the request of decedent, but did not remember this particular paper. No one ever told him that he was signing as a witness to decedent's will. He was quite positive that he had never signed any document when both or either of the other two witnesses were present. It was stipulated that if he were called as a witness he would deny the conversation testified to by the proponent to the effect that he had told her in a "kidding" way that he had witnessed her husband's will.

[1, 2] On this testimony, the trial court found that the will was duly and properly executed, and admitted it to probate. Appellants urge that the uncontradicted evidence of two of the three subscribing witnesses establishes that the testator did not sign or acknowledge his signature to the document in the presence of two of the subscribing witnesses, nor declare to the witnesses that it was his will, nor did the witnesses sign in the presence of each other. Appellants admit that upon proof of the signatures of the testator and of the subscribing witnesses a rebuttable presumption of due execution arises. This presumption arises whether or not the will contains an attestation clause, but certainly arises where, as in the instant case, such a clause is contained in the will. In re Estate of Pitcairn, 6 Cal.2d 730, 59 P.2d 90; In re Estate of Kent, 161 Cal. 142, 118 P. 523; In re Estate of Tyler, 121 Cal. 405, 53 P. 928. Appellants urge, however, that where the attesting witnesses are all before the court and testify to facts that demonstrate that the will was not properly executed, the presumption has no place in the case and will not support a finding of due execution.

[3-8] This contention is unsound. The trial judge saw and heard the witnesses. He, as the trier of the facts, had the power to pass on their credibility. This court has no such power. Whatever may be the rule in other states, the rule in this state is that a disputable presumption, whether contradicted by other evidence or not, will support a finding. A disputable presumption does not go out of the case when contradicting evidence is introduced, if the trier of the facts does not believe that contradicting evidence. Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. This rule has been applied to the very presumption involved in this case. In Re Estate of

Pitcairn, supra, the two subscribing witnesses, both called by the proponent, testified that the will was not properly executed. There was no evidence to the contrary. There was no complete attestation clause. The trial court admitted the will to probate. In affirming the order admitting the will to probate the Supreme Court stated (page 732 of 6 Cal.2d, page 92 of 59 P.2d):

"We have, then, a case where the signatures of the testatrix and subscribing witnesses are genuine; the will is attested, but lacks a formal attestation clause reciting the steps in execution; the attesting witnesses, seemingly adverse but uncontradicted on the essential issues, testify to a technical failure to comply with the formalities of execution. In such a case, may the trial court admit the will to probate? We think it may.

"The rule is well established that a regular and complete attestation clause makes out a prima facie case of due execution of the will. The authorities have clearly recognized that where witnesses are dead, unavailable, or unable to testify or recollect, or are adverse or corrupt, it is necessary to rely upon other evidence of the sufficiency of the instrument, and accordingly have applied the above-mentioned presumption. [Citing cases.]"

The court then held that the presumption applies whether or not there is an attestation clause, and then stated (page 733 of 6 Cal.2d, page 92 of 59 P.2d): "The contestants herein seek to distinguish most of the cases applying the presumption in the absence of an attestation clause on the ground that the witnesses were either not present or unable to recall the facts. They contend that even if the presumption is applicable to those situations, the presence of subscribing witnesses who give adverse testimony destroys the presumption. But in our opinion, if the presumption be recognized, it is seldom material to an appellate court whether the subscribing witnesses were unavailable, unable to remember, or gave affirmative testimony adverse to the will. A presumption is recognized in this state to be independent evidence which may be weighed against positive testimony, and in a proper case the lower court may follow the presumption of due execution from proof of genuineness of the signatures, though the witnesses attack the will. In the present case the presumption, together with other circumstances such as the exposed mistaken testimony of Miss Alcock, justified the finding of the probate court that the will was properly executed."

[9, 10] This case is decisive of the present appeal. Appellants urge, however, that the rule only applies where the witnesses are unavailable, have forgotten the facts, or where the witnesses are hostile, guilty of connivance, or are unworthy of belief. Of course, it is a general rule that the trier of the facts is the sole judge of the credibility of the witnesses, and may generally disregard even uncontradicted evidence. Kelly v. Jones, 290 Ill. 375, 125 N.E. 334, 8 A.L.R. 796. Moreover, in this case, there was evidence contradicting two of the subscribing witnesses in a very material respect. Harry E. Pahl and C. J. Tracy testified positively that the attestation clause was not upon the document when it was signed by them; that had it been there they would have seen it; that there was no doubt in their minds that the clause was not on the will when it was signed by them. As already stated, this clause is typed immediately opposite the signatures of these witnesses. Mrs. Braue testified positively that she placed the clause on the document when she typed the will a few days before it was executed. This, of course, created a direct conflict in the evidence which the trial court resolved in favor of respondent. Having found these witnesses false in their testimony on this point, the trial court was justified in looking with suspicion upon the balance of their testimony. The other witness, Irving L. Pahl, testified he could not recollect the circumstances under which he signed the document. His testimony, as well as the testimony of the other two subscribing witnesses, falls directly within the rule, even as limited by appellants.

The order admitting the will to probate is affirmed.

We concur: KNIGHT, J.; WARD, J.

PEOPLE v. UNITED STATES FIDELITY & GUARANTY CO.

Civ. 11466.

District Court of Appeal, First District, Division 1, California.

June 20, 1941.

Rehearing Denied July 19, 1941.

Hearing Denied Aug. 18, 1941.

1. Bankruptcy ⚷114(1)

A brewing company's bankruptcy receiver, by virtue of his appointment, succeeded to powers of company's board of directors, and thereafter acted in dual capacity as representative or agent of creditors and as agent or representative of the company.

2. Intoxicating liquors ⚷87

Where licensed brewing company's receiver, pursuant to order of bankruptcy court, sold beer previously manufactured by company, receiver in selling beer exercised right conferred by license issued to company, and surety on company's bond covering obligation of paying excise taxes was liable for excise taxes on the beer. St.1933, pp. 626–628, §§ 2, 3, 5.

3. Intoxicating liquors ⚷87

Where licensed brewing company's receiver, pursuant to order of bankruptcy court, sold beer previously manufactured by company, fact that receiver was a liquidating receiver rather than an operating receiver did not relieve surety on company's bond covering obligation of paying excise taxes from liability for excise taxes on beer. St. 1933, pp. 626–628, §§ 2, 3, 5.

4. Intoxicating liquors ⚷87

Where licensed brewing company's receiver, pursuant to order of bankruptcy court, sold beer previously manufactured by company, surety on company's bond for manufacture and sale of beer could not avoid liability for excise taxes on the beer on ground that receiver's bond should be held liable because the company had not both manufactured and sold the beer, since application of same reasoning would absolve receiver's surety because receiver sold beer, but did not manufacture it. St.1933, pp. 626–628, §§ 2, 3, 5.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by the People against the United States Fidelity & Guaranty Company involving the defendant's liability as surety for taxes assessed in connection with the sale of beer by the receiver of the Bailey Brewing Company pursuant to an order of the bankruptcy court. From a judgment determining that the defendant was liable, the defendant appeals.

Judgment affirmed.

Hearing denied; CARTER and EDMONDS, JJ., dissenting; TRAYNOR, J., did not participate herein.

Horace W. B. Smith, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

The defendant company appeals from a judgment in favor of the State determining that defendant as surety for the Bailey Brewing Company is liable for taxes assessed by the State Board of Equalization under the California Beverage Tax Act (Stats. of 1933, chap. 178, p. 625), in connection with the sale of beer manufactured by the Bailey Brewing Company and sold by the receiver of that company pursuant to a court order of the bankruptcy court.

The California Beverage Tax Act, supra, section 2, requires every manufacturer of beer to secure a license from the state board to engage in that business. The same section requires the applicant for a license to accompany his application with a corporate surety bond "conditioned upon faithful performance of all of the requirements of this act and expressly providing for the payment of all excise taxes, penalties and other obligations of such person, arising out of this act". Section 3 provides that the license shall not be assignable and shall be valid only for the person in whose name it is issued. Section 5 of the act imposes on beer sold by a manufacturer an excise tax of sixty-two cents per barrel.

The facts giving rise to the present proceeding were stipulated to by the parties. It appears that prior to April 1, 1935, the Bailey Brewing Company, a California corporation, was duly licensed to manufacture and sell beer. Pursuant to the provisions of section 2 of the California Beverage Tax Act, supra, the company had secured from defendant and delivered to the state board a $1,000 surety bond conditioned as set forth in the section. While the license and bond were in full force and effect, on April 1, 1935, a petition in involuntary bankruptcy was filed against the Bailey Brewing Company, and on the same day one Hubert F. Langham was appointed receiver for the company. At the time that Langham was appointed the brewing company had on hand over 1,200 barrels of beer manufactured by it. On April 4, 1935, Langham petitioned the bankruptcy court for authority to sell the beer. Among other things, the petition recited that the sale of the beer would be subject to the sixty-two cents per barrel state tax, and that the receiver did not intend to operate the brewery. It was also recited that the tax would be paid from the purchase price received. This petition was granted and the beer sold. Neither the receiver, the Bailey Brewing Company, nor the defendant surety has paid the state tax on this sale, nor was the tax paid in the bankruptcy proceeding. After the sale of the beer, a trustee in bankruptcy was appointed and the Bailey Brewing Company has since been discharged as a bankrupt.

On this state of facts the trial court concluded that the tax, amounting to $641.67, plus interest, was properly assessed against the Bailey Brewing Company, and that the defendant surety company is liable therefore on its bond.

It is contended by the appellant surety company that the license of the Bailey Brewing Company to manufacture and sell beer was personal to it and did not inure to the benefit of the receiver; that such license terminated upon the appointment of the receiver; that the receiver was a liquidating as distinguished from an operating receiver; that the surety on a licensee's bond for the manufacture and sale of beer, is not liable for taxes on beer manufactured by the licensee but sold by a liquidating receiver of the licensee. The appellant concedes that, since it is a compensated surety, the rule of strict construction of its obligation does not obtain, and that the bond is to be liberally construed to effect its object. It is also conceded that neither the liability of the surety, nor of the licensee, if they are liable for these taxes, was affected by the discharge in bankruptcy, and that the sale by the receiver was a taxable sale, since such officers are required to comply with local law and pay state taxes. Appellant's sole contention, as noted above, is that the bond covers only sales of beer where the beer is both manufactured and sold by the licensee, and that it does not secure payment of the excise tax on beer manufactured by the licensee but sold by the liquidating receiver. Appellant suggests that the receiver's bond, conditioned that he would faithfully perform his duties, rather than the bond filed by the Bailey Brewing Company, should protect the State in its claim.

[1, 2] It is appellant's theory that the license of the Bailey Brewing Company to manufacture and sell beer, or the right to exercise that license, terminated with the appointment of the receiver, with the result that the beer was not sold under the license, so that the tax was not due either from the brewing company or its surety. It is the basis of appellant's position that the receiver in making the sale was not the agent or representative of the Bailey Brewing Company, but either the agent or representative for the creditors, or acting independently of the corporation and the creditors. This position is unsound. The beer had already been manufactured by the licensee under the license. The receiver acted for and on behalf of the corporation in making the sale, as well as on behalf of the creditors. The receiver acted in place of the board of directors. The powers of the board of directors were immediately suspended upon the appointment of the receiver. The receiver, by virtue of his appointment, succeeded to the powers of the board of directors and thereafter acted in a dual capacity—as the representative or agent of the creditors, and as agent or representative of the corporation. There are many cases establishing the rule that a receiver of a corporation is the agent and representative of the corporation for most purposes. Scott v. Hollingsworth, 215 Cal. 314, 9 P.2d 836, 82 A.L.R. 995; Verder v. American Loan Society, 1 Cal.2d 17, 32 P.2d 1081; North v. Cecil B. DeMille Productions, Inc., 2 Cal.2d 55, 39 P.2d 199; Camerer v. California Sav., etc., Bank. 4 Cal.2d 159, 48 P.2d 39, 100 A.L.R. 667; see, also, New York Terminal Co. v. Gaus, 204 N.Y. 512, 98 N.E. 11; Central Trust Co. v. New York City & N. R. Co., 110 N.Y. 250, 18 N.E. 92, 1 L.R.A. 260. Under these authorities, when the receiver sold the beer manufactured by the licensee he was clearly acting on behalf of both the corporation and its creditors, and, in so doing, exercised the rights conferred by the license issued to the corporation. The bond was given for the express purpose of securing the payment of the excise taxes. It would be a most anomalous situation if, where the bond is needed most—that is, where the licensee

is bankrupt—the surety should be released from liability. Fortunately, there is no compelling rule of law that requires such a holding, and there are several authorities that sustain the view that the surety is liable under such circumstances.

In City of Montpelier v. National Surety Co., 97 Vt. 111, 122 A. 484, 33 A.L.R. 489, a bond was given to secure performance of construction work. The company went into receivership, and the receiver continued the work. An action was brought against the receiver for violation of the contract in a portion of the work performed by him. Against objections very similar to the ones urged by appellant in the present case, the court held that the bond applied and that the surety was liable. The same rule was applied in United States v. Bailey, C.C., 178 F. 302, where the surety had executed a bond to indemnify the United States for damage to public property growing out of the operation of the railroad. The corporate principal went into receivership, and the bond was violated by negligent injury to public property after the receiver had taken possession. The surety was held liable.

[3] Appellant attempts to distinguish these and the other cases cited on the ground that they involved operating receivers while the instant case involves a liquidating receiver. There are no doubt many legal and statutory distinctions between the powers and duties of operating and liquidating receivers, but, it is our opinion, that, in selling the beer already manufactured by the Bailey Brewing Company, the receiver was clearly acting on behalf of the corporation, as well as the creditors, and for that reason he was acting under the license secured by the Bailey Brewing Company.

None of the cases cited by appellant compel or even suggest a contrary result. Rumford v. Boston Grocery Co., 111 Me. 116, 88 A. 394, involved a situation where the defendant secured a license to keep a pool hall and filed a bond conditioned that gambling would not take place therein, and that the pool hall would not remain open after certain hours. Thereafter, the defendant rented the premises and equipment to a third person, who violated the provisions of the permit. It was held that the bond did not cover operations of the tenant Lyman v. Cheever, 168 N.Y. 43, 60 N.E. 1047, also cited by appellant, involved a situation where a bond was required to secure a liquor license. The licensee surrendered his license, and thereafter violated the conditions of the permit. The court properly held the surety was not liable. These cases are obviously not in point.

Appellant also cites United States v. Whitridge, 231 U.S. 144, 34 S.Ct. 24, 58 L.Ed. 159, which held that a corporation operated by a receiver in bankruptcy was not subject to the excise or privilege tax imposed by the United States Corporation Laws of 1909, 36 Stat. 112, upon the carrying on or doing business by a corporation, for the reason that the receiver was acting as an officer of the court and not as an officer of the corporation, and that the appointment of the receiver constituted an ouster of corporate management. That case, decided in 1913, turned upon the language of the particular statute involved, and upon the legal situation that existed before the passage of the sixteenth amendment to the federal Constitution.

There is nothing in the decision of In re California Pea Products, D.C., 37 F. Supp. 658, cited at the oral argument, that assists appellant. It held that a liquidating receiver could not be compelled to secure a license under the California Sales Tax Act, St.1933, p. 2599. That does not determine whether under a statute such as is here involved the receiver acts under the license of the bankrupt.

[4] Appellant's suggestion that the receiver's bond should be held liable and not the surety for the licensee is clearly without merit. If the surety for the manufacturer is not liable it would be only because the tax is imposed on a manufacturer and seller of beer, and the licensee manufactured the beer in question but did not sell it. By the same reasoning, the receiver sold the beer but did not manufacture it. As a result of such reasoning, neither surety would be liable, and the State would lose the tax. The very purpose of the bond provision in the statute is to assure the State that the tax will be paid.

It is our view, that, under the terms of the statute, considering its language and purposes, and under the rule laid down in the above-cited cases, the receiver was acting under the license in selling the beer already manufactured by the licensee, and that the appellant surety is liable for the tax.

The judgment appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

45 Cal.App.2d 535

PEOPLE v. GIMINIANI.

Cr. 538.

District Court of Appeal, Fourth District, California.

June 23, 1941.

1. Infants 🔑20
Rape 🔑52(1)

Evidence was sufficient to support conviction of rape and of violations of Section 288 of the Penal Code, arising out of acts alleged to have been committed on 8-year old girl and on a 10-year old girl, as against contention that testimony given by two girls was inherently improbable. Pen.Code, § 288.

2. Criminal law 🔑957(1)

The statement of a juror cannot be used to impeach the verdict, whether it takes the form of an affidavit or an extra-judicial statement. Code Civ.Proc. § 657.

3. Criminal law 🔑956(11)

Since verdict cannot be impeached by affidavit of a juror, it cannot be impeached by affidavits of third persons which merely set forth substance of extra-judicial statements made by juror. Code Civ.Proc. § 657.

4. Criminal law 🔑956(11)

Affidavits of third persons as to statement of one of jurors a few hours after verdict was returned that another woman, whom she did not name, had told her over telephone on evening before, while action was still pending, that defendant had previously been convicted of a similar offense, and that he had bad record for such offenses, would not be considered for purpose of showing jury's "misconduct", so as to entitle defendant to a new trial, since jurors are disabled to impeach their verdict by any means. Code Civ.Proc. § 657.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

5. Constitutional law 🔑70(3)

The rule disabling jurors from impeaching their verdict by any means is a statutory one, and any change therein should come from the legislature. Code Civ.Proc. § 657.

6. Criminal law 🔑1171(1)

Record failed to show that district attorney was guilty of prejudicial "misconduct" in his closing argument on ground that he gave expression to his personal beliefs as to guilt of defendant, as distinguished from a belief based upon the testimony.

7. Criminal law 🔑723(1), 1171(1)

In prosecution for rape and violations of Section 288 of the Penal Code, arising out of acts alleged to have been committed on an 8-year old girl and on a 10-year old girl, district attorney's remarks in his closing argument that only pleasant thing about the case was fact that it had been possible for details to come "from the mouths of the victims themselves, instead of from an autopsy surgeon" was improper, but was not so inflammatory and prejudicial as to constitute prejudicial "misconduct", where no request was made of trial court to instruct jury to disregard it. Pen.Code, § 288.

◆

Appeal from Superior Court, Kern County; Raymond McIntosh, Judge.

William Giminiani was convicted of rape and of violations of Section 288 of the Penal Code, and he appeals.

Affirmed.

Victor H. Parry and James Vizzard, both of Bakersfield, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with rape and in second and third counts with violations of section 288 of the Penal Code. He was found guilty on all three counts and has appealed from the judgment and from an order denying his motion for a new trial.

The first two counts involve a 10-year-old girl named Barbara and acts alleged to have taken place on April 13, 1940. The third count involves Barbara's 8-year-old sister, Patricia, and acts alleged to have taken place on June 22, 1940.

The appellant is a brother of the wife of the next door neighbor of the parents of these two girls. The acts involved in all three counts are claimed to have taken place in a building at the rear of the neighbor's lot. This building consisted of a two-car garage with two rooms at one end. In front was a wash room containing a laundry tray, and to the rear of that was a storeroom containing a bed. The appellant had often visited his sister's home and was acquainted with these two girls.

There is evidence that on April 13, 1940, while the appellant and the two girls were in the back yard of his sister's home, he suggested that they play hide and seek. The younger girl was "it" and was to count to 500 by 5's while the others hid. Barbara testified that when her sister began to count she went through the wash room into the storeroom and hid behind the bed, that the appellant followed her into that room and lifted her upon the bed, that the acts involved in counts one and two then took place, and that appellant desisted when Patricia entered the wash room.

With reference to the acts involved in the third count there is evidence that on June 22, 1940, the appellant was at his sister's home and that his nephew and a brother of the two girls were washing his car. Patricia testified that on this occasion the appellant handed her a chamois and told her to wash it, that she went into the wash room and proceeded to wash it at the laundry tray, and that while she was doing this the appellant came in and committed the acts in question.

[1] The appellant first contends that the verdicts are not supported by the evidence. It is virtually conceded that the evidence, if believed, is sufficient but it is argued that portions of the evidence given by the two girls are so inherently improbable that they could not be accepted as true, with the result that there is no substantial evidence to support the verdicts. In each instance, the testimony of the girls is corroborated by other witnesses in so far as the surrounding events and circumstances are concerned, although in each instance there is no corroborating evidence as to what took place inside of the building.

With respect to the claimed improbability of Barbara's testimony it is argued that for Patricia to have counted to 500 by 5's could have consumed little more than two minutes at most, and that it was impossible for the things described by Barbara to have taken place within that period of time. The evidence is such that this conclusion would not necessarily follow even though it be assumed that only two minutes elapsed. Moreover, this argument entirely fails because, so far as appears from the evidence, considerable time may have elapsed between the time Patricia completed the counting and the time she entered the wash room and alarmed the appellant, during which time she may have been searching elsewhere. It is further argued in this connection that it was a physical impossibility for the appellant to have effected penetration while a certain portion of the girl's clothing was about her ankles, as she testified. The argument hardly sounds convincing and, as the record clearly indicates, the entire matter presented a question of fact for the jury.

The only claim of improbability in connection with the testimony of Patricia rests upon an asserted conflict between a statement she made on direct examination and one on cross examination. A reading of the transcript discloses that the two statements were not in the least conflicting and nothing in her testimony is pointed out to us which in any way indicates improbability.

The appellant testified that he was not at his sister's home on either of these two occasions and produced a number of witnesses who testified that he was elsewhere on each of those days. The plain situation is that if the People's evidence is accepted as true there is no question of appellant's guilt, while if the appellant's evidence is accepted he was not there on either occasion. It may be here observed that the record discloses a number of matters in connection with the testimony of several of appellant's witnesses which strongly indicate why the jury preferred to accept the testimony of the two girls and the other witnesses for the People. While the evidence is conflicting, it is sufficient to support the verdicts and judgment.

It is next contended that the court erred in denying the motion for a new trial for the reason that the jury received evidence out of court. The asserted facts upon which this contention is based are as follows: A few hours after the verdict was rendered a woman juror, in the presence of several other persons, told one of the attorneys for the appellant that another woman, whom she did not name, had called her on the telephone on the evening before, while the action was still pending, and had told her that the appellant had previously been convicted of a similar offense and that he had a bad record for such offenses.

Five days after the verdict was returned the attorney who had heard the juror's statement had his secretary call a Mrs. Clampitt while he and another listened on two extensions of the phone. The secretary represented to Mrs. Clampitt that she was a friend of this juror, that she was the mother of two children and worried because of the facts surrounding this case, that this juror had told her that Mrs. Clampitt had talked to her and suggested that she call Mrs. Clampitt for further information about the case. Mrs. Clampitt then told the secretary that the appellant had been convicted of a similar crime in 1925 and that there had been other charges against him, mentioning one in particular. The secretary did not directly accuse Mrs. Clampitt of having talked to this juror but, during the conversation, when the secretary mentioned that the juror had said that Mrs. Clampitt had talked to her regarding this case, Mrs. Clampitt did not deny the fact.

In support of his motion for a new trial the appellant filed the affidavits of the persons who had heard the juror's statement a few hours after the verdict was returned and also the affidavits of the secretary and the two other persons who had heard the telephone conversation with Mrs. Clampitt. The affidavit of the juror who is said to have made the statement was not filed.

The appellant contends that the circumstances here do not come within the rule that a juror may not impeach the verdict, it being insisted that it was here established by evidence other than that of the jurors that outside evidence was received. In discussing a similar contention the Supreme Court, in People v. Gidney, 10 Cal.2d 138, 73 P.2d 1186, 1191, said:

"Another affidavit charges the bailiff with informing the juror that one of the defendants had a bad reputation with the police. That these activities would justify a new trial cannot be doubted, and it may be conceded that such misconduct, properly established, would constitute reversible error.

"There remains the question whether it was properly established, and in this case the only evidence to show the misconduct was that of the jurors themselves. Their affidavits constitute an impeachment of their verdict, and under the provisions of section 657 of the Code of Civil Procedure, cannot be admitted in evidence. Counsel for defendants urges that a distinction should be made between the situation where jurors affirm improprieties in their own deliberations and where, as here, they disclose outside influences, unauthorized communications by a court officer. Some jurisdictions make this distinction, while others apply the general rule literally. [Citing authorities.] In California the rule is statutory, and it has been held that the statutory exception of chance verdicts is exclusive. Accordingly, affidavits of jurors showing misconduct out of court or evidence received by them from outside sources have been refused admission."

In People v. Reid, 195 Cal. 249, 232 P. 457, 462, 36 A.L.R. 1435, the court said: "His claim to relief rests solely upon the affidavits of jurors, the necessary effect and sole purpose of which is to impeach their verdict, but it is well settled that the testimony of jurors is utterly incompetent for this purpose. Upon well-grounded considerations of public policy jurors are legally disabled to impeach their verdict by any means, whether it be by affidavits or by testimony or by extrajudicial statements."

A very similar situation was recently held by this court to be insufficient to justify a reversal. People v. King, 40 Cal.App.2d 137, 104 P.2d 521.

[2-5] The rule seems to be thoroughly established in this state that the statement of a juror may not be used to impeach the verdict whether it takes the form of an affidavit or an extra-judicial statement. In the instant case, the proof offered was to the effect that this juror had made such a statement, and there was no direct evidence of the pertinent fact that outside evidence had been received by the juror. The juror's affidavit would have been inadmissible, and the evidence of the woman who is said to have talked to her was not obtained. Aside from any other consideration, the affidavits relating to the telephone conversation with Mrs. Clampitt, did not even establish that she was the woman who talked to the juror, if anyone did. Nothing further appears than that proof was offered that the juror had made a statement which had the effect of impeaching the verdict. As the verdict may not be impeached by the affidavit of the juror it cannot be impeached by affidavits of third persons which merely set forth the substance of extra-judicial statements made by the juror. It may be conceded that the fact sought to be proved, if properly established, would have justified the granting of a new trial. It would seem that something more could have been done in the trial court to secure the presence of Mrs. Clampitt to further investigate the facts in this regard. But this was not done and we are confined to the record before us which, under the established rule, is not sufficient to justify a reversal. Any relaxation of the rule might lead to most undesirable conditions. Moreover, the rule is statutory and any change therein should come from the legislature.

[6, 7] The appellant's last point is that the district attorney was guilty of prejudicial misconduct in his closing argument to the jury. It is suggested that the district attorney there gave expression to his personal belief as to the guilt of the appellant, as distinguished from a belief based upon the testimony. The record does not support this contention. It is further argued that a remark made by the district attorney to the effect that the only pleasant thing about this case was the fact that it had been possible for the details to come "from the mouths of the victims themselves instead of from an autopsy surgeon" was inflammatory and prejudicial, as tending to remind the jury of certain well known cases in this state where the victims had been killed. The remark should not have been made but no request was made of the court to instruct the jury to disregard the same. It by no means appears that it was so prejudicial that its effect could not have been removed in that manner had a timely request been made. No reversible error appears in this connection.

The judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

45 Cal.App.2d 395

MACART et al. v. SAN JOAQUIN BUILDING & LOAN ASS'N et al.

Civ. 12469.

District Court of Appeal, Second District, Division 1, California.

June 17, 1941.

1. Appeal and error 🔑931(1)

Where an appeal is taken on the ground of insufficiency of evidence to support the judgment, all conflicts in the evidence must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged to uphold the judgment if possible.

2. Appeal and error 🔑989

Where a verdict is attacked as unsupported by the evidence, the appellate court's power begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

3. Appeal and error 🔑996

Where two or more inferences can reasonably be deduced from the facts, the appellate court is without power to substitute its deductions for those of the trial court.

4. Appeal and error 🔑994(3)

The credibility of witnesses and the intrinsic value of testimony are matters for the trier of facts, and are not for the consideration of the appellate court.

5. Appeal and error 🔑1010(1)

An appellate court may not disturb the findings of the trial court except when it is made to appear clearly that upon no hypothesis whatever is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the trial court.

6. Appeal and error 🔑842(7)

The appellate jurisdiction of the District Court of Appeal is confined solely to questions of law, and where the evidence which militates against an appellant, considered by itself and without regard to conflicts in the entire evidence, is sufficient to support the findings, the question ceases to be a "question of law" and becomes a "question of fact" upon which the determination of the trial court is conclusive.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

7. Fraud 🔑58(1)

In action for damages based on allegedly fraudulent misrepresentations whereby plaintiffs were induced to purchase realty, evidence, including testimony that one defendant had stated that property was "in nice condition", that it had been checked and "was in very fine condition", and that any boards that looked bad were painted so that they would look good, sustained findings that false representations were made to plaintiffs as charged.

8. Fraud 🔑58(2)

Defendants, appealing from judgment for plaintiffs in action for damages for allegedly fraudulent misrepresentations whereby plaintiffs were induced to purchase realty, could not contend that defective condition of buildings was latent and not within defendants' knowledge, where one defendant, in reply to query whether an investigation had been made to determine the presence of a termite condition, testified that the property had been thoroughly checked and "was in very fine condition".

9. Fraud ⚷58(4)

In action for damages for allegedly fraudulent misrepresentations whereby plaintiffs were induced to purchase realty, evidence did not sustain defendants' contention that plaintiffs did not rely on representations made.

10. Fraud ⚷62

Evidence was sufficient to justify the trial court in awarding plaintiffs $990 as damages sustained by reason of false representations made by defendants to induce plaintiffs to enter into a contract for the purchase of realty. Civ.Code, § 3343.

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action by H. J. Macart and his wife against the San Joaquin Building & Loan Association and another, to recover damages for allegedly fraudulent misrepresentations whereby plaintiffs were induced to purchase certain realty. From a judgment for plaintiffs, defendants appeal.

Affirmed.

O. C. Parkinson, of Stockton, for appellants.

Samuel Schwartz and P. Talbot Hannigan, both of Los Angeles, for respondents.

WHITE, Justice.

After trial without a jury of an action for damages based upon alleged fraudulent misrepresentations whereby plaintiffs were induced to purchase certain real estate, the court made findings of fact, substantially according to the allegations of plaintiffs' complaint (as amended to conform to the proof), and rejecting the denials of defendants' answer. Such findings were that on or about October 18, 1937, defendants offered to sell to plaintiffs a certain parcel of property located in Orange county; that prior to such purchase defendants represented to plaintiffs that the buildings located upon said property were in good and substantial structural condition and had not been impaired by termites, dry rot or otherwise. The court further found that plaintiffs had not made any inspection of said buildings prior to the purchase other than inspection of a casual nature, and that such plaintiffs did not rely upon any inspection of said buildings, but relied upon the representation of defendants, and in reliance thereon purchased the property in question. The court further found that the sills, studdings and timbers of portions of the buildings were infested and destroyed by dry rot and fungus; that the falsity of the representations was known to the defendants, and that the representations were made with intent to induce plaintiffs to purchase the property.

Judgment accordingly was entered in favor of plaintiffs in the sum of $990, and from such judgment defendants prosecute this appeal, contending that there is no evidence of misrepresentation; no proof of knowledge by defendants of the alleged conditions; that plaintiffs did not rely upon the asserted representations; and that no actual damage was shown.

The plaintiffs were husband and wife and the defendant W. J. Haryett was the resident manager in Los Angeles of the defendant association. The property involved was a two-story stucco building, about seven years old, containing two stores, each with an apartment above it, a three-room cottage in the rear, and a four-car detached garage, and was located at Dana Point, a beach subdivision along the coast highway in Orange county. The plaintiff H. J. Macart lived in Los Angeles and was employed as a real estate sales manager for Dana Point Corporation, spending his Sundays at the office of the corporation about a block and a half from the property. The misrepresentations assertedly were made in two conversations with Mr. Haryett, the first of which was had about October 18, 1937, when Macart and Haryett inspected the property. Mr. Macart testified that at this time they looked at the property for "about five or six minutes"; that they looked at the west store, east apartment and rear bungalow, but did not "make any examination of the construction of the building or condition of the structure"; that at that time Mr. Haryett "said the property was in nice condition"; that they could not get into one store because they could not unlock the door; that he could not see much through the windows of that store because they were dirty; that he did not attempt to get into that store or further inspect the building before the actual purchase.

After this conversation, on November 1 plaintiff Macart went to the Los Angeles office of defendant association and made a deposit of $20. At this time Mr. Macart and defendant Haryett as manager of the association executed a document which, in substance, acknowledged receipt by defendant association of the deposit as "part purchase price", and recited that the full purchase price was to be $2,500, payable $250 down and the balance $25 or more per month including principal and interest at 6 per cent. It also contained the following provision: "The deal is subject to the approval of the Board of Directors of San Joaquin Building & Loan Association. * * *" At the foot of this receipt there was indorsed: "I hereby agree to purchase the within described property upon the price and terms herein mentioned with the understanding that the deposit is to be returned in the event the deal is not approved. H. J. Macart."

The second alleged misrepresentation, according to the testimony of both plaintiffs, was made in the office of defendant association in Los Angeles on November 5, 1937. On this occasion the parties executed an "escrow agreement", which recited that the seller agreed to sell and the buyer to purchase the property in question for $2,500, of which $250 was to be paid in cash and the balance by the execution of a trust deed for $2,250, payable $25 per month, including interest at 6 per cent. It will be noted that these were precisely the terms contained in Mr. Macart's offer of November 1. Mr. Macart testified that while the papers were being prepared by the girl in Mr. Haryett's office, "I asked about the condition of the store; asked if it had been checked for termites or fungus or in what condition it was in. He" [Haryett] "said it was in very good condition because he had gone all over the place and checked it thoroughly and it was in very fine condition. Because I could not get into that one store, I didn't know what it looked like." Mr. Macart further testified that he would not have purchased the property had the statements not been made.

[1-3] Appellants earnestly contend that the record herein is barren of any substantial evidence to support the findings, and that the judgment predicated thereon must be reversed. The powers of an appellate court in reviewing the evidence when an appeal is taken on the ground of insufficiency of the evidence to support the judgment have received frequent attention from the courts, and the limitations upon appellate tribunals in such cases have been definitely announced and established. The rule in question may be epitomized in a quotation of the following language taken from the case of Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183, 184: "In reviewing the evidence on such an appeal, all the conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

[4-6] We think that enough of the evidence has been summarized herein to indicate that, although the question may be a close one, there is substantial evidence to sustain the findings of the trial court that the false representations were made to plaintiffs as charged. We cannot concern ourselves with the credibility of witnesses or the intrinsic value of testimony. Those are matters addressed to the trier of facts. No rule is more firmly grounded in our law than the one which provides that an appellate tribunal cannot disturb the findings of the trial court except when it is made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court. Our appellate jurisdiction is confined solely to questions of law, and where the evidence which militates against an appellant, considered by itself and without regard to conflicts in the entire evidence, is sufficient to support the findings, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact, upon which the determination of the trial court is final and conclusive.

[7] In the light of the rule just announced, let us proceed to an analysis of the record before us. In it we find positive and direct testimony that, in response to an inquiry by plaintiffs as to whether the premises in question "had been checked for

termites or fungus, or in what condition it was", defendant Haryett replied that "it was in very good condition, because he had gone all over the place and checked it thoroughly and it was in very fine condition". True, this statement was made on the occasion of the second meeting of the parties and following the execution of the original offer and receipt, but it was nevertheless made at a time prior to the final consummation of the deal between the parties, the original agreement being of an executory character. Further, such evidence was corroborative of the statement made by the same defendant to one of the plaintiffs at the time of their initial meeting, which statement was that the property was "in nice condition". In addition to the foregoing, the record indicates that at the trial, when defendant Haryett was asked in connection with his inspection of properties which his codefendant was offering for sale, "If you see any places which seem to have been infected what do you do?" he answered, "If we see any boards that look bad we paint them so they look good." In such circumstances, we are without power to disturb the questioned findings.

[8] Appellants' claim that the defective condition of the buildings was latent and not within the knowledge of appellants is answered by the positive testimony given by appellant Haryett, when in reply to a query by one of the respondents as to whether an investigation had been made to determine the presence of a termite condition, he replied that the property had been thoroughly checked and "was in very fine condition".

[9] Appellants' next contention, that respondents did not rely upon the alleged representations of the former, is completely refuted by the following testimony given by respondent Macart:

"Q. This statement regarding the condition of the building was before you and your wife signed the escrow papers? A. That is right.

"Q. Did you rely upon that statement? A. I did.

"Q. If that statement had not been made, would you have purchased the property? A. I don't believe I would; I would not have had money to take care of it.

"Q. Well, do you know whether you would or not? A. I know I would not."

Mrs. Macart likewise testified: "Q. If you had not been sure that the building was in good condition would you have gone ahead with this deal? A. No, I know we would not."

[10] While the evidence was in conflict as to the actual value of the property which respondents received, there is present in the record evidence of sufficient substantiality to justify the court, in conformity with section 3343 of the Civil Code, in awarding plaintiffs the sum of $990 as damages sustained by reason of the false representations made to induce them to enter into the contract in question.

No other issues raised require consideration or discussion. The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

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45 Cal.App.2d 493

DOYLE et al. v. LOYD et al.

Civ. 11620.

District Court of Appeal, First District,
Division 2, California.

June 20, 1941.

1. Automobiles 🔑244(35)

In action by automobile occupants against driver of approaching truck for injuries sustained in collision at intersection, evidence warranted finding that truck was traveling in excess of 35 miles an hour.

2. Automobiles 🔑244(11)

In action by automobile occupants against driver of approaching truck for injuries sustained in collision at intersection, evidence was sufficient to show that truck driver did not make proper use of highway at time of collision in respect to signaling left turn, and in delaying commencement of left turn.

3. Automobiles 🔑171(13)

A truck driver not exercising due care as he approached intersection was not entitled to assume that driver of automobile would exercise due care in approaching intersection and would stop at boulevard stop sign.

4. Infants ⇨80(1)

Where trial court was not advised as to ages of certain plaintiffs at commencement of trial of personal injury actions, and later it transpired that such plaintiffs were minors, and thereupon trial court caused such proceedings to be had that a guardian ad litem was appointed for each of such minors, and guardians promptly appeared and thereafter continued to act for minors, defendants' motion that causes of action of such minors be stricken from the pleadings was properly denied.

5. Infants ⇨77

The statutes regarding appointment of guardians ad litem were enacted for purpose of protecting minors and not for purpose of precluding minors from their legal rights.

Appeal from Superior Court, Monterey County; Maurice T. Dooling, Judge.

Action by Arthur Doyle and others against Kenneth Loyd and others for injuries sustained in an automobile accident. From a judgment for the plaintiffs, the defendants appeal.

Affirmed.

Garth V. Lacey, of Salinas, for appellants.

Phillip Barnett and Samuel Vartan, both of San Francisco, and Anthony Brazil, of Salinas, for respondents.

STURTEVANT, Justice.

On August 10, 1939, a truck being operated by defendant Kenneth Loyd collided with an automobile being operated by Joaquin Rodriquez. The latter commenced action No. 19622 to recover damages. Others riding in the automobile with him commenced action No. 19623 to recover damages. The numbers indicate the records of Monterey county. The actions were tried together. In the first action the trial court made findings in favor of the defendants. The plaintiff has not appealed. In the other action the trial court made findings in favor of the plaintiffs and the defendants have appealed.

Highway 101 leads from San Francisco south to Los Angeles. A short distance north of Salinas the Southern Pacific Railroad right-of-way extends practically at right angles across the right-of-way of the highway. The highway crosses the railroad property by an underpass. That underpass is so constructed as to form the letter "Y". The stem extends to the north and the arms respectively to the southwest and southeast. The southeast arm is known as Monterey street. The southwest arm is known as Main street. The sides of the excavation are concrete walls. At the time of the accident Rodriquez was driving his automobile, a Chevrolet, toward the north. The plaintiffs Arthur Doyle, Virginia De Sosa, Ana De Sosa, and Mary Escobar, were riding with him in the automobile, Kenneth Loyd, as the agent of the defendant Marty Sherman, was driving a truck in a southerly direction toward Los Angeles. The accident happened at the intersection in the underpass below the railroad trestle. There were stop signs at the intersection of Main street and Highway 101. On the pavement between the stop signs there was written "Stop". The accident happened at about 6:20 p. m.

The Dugger family were proceeding in their automobile on North Main street behind defendant. They testified that he was operating the truck in the right-hand lane and that he entered the underpass at an approximate speed of 20 miles per hour. Defendant's testimony regarding his course and speed was in accord. The accident report made out by Officer Adcock stated that defendant's speed at the time of the accident was 20 miles per hour. Mr. Freer, who was driving on Main street behind plaintiffs' automobile, testified that defendant's speed was "around 35 miles per hour". Defendant testified that as he started into the underpass he held the arm signal strap down with one hand because it was not equipped with a ratchet. The highway at this intersection is constructed so that a turn left into Monterey street should be commenced at a point before reaching the overhanging bridge of the underpass. The testimony was to the effect that the Chevrolet in which plaintiffs were riding crossed over the stop sign painted on Main street and proceeded into the intersection at a slow speed without stopping. The witnesses stated that when defendant was under the bridge he applied his brakes and turned the truck sharply to the left out of the right-hand lane. Defendant's story was that he saw the Chevrolet proceed into the highway without making a stop and that he immediately applied his air brakes and tractor brakes and cut to the left to avoid a collision with the automobile. Plaintiffs' theory of the accident was that defendant reached a point under the overhang, realized that he had proceeded too far to make a proper left turn into Monterey street, and made a sudden turn to the left causing the collision with the Chevrolet. The accident occurred near the center line of Highway 101, the truck pushing the automobile over the curb and into the concrete wall of the underpass. Mr. Freer testified that the impact was such that three of the passengers were thrown out of the Chevrolet. Police officers and an engineer stated that the truck's skid marks started from a point in the right lane underneath the overhang and swung across the highway to the left side of the road; the marks were over 100 feet in length, were very pronounced, and contained several breaks. After the accident defendant told one of the officers that it was the first time he had driven the truck along the southerly route and that he did not know just where the turn was located.

[1] The defendants contend that the preponderance of the evidence was to the effect that the truck was traveling 20 to 25 miles per hour at the time of the collision and that the trial court's finding that it was traveling in excess of 35 miles per hour is not sustained by the evidence. We find no merit in that contention. It is true there was some evidence to the effect the truck was traveling 20 to 25 miles per hour but there was substantial evidence that it was traveling much faster. One witness testified that it was traveling 35 miles per hour. The skid marks and other physical facts strongly tend to corroborate the testimony of the witness last mentioned.

[2] The defendants also contend that Kenneth Loyd was driving in the most westerly and outer lane of Highway 101 and was making proper use of said highway at said time under all existing conditions. It was not contended by the plaintiffs that the truck was not driven on the right-hand side of the highway before it reached the underpass. However, as shown above, it was the contention of the plaintiffs, and the record sustains their contention, that Loyd was not familiar with the road, that immediately before he reached the underpass he did not commence to make the turn into Monterey street but delayed until it was necessary for him to make what one witness designated a "hard turn" to the left. The uncontradicted facts were that the signal arm attached to the truck could be operated only by pulling a strap. To pull that strap was impossible at the very instant Loyd was making the left turn. At that very instant it was particularly necessary that the signal should have been in use and indicating to Rodriquez that the truck was about to pass immediately in front of him. For each of these reasons it may not be said that Loyd was making proper use of said highway at the time of the collision.

[3] The plaintiffs next contend that Loyd had no reason to believe Rodriquez would violate the boulevard stop sign and unlawfully proceed into Highway 101 without first stopping. As we have pointed out above there was evidence that the defendant Loyd was not exercising due care as he approached the entrance to Monterey street. Under those circumstances he was not entitled to assume that Rodriquez would exercise due care.

[4, 5] At the time the trial of said actions commenced the trial court was not advised as to the ages of Ana De Sosa and Mary Escobar. Later it transpired that they were minors. Thereupon the trial court caused such proceedings to be had that a guardian ad litem was appointed for each of said minors. Thereafter said guardians promptly appeared and have since continued to act for said minors. After it transpired that two of the plaintiffs were minors the defendants made a motion that the causes of action of the two minors be stricken from the pleadings. That motion was denied and the court's ruling is assigned as error. It is sufficient to state that we find no error in the ruling. The statutes regarding the appointment of guardians ad litem were enacted for the purpose of protecting the minors and not for the purpose of precluding them from their legal rights. The defendants cite no case that holds to the contrary.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

45 Cal.App.2d 435

HOCHWENDER v. CARTER et al.

Civ. 2703.

District Court of Appeal, Fourth District, California.

June 18, 1941.

Hearing Denied Aug. 14, 1941.

1. Executors and administrators ⚷117

The statute providing that, if any person embezzles property of a decedent, he shall be liable to an action by executor or administrator for double the value of the property, applies to all persons who embezzle property belonging to an estate and the statute was not designed particularly to cover executors. Probate Code, § 612.

2. Executors and administrators ⚷117

The statute providing that, if any person embezzles property of a decedent, he shall be liable to an action by executor or administrator for double the value of the property, does not apply to the surety on an executor's bond where executor has embezzled from the estate. Probate Code, §§ 541, 612, 920.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Jean Hochwender, etc., against Dallas L. Carter and others to recover sums embezzled by a former executor. From a judgment of dismissal, as to the surety, of his second cause of action under the doubling provision of Probate Code, § 612, plaintiff appeals.

Affirmed.

Clifford C. Pease, of San Diego (Edward J. Schwartz, of San Diego, of counsel), for appellant.

Pfanstiel & Fox, of San Diego, for respondent.

BARNARD, Presiding Justice.

This action was brought pursuant to section 612 of the Probate Code against a prior executor and his bondsman to recover an amount embezzled and fraudulently retained by the former executor, together with the additional amount arising from the doubling provision of that section.

In its decree settling the final account of the prior executor the probate court determined that he was chargeable with $8,069.45, and further found that he had appropriated to his own personal use moneys of the estate to the amount of $2,525.38. The latter amount was included in the $8,069.45 with which he was charged, but there was no order or decree charging him with an additional $2,525.38 under the doubling provision of section 612.

This action was begun after the entry of the decree settling the final account in the probate court. A first cause of action sought to recover the amount with which he was charged in the decree settling his final account. That amount was paid and we are not here concerned with the first cause of action.

The second cause of action sought to recover an additional $2,525.38 under the doubling provision of section 612. A demurrer to that cause of action, filed by the prior executor's surety, was sustained and the plaintiff has appealed from the judgment of dismissal as to the surety, upon that cause of action.

Three questions are here presented. The first is whether section 612 of the Probate Code was intended to apply to executors and administrators, that is, whether the double liability provided for therein was intended to be imposed upon an executor. This question seems not to have been directly decided on any appeal in this state. However, see Hill v. Superior Court, 16 Cal.2d 527, 106 P.2d 876 and Turney v. Shattuck, 96 Cal.App. 590, 274 P. 442. Assuming that section 612 does impose such a liability, a second question is whether the entry of a decree of a probate court settling the final account of an executor and determining the amount with which he is to be charged, including an amount which he has embezzled but not doubling the embezzled portion, is conclusive in an action of this nature which is subsequently brought. In other words, the question is whether the imposition of the penalty by the fixing of the amount thereof, as distinguished from the procedure to enforce collection, is exclusively within the jurisdiction of the probate court. The third question is whether, in any event, a surety on an executor's bond is liable for the increased amount represented by the doubling provision of section 612. In our opinion, this last question must be answered in the negative, and it is unnecessary to consider the other questions presented.

Under section 541 of the Probate Code the bond of an executor is conditioned upon his faithfully executing the duties of his trust according to law. An executor's bond would undoubtedly cover anything he embezzles from the estate and the surety would be liable for its return. This is true under the provisions of the Probate Code and such a situation would come within the terms of the bond, but if there is any further liability in such a connection it must be set forth or included in some statute or other law. Aside from liability arising under general provisions the Probate Code specifically makes a surety liable in certain instances. Thus the surety is liable under section 610 for injury resulting from his failure to file an inventory; under section 955 to creditors for damage arising from the failure to give notice to creditors; and under section 759 for actual damages caused by any neglect or misconduct in connection with the sale of property.

There are only two sections in the Probate Code imposing a double liability. One of these is section 792, relating to the fraudulent sale of real property. This imposes a liability upon the executor for double the value of the land sold, as liquidated damages. While section 759 also makes the surety liable for actual damages caused by neglect or misconduct on the part of the executor in making a sale of property, section 792, relating to the fraudulent sale of property, imposes a liability upon the executor only, without specifically including his surety. In Weihe v. Statham, 67 Cal. 245, 7 P. 673, this distinction was pointed out and it was held that this double liability for a fraudulent sale was not imposed on the bondsman.

The other section imposing a double liability is section 612, with which we are directly concerned. It is not referred to as liquidated damages and is not conditioned on the amount of any damage, and apparently it is in the nature of a statutory penalty for embezzlement which is really an aggravated form of fraud. Like the other section involving fraud, section 792, liability is not specifically imposed on the surety by the terms of section 612. The fact that liability is not specifically imposed on the surety in these fraud sections, while it is specifically so imposed in other sections involving neglect or misconduct, indicates that it was not intended to apply this liability to the bondsman of an embezzling executor. A very real distinction appears in that in every section of the Probate Code involving actual damages caused by the act of an executor, liability is imposed also upon his surety, while in both cases imposing double liability on account of the fraudulent act of an executor the liability is not by the terms of the statute extended to the surety.

Not only does this appear to be the intention of the legislature as expressed in these statutes, but there are good reasons why this should have been done. The bond being conditioned that the executor will faithfully execute his trust, it is logical and reasonable to impose liability upon the surety for his accounting for what came into his hands, to secure the return of any assets of the estate which he takes or conceals, and for any actual damage caused by his neglect or his misconduct. But something going beyond this, imposing double liability, is in the nature of a penalty imposed upon the wrongdoer as a punishment for his act, and possibly as a warning to others, whether it is called a penalty or liquidated damages. Such double liability has only been imposed in those cases involving actual fraud as distinguished from neglect or misconduct. While such a punishment may well be imposed on the guilty party it would hardly be logical to also impose it upon his bondsman who is not at fault, who is himself a victim of the same fraud, and who is already obligated to return the amount wrongfully taken. Such a double liability imposed by way of a punishment on the guilty party is not directly "nominated in the bond", and should not be added thereto in the absence of a specific statutory requirement.

[1, 2] Every executor is chargeable with all of the assets of the estate which come into his hands, under section 920 and irrespective of section 612. The further liability imposed by section 612 is added by way of punishment and that section specifically covers and is made applicable to any and all persons who embezzle property belonging to an estate. It was not designed particularly to cover executors, and perhaps more often than otherwise other persons would be involved where that section is to be applied. If we assume, however, that the language used is broad enough to include executors, where they have embezzled from such estates, it would be unreasonable to assume that it was intended also to apply to the surety on their bonds, merely because that one class of persons happen to have furnished a bond. So far as section 612 is concerned an executor, if included within its provisions, is in the same position as, and should be treated like, any other person to whom the section applies. That is, it should be held that the

penalty is personal to the guilty party and the section should not be held applicable to his surety in the absence of statutory intention so to do.

For the reasons given the respondent's demurrer to the second cause of action was properly sustained, and the judgment is affirmed.

We concur: MARKS, J.; GRIFFIN, J.

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45 Cal.App.2d 447

WHITEHEAD v. WHITEHEAD.

Civ. 11685.

District Court of Appeal, First District, Division 2, California.

June 19, 1941.

1. Divorce 🔑184(4)

Where appeals from orders and final decree in divorce proceedings were taken on what purported to be a judgment roll, and there was no certification of roll by clerk, no reporter's transcript, and no certification by reporter, and record did not disclose what evidence was taken in relation to final decree, reviewing court was bound to assume in support of decree that such evidence was taken as might be necessary to sustain it, and decree was a binding determination of issues of fact raised and cured alleged errors arising out of hearing upon motions even if preliminary orders were not merged in decree.

2. Divorce 🔑245(1)

The trial court's power to modify alimony provisions of an interlocutory decree of divorce is derived from statute, and the only successful attack upon such an order, when the only claim is that the award is too high or too low, must be based upon a clear showing of an abuse of discretion. Civ.Code, §§ 137, 139.

3. Divorce 🔑286

An abuse of discretion with respect to an application to modify alimony provisions of an interlocutory decree of divorce is never presumed and must be affirmatively established. Civ.Code, §§ 137, 139.

4. Divorce 🔑286

Appellant's contention that trial court abused its discretion in rejecting appellant's evidence on a motion to reduce award of alimony fixed by provisions of interlocutory decree of divorce and in believing conflicting testimony of respondent on such motion presented nothing for review. Civ.Code, §§ 137, 139.

5. Appeal and error 🔑946

An appellate court is never justified in substituting its discretion for that of the court sitting nisi prius, and its power is limited to determination whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice. Const. art. 6, § 4½.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Suit for divorce by Ella Whitehead against Emmett B. Whitehead. From an order modifying alimony provisions of an interlocutory decree of divorce, and from an order denying his motion for a reduction of the award, and from the final decree of divorce, defendant appeals.

Orders and decree affirmed.

Samuel D. Hamburg, of San Francisco, for appellant.

O'Brien, Dibert & Acton and Arthur F. Edwards, Jr., all of San Francisco, for respondent.

NOURSE, Presiding Justice.

The defendant in an action for divorce appeals from an order modifying the alimony provisions of the interlocutory decree, from an order denying his motion for a reduction of the award, and from the final decree of divorce.

Plaintiff was granted an interlocutory decree of divorce on April 4, 1934. The decree carried an award of $65 a month as alimony. In December, 1937, defendant filed a motion to reduce the award to $1. In August, 1938, the plaintiff filed a counter motion to fix the award at $50. Both motions rested upon a change of circumstances relating to the temporary employment of the wife and a diminution of the income of the husband. Both motions were heard at the same time in September, 1938, upon affidavits and oral testimony. An order was made on September 16, 1938, granting plaintiff's motion and denying that of the defendant. On September 26, 1938, a final decree of divorce was entered fixing the alimony at $50 a month.

The appeals are taken on what purports to be a judgment roll, a copy of two affidavits, and a statement of some of the oral testimony taken at the hearing. There is no certification of the judgment roll by the clerk, no reporter's transcript, and no certification by the reporter. The parties stipulated that the "above transcript on appeal and/or amendments thereto may and shall constitute the full, complete and correct transcript on appeal", and the trial court made its order that it should be taken as such record pursuant to such stipulation. This order is of no greater value than the stipulation because, on the face of the record, no part of the oral testimony of any of the witnesses appears. The statement does contain a recital of certain facts put in evidence upon the two motions, but nowhere does it appear that this was all the evidence taken at the hearing. The entire statement as to evidence taken relates to the hearing of the two motions on September 16, 1938. There is nothing in the record disclosing what if any hearing was had, or what evidence was taken, in relation to the final decree entered on September 26, 1938.

[1] In this state of the record this court must assume in support of the judgment that such evidence was taken as may be necessary to sustain it, and if the preliminary orders were not merged in the final decree, the latter is nevertheless a conclusive and binding determination of the issues of fact raised and cures all the alleged errors arising out of the hearing upon the two motions.

[2, 3] The power of the court to make the modification of the interlocutory decree comes directly from the statute. Sections 137 and 139 of the Civil Code provide that orders for the payment of alimony may be altered, modified or revoked "at the discretion of the court." The only successful attack upon such an order (when the only claim is that the award is too high or too low) must be based upon a clear showing of an abuse of that discretion. It was said in Wilder v. Wilder, 214 Cal. 783, 785, 7 P.2d 1032, 1033: "An abuse of discretion is never presumed, and it must be affirmatively established." Here the whole case of the appellant rests upon the assertion that the trial court abused its discretion when it rejected his evidence and believed the conflicting testimony of the respondent.

[4, 5] This does not present a debatable question on appeal. As this court said in Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 308, 77 P.2d 301, 302: "An appellate court is never justified in substituting its discretion for that of the court sitting nisi prius. Its power is limited to the determination whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice. Const. art. 6, § 4½; Davies v. Ramsdell, 40 Cal.App. 432, 433, 183 P. 702; Sunset Farms, Inc., v. Superior Court, 9 Cal.App.2d 389, 405, 50 P. 2d 106."

The orders and the decree are affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

45 Cal.App.2d 507

LIMITED MUT. COMPENSATION INS. CO. v. CURTIS.

Civ. 11647.

District Court of Appeal, First District, Division 1, California.

June 23, 1941.

Venue 🔑7

Under statute authorizing action on obligation to be brought either in county where obligation is to be performed, or in county in which contract in fact was entered into, or in county in which defendant resides, and providing that county in which obligation is incurred is county in which obligation is to be performed, place of trial of insurer's action to recover premiums allegedly due on workmen's compensation insurance policies would not be changed from San Francisco to Los Angeles county, in which defendant resided, where obligations imposed by policies were "incurred" in San Francisco in view of provisions in policies that as a condition precedent the policy was void, unless the premium was paid to insurer at its office in San Francisco, notwithstanding that payments were in fact made to insurer in Los Angeles. Code Civ.Proc. § 395.

See Words and Phrases, Permanent Edition, for all other definitions of "Incur".

Appeal from Superior Court, City and County of San Francisco; C. C. Goodell, Judge.

Action to recover premiums on policies of workmen's compensation insurance by the Limited Mutual Compensation Insurance Company against E. G. Curtis. From an order denying defendant's motion for a change of place of trial, the defendant appeals.

Order affirmed.

Becker & Becker, of Los Angeles, for appellant.

Keith & Creede, of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiff brought this action in San Francisco to recover premiums claimed to be due on three policies of workmen's compensation insurance, issued by plaintiff to defendant for the years 1937, 1938, and 1939, respectively. Defendant moved for a change of place of trial to the county of Los Angeles; and he has appealed from the order denying his motion.

Section 395 of the Code of Civil Procedure provides: "When a defendant has contracted to perform an obligation in a particular county, *either* the county where such obligation is to be performed, *or* in which the contract in fact was entered into, *or* the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary." (Italics ours.) Defendant is a resident of Los Angeles, and in his notice of motion he stated that such would be the ground upon which he would move for a change of venue; but in his supporting affidavit he averred also "that the policies of insurance were contracted for, obtained in and the obligations if any thereunder incurred by the defendant were performed or incurred in the city of Los Angeles. * * *" It is to be noted that the provisions of said section 395 are in the alternative; therefore, if the obligations arising under the contracts of insurance were "incurred" in San Francisco, such is the proper county for the trial of the action, regardless of the residence of the defendant or the question of where the contracts were negotiated or executed.

The form of policies sued upon was not embodied in or attached to the complaint; but it was shown by the affidavit filed by the plaintiff in opposition to the motion that the 1937 and 1938 policies contained this clause: "As a condition precedent, this policy is null and void unless the total initial premium stated herein is paid to the Limited Mutual Compensation Insurance Company or its agents at its office in San Francisco on or before" the date specified therein; it was also shown by said affidavit that the 1939 policy contained the same clause, except it is headed "Premium Payment Required to Make Insurance Effective", and the term "total initial deposit premium" is used in the text instead of "total initial premium". Plaintiff then goes on to aver: "At no time was there a special contract in writing entered into between plaintiff and defendant changing the county in which the contracts of insurance were to be performed from the county in which the obligation of each contract was incurred to any other county."

We agree with the trial court that the foregoing clauses were legally sufficient to justify the conclusion that the obligations imposed by the contracts were "incurred" in San Francisco, for obviously according to the plain terms of said clauses, as between plaintiff and defendant, no obligations whatever arose under the contracts until defendant performed the "condition precedent" of making the payments provided for therein to plaintiff "at its office in San Francisco". In other words, by the terms of the contracts the parties themselves fixed the time when and the place where the condition precedent should be performed to make the contracts binding and operative; and it follows therefore, that the place where they became binding and operative is the place where the obligations thereunder were "incurred".

In a counter affidavit defendant averred, among other things, that plaintiff maintained general offices and agents in Los Angeles for the operation of its business in that county and "that all the payments and demands were made in the city of Los

Angeles, and the defendant made his payments and did pay all the premiums in the city of Los Angeles. * * *". But since the obligations arising under the contracts were by the provisions thereof incurred in San Francisco, the fact that payments were made in Los Angeles could not, in the absence of a written agreement, deprive plaintiff of the right, granted by said section 395, to bring the action in the county wherein the obligations were so incurred.

The arguments advanced and cases cited by defendant in connection with the making of said payments would doubtless be pertinent if the question of the validity of said payments were here involved. But that is not the issue. The sole question presented is one of venue, and for the reasons stated, it is our opinion that trial court's ruling thereon should be sustained. The order is therefore affirmed.

We concur: PETERS, P. J.; WARD, J.

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45 Cal.App.2d 408

LANFRIED v. BOSWORTH et al.

Civ. 12902.

District Court of Appeal, Second District, Division 2, California.

June 17, 1941.

Rehearing Denied July 17, 1941.

Hearing Denied Aug. 14, 1941.

1. Automobiles 🔑339

It is a criminal offense for any person to drive an automobile not his own without owner's consent and in absence of owner. Vehicle Code, § 503, St.1935, p. 174.

2. Automobiles 🔑242(6)

In absence of evidence of relationship between driver and owner of automobile, presumption that driver was innocent of crime or wrong warranted finding that driver operated automobile with owner's consent so as to make owner liable for damages occasioned by negligence of driver. Vehicle Code, § 503, St.1935, p. 174; Code Civ.Proc. § 1963.

3. Automobiles 🔑242(6)

There is a presumption that one operating the automobile of another has necessary consent to make his act lawful. Code Civ. Proc. § 1963.

4. Appeal and error 🔑596

The party taking an appeal has duty of furnishing reviewing court with a complete record properly certified.

5. Appeal and error 🔑907(4)

Where trial judge's certificate showed that material evidence having a bearing upon defendant's liability was omitted from bill of exceptions, reviewing court was required to presume that omitted evidence justified judgment in favor of defendant.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Action by Maurice Lanfried against Wallace Bosworth, one Like, and another, to recover for injuries sustained in an automobile collision. From a judgment in favor of the defendant, Like, and from an order vacating the judgment against the defendant Bosworth, and granting him a new trial, the plaintiff appeals.

Judgment in favor of defendant Like affirmed, and the order reversed.

Prior opinion, 113 P.2d 23.

Max Fink and Ray Sandler, both of Los Angeles, for appellant.

Charles E. Taintor, of Los Angeles, for respondent Wallace Bosworth.

Sam Wolf and Leo Shapiro, both of Los Angeles, for respondent Martha J. Like.

WOOD, Acting Presiding Justice.

Plaintiff commenced this action to recover damages for injuries which he suffered when the automobile which he was driving collided with an automobile driven by defendant Delores Davis, which was owned by defendant Bosworth and registered in the name of defendant Like. The accident occurred on April 6, 1938, on Los Feliz boulevard near its intersection with Griffith Park boulevard in the city of Los Angeles.

A joint answer was filed by defendants Davis and Bosworth but neither of these defendants appeared at the trial either in person or by counsel. A separate answer was filed by defendant Like, who appeared at the trial and contested plaintiff's claim. The trial court found against defendants Davis and Bosworth and rendered judgment against them in the sum of $2,137. The judgment was entered on January 6, 1939, and on the same date judgment was entered in favor of defendant Like. On February 16, 1939, plaintiff caused to be served and filed a notice of motion to set aside and vacate the judgments and to enter a judgment under sections 663, 663a of the Code of Civil Procedure against all three defendants. On February 28, 1939, defendant Bosworth caused to be served and filed a notice of intention to move for a new trial. On March 8, 1939, and prior to the hearings on the two motions just mentioned, plaintiff caused to be served and filed his notice of appeal from that portion of the judgment which ordered and adjudged that defendant Like have judgment against plaintiff. A minute order was entered on April 18, 1939, denying plaintiff's motion to vacate the judgment and to enter a new judgment against the three defendants. A minute order was entered on April 17, 1939, amending the original findings by inserting a provision that the automobile in question was driven by defendant Davis without the consent and permission of defendant Bosworth. By the same minute order the judgment against Bosworth was vacated and a new trial was granted to him on the grounds of insufficiency of the evidence to support the judgment and that the judgment as to Bosworth was contrary to law. Thereafter plaintiff appealed from the abovementioned minute orders affecting defendant Bosworth.

[1-3] The trial court found that plaintiff's injuries were suffered as a result of the negligence of defendant Davis in driving the automobile in question. It is a criminal offense for any person to drive an automobile not his own without the consent of the owner and in the absence of the owner. Vehicle Code, sec. 503, St.1935, p. 174. Section 1963 of the Code of Civil Procedure enumerates disputable presumptions, among them being the presumptions that a person is innocent of crime or wrong and that the law has been obeyed. The record before us is barren of any evidence concerning the relationship between defendants Bosworth and Davis unless it be that some mutual relationship was shown by their filing a joint answer. In determining whether defendant Davis was driving the automobile with the consent of defendant Bosworth the court was confronted with the presumption that defendant Davis was innocent of crime or wrong. This presumption is sufficient to support a finding that defendant Davis operated the car with the consent of defendant Bosworth. Indeed, no contrary finding could be supported by the evidence. The Code section provides that the presumption is "satisfactory" unless controverted by other evidence, but no other evidence was presented to the court. In Prickett v. Whapples, 10 Cal.App.2d 701, 52 P.2d 972, 973, it was held that "the presumption arises that one operating the automobile of another has the necessary consent to make his act lawful". Manifestly the trial court erred in concluding that the findings should be amended, and that the evidence was insufficient to support the original judgment against defendant Bosworth and that it was contrary to law.

[4, 5] No petition for a rehearing was filed by defendants Bosworth and Davis but defendant Like has filed a petition for a rehearing in which she calls our attention to the fact that the bill of exceptions does not purport to contain all of the material evidence received at the trial. She asserts that certain witnesses, whom she names, testified to facts which if true establish that she is not liable. The certificate of the trial judge, although somewhat indefinite, is sufficient to support an affirmation of the original judgment entered against defendants Davis and Bosworth. The certificate shows, however, that material evidence was received which may have had bearing upon the liability of defendant Like. It was plaintiff's duty to furnish this court with a complete record properly certified. This he has not done and this court must presume that evidence omitted from the record fully justified the judgment of the trial court in favor of defendant Like. Berri v. Rogero, 168 Cal. 736, 145 P. 95; Haase v. Central Union H. S. Dist., 27 Cal.App.2d 319, 80 P.2d 1044.

The order made on April 17, 1939, amending the findings of fact and conclusions of law and vacating the judgment against defendant Bosworth and granting him a new trial is reversed. The judgment in favor of defendant Like is affirmed.

I concur: McCOMB, J.

45 Cal.App.2d 522

ARNOLD v. UNIVERSAL OIL LAND CO. et al.

Civ. 2750.

District Court of Appeal, Fourth District, California.

June 23, 1941.

Rehearing Denied July 16, 1941.

Hearing Denied Aug. 22, 1941.

1. Pleading 🔑214(2)

A demurrer admits the truth of all of the well pleaded allegations of a complaint, subject to the exception that facts alleged, which are contrary to those facts of which judicial notice is taken, cannot be regarded as true.

2. Evidence 🔑29, 30, 43(1, 4), 46, 47, 48

The courts must take judicial notice of the public and private official acts of the legislative, executive and judicial departments of the State of California and of the United States government, and of records of General Land Office of United States, and of regulations of Department of Interior. Code Civ. Proc. § 1875.

3. Pleading 🔑6

Judicial notice comes to the aid of a pleading when such aid is necessary.

4. Appeal and error 🔑837(4)

The District Court of Appeal must measure the vulnerability of each count of complaint demurred to, by those facts which are well pleaded, and also by those additional facts of which both the trial court and the District Court of Appeal must take judicial notice.

5. Pleading 🔑6

Complaints must be read as though incorporating everything of which the courts are bound to take judicial knowledge.

6. Evidence 🔑48

On appeal from judgment of dismissal entered after sustaining of demurrer to complaint to establish trust in oil royalties and to establish plaintiff's title to royalties which plaintiff claimed to have purchased from person to whom United States had issued a prospecting permit, District Court of Appeal must judicially notice that various transfers of interests in the permit property were of record in land office and were approved by Secretary of Interior, that oil was discovered, that wells were placed in production, that leases based on production were granted, that royalties were paid, and that an association was organized to manage property of which the permit property was a part. Code Civ.Proc. § 1875; Oil Land Leasing Act, 30 U.S.C.A. § 181 et seq.

7. Records 🔑19

Persons interested in subject matter of records and orders of land office and actions of executive officers of United States concerning such records and orders, of which the courts are required to take judicial notice, are also charged with notice thereof, and laches can be predicated on such notice. Code Civ.Proc. § 1875.

8. Pleading 🔑193(4)

The question of laches can be raised by demurrer if laches appears on the face of the complaint and in the facts of which the courts must take judicial notice.

9. Equity 🔑67

The doctrine of "laches" prevents resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights, and requires of every owner that he take care of his property and of every claimant that he make known his claims, and gives to the actual and longer possessor security and justifies him in all efforts to improve and make valuable the property he holds.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

10. Equity 🔑72(4)

Under the doctrine of "laches" a person is not permitted to stand by while another develops property in which he claims an interest, and then if the property proves valuable, assert his claim thereto, and if it does not prove valuable, be willing that the losses incurred in exploration be borne by the opposite party.

11. Records 🔑19

A plaintiff seeking to establish trust in oil royalties and to establish her title to royalties which plaintiff claimed to have purchased from person to whom the United States had issued a prospecting permit, was charged with "notice" that the various transfers of interests in permit property were of record in land office, that oil was discovered, that wells were placed in production, that leases based on production were granted, that royalties were paid, and that an association was organized to manage property of which the permit property was a part. Oil Land Leasing Act, 30 U.S.C.A. § 181 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

12. Mines and minerals ⚷6
Trusts ⚷365(5)

Allegations relating to plaintiff's ill health and to trust and confidence which plaintiff reposed in her husband who advised her as to her business affairs, were insufficient to furnish excuse for plaintiff's failure for 14 years to make inquiry concerning or to take any interest in oil royalties which plaintiff claimed to have purchased from person to whom United States had issued a prospecting permit, so that plaintiff, being charged with notice that oil had been developed in large quantities on such property, and that royalties were being paid out of production, was barred by "laches" from maintaining action to establish trust in oil royalties and to establish plaintiff's title to royalties. Oil Land Leasing Act, 30 U.S.C.A. § 181 et seq.

13. Limitation of actions ⚷103(4)

An action instituted on October 11, 1937, to establish trust in oil royalties and to establish plaintiff's title to royalties which plaintiff claimed to have purchased from person to whom United States had issued a prospecting permit, was barred by statute of limitations, where breach of trust occurred at least as early as 1930 at which time trustee failed to account to plaintiff for such royalties, where plaintiff was charged with notice that she should have been receiving such royalties and had available a simple method of discovering the facts. Oil Land Leasing Act, 30 U.S.C.A. § 181 et seq.

14. Limitation of actions ⚷103(4)

In determining whether action to establish trust in oil royalties and to establish plaintiff's title to royalties which plaintiff claimed to have purchased from person to whom United States had issued a prospecting permit, was barred by limitations, plaintiff was required to learn those facts which could easily have been brought to light, and would be presumed to have known that which, with reasonable diligence, she could have learned respecting discovery of oil and payment of royalties to other persons. Oil Land Leasing Act, 30 U.S.C.A. § 181 et seq.

15. Appeal and error ⚷1039(2)

The granting of defendants' motion for judgment on the pleadings did not require reversal of judgment, even though motion for judgment on pleadings may have been inappropriate due to fact that defendants appeared by demurrer only, since the proper sustaining of the demurrer without leave to amend sufficiently supported the judgment.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action to establish a trust in oil royalties and to quiet title to royalties by Bessie E. Arnold against the Universal Oil Land Company, and others. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Henry Schaefer, Jr., of Los Angeles (William E. Burby, of Los Angeles, of counsel), for appellant.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, and Sullivan, Roche & Johnson, of San Francisco, for respondents.

MARKS, Justice.

On October 11, 1937, plaintiff filed her original complaint in this action to establish a trust in oil royalties in her favor and to quiet her title to the royalties. A second amended complaint was filed on March 17, 1939, to which general and special demurrers to each of the three causes of action were sustained without leave to amend, after counsel for plaintiff had stated to the trial court that there were no facts in addition to those alleged that could be pleaded to support plaintiff's case. The trial court granted the motion for judgment on the pleadings made by certain defendants. This appeal was taken from the judgment of dismissal. Hereafter we will refer to the second amended complaint as the complaint.

The oil interests involved grow out of a prospecting permit issued by the United States to Washington H. Ochsner on April 16, 1921, under the terms of the Oil Land Leasing Act which was passed by the Congress on February 25, 1920. 30 U.S.C.A. § 181 et seq. The permit covered land in the Kettleman Hills Oil Field which has become very valuable because of the large production from it of high gravity oil. Ochsner's dealings with this property have provided the source of much litigation. See Dougherty v. California Kettleman Oil Royalties, Inc., 9 Cal.2d 58, 69 P.2d 155; Medallion Oil Co. v. Hinckley, 9 Cir., 92 F.2d 155; Morrow v. Coast Land Co., 29 Cal.

App.2d 92, 84 P.2d 301. Plaintiff claims to be the owner of certain overriding royalties from the oil produced from this property which were reserved by Oschner to himself, by reason of her purchase of them from him on August 17, 1923.

The complaint contains three counts which we must analyze with considerable detail.

The first count alleges the corporate existence of the Universal Oil Land Company, the California Kettleman Oil Royalties, Inc., and the General Petroleum Corporation of California. It also alleges that Hilda Carling Hinckley is the administratrix of the estate of Washington H. Ochsner, deceased, and that Bernice A. Monks and H. L. Monks are the administrators of the estate of R. H. Arnold, deceased. It contains the usual allegations concerning the defendants sued under fictitious names.

It is further alleged that on April 16, 1921, the United States, through its Department of the Interior, issued to Washington H. Ochsner an exclusive oil and gas prospecting permit, a copy of which is attached to the pleading, which permitted him to prospect for oil on described government land for a period of two years; that on August 7, 1923, Ochsner assigned the permit to the Coast Land Company, reserving to himself 7½ per cent of the oil and gas produced from the discovery area, and 2½ per cent of the oil and gas produced from the balance of the property; that on October 8, 1923, the Coast Land Company assigned its interest in the permit to the General Petroleum Corporation, the predecessor in interest of defendant, General Petroleum Corporation of California; that the foregoing assignments were approved by the Secretary of the Interior of the United States; that the General Petroleum Company of California was the owner and holder of the permit subject to the overriding royalties reserved to Washington H. Ochsner; that on August 17, 1923, plaintiff purchased the overriding royalties for $30,000, which was paid to Ochsner from her separate property; that she purchased in good faith and without notice of any claims upon or to the overriding royalties.

The foregoing allegations are contained in paragraphs one to nine, inclusive, of the first cause of action of the complaint.

It is further alleged "that on or about the 21st day of July, 1903, plaintiff married R. H. Arnold, and remained his wife until the time of his decease on or about the 19th day of August, 1931. Plaintiff, from the time of her marriage, had confidence in his honesty and integrity. During the period of time mentioned the said R. H. Arnold advised the plaintiff with respect to the investment of her separate estate and acted for and in her behalf in many business transactions. That during the period of time mentioned plaintiff relied solely upon the advice and counsel of her husband, the said R. H. Arnold, and entrusted large sums of money to his care and management. That, while plaintiff was not experienced in business affairs, many of the business transactions entrusted to her husband proved highly successful. That during the period from 1918 to 1923 plaintiff, acting through her husband, the said R. H. Arnold, invested large sums in the ship building industry. During the year 1923, and as a result of that investment, plaintiff paid an income tax on one-quarter of a million dollars"; that prior to August 17, 1923, plaintiff was domiciled in Greenwich, Connecticut; that her husband was financially interested in oil properties in California; that R. H. Arnold advised plaintiff to invest in oil properties owned by Washington H. Ochsner; that she came to California and in July, 1923, negotiated for the purchase of the oil royalties involved, at a meeting at which plaintiff, her husband and Ochsner were present; that the purchase was "confirmed" on August 17, 1923; that on that date Arnold, Ochsner and Richard Young were the owners of practically all of the stock of the Universal Oil Land Company, with Young holding a nominal interest therein; that Arnold and Ochsner were officers and directors of the Universal Oil Land Company which was their alter ego used for the purpose of carrying on their private transactions in connection with oil investments; that in the purchase of the overriding royalties from Ochsner, plaintiff relied upon the assurances of Arnold and Ochsner "that her interest, as owner, would be properly protected".

The allegations which we have just summarized in the foregoing paragraph appear in paragraphs ten to thirteen, inclusive, of the first cause of action of the complaint.

It is further alleged that without the knowledge of plaintiff, Arnold and Ochsner caused the overriding royalties purchased by plaintiff to be transferred without consideration to the Universal Oil Land Company, their alter ego, which "acquired with notice of plaintiff's title"; that plaintiff made frequent inquiries of her husband concerning her investment and was informed by him that it was secure; that she should forget it for the time because production of oil had not been started; that because of her confidence in and relation to Arnold, plaintiff relied upon his representations to her; that after August 17, 1923, plaintiff returned to her home in Greenwich, Connecticut, and continued to reside in Connecticut and in Washington, D. C., until prior to 1936; that until 1937, plaintiff continued to have full confidence in the honesty and integrity of her husband and continued to rely upon his statements that her investments were in proper order.

It is further alleged that in 1928, plaintiff was first informed that her husband was unfaithful to her and, as early as 1923, had been carrying on "an intimate relationship" with another woman; that in 1928, plaintiff instituted an action for divorce against her husband; that "a New York decree" awarded her over $3,000 a month temporary alimony, payments of which were to continue pending negotiations for a property settlement; that because of the involved condition of Arnold's affairs no property settlement had been made and no divorce decree had been entered at the time of his death in 1931.

It is also alleged that since 1925, plaintiff had been suffering from cancerous infections and had undergone many serious operations and had been constantly under the care of physicians and surgeons; that because of her illness she had been unable to take any active part in her business affairs; that on December 17, 1928, Arnold, Young, and "the Estate of Washington H. Ochsner" owned all, or practically all, of the stock of the Universal Land Oil Company; that at that time and within a few weeks after plaintiff had filed her suit for divorce, as a further means of concealing from her the true state of her affairs, Arnold caused the California Kettleman Oil Royalties, Inc., to be incorporated; that its sole stockholders were Arnold, Young, and the estate of Washington H. Ochsner; that the corporation was the alter ego of Arnold who caused the oil royalties to be assigned to it by the Universal Oil Land Company without consideration but with notice of plaintiff's interest therein; that these practices amounted to active concealment of the true facts concerning her oil royalties from plaintiff who did not know and did not have the means of discovering those true facts until June, 1937, when the decision in the case of Dougherty v. California Kettleman Oil Royalties, Inc., supra, was called to her attention; that from the time she instituted the action for divorce against her husband in 1928, it was impossible for her to ascertain the true facts concerning his, or her own property; that from the time Arnold started to associate with the other woman in 1923, he started to conceal from plaintiff facts with respect to his own estate and in respect to the monies she had entrusted to him for investment; that Arnold's affairs were so involved that his estate is still in the process of probate.

In paragraph twenty-two of the first cause of action it is alleged that each of the defendants claims some interest in the overriding royalties but that none of them has any interest therein; that such right, title or interest, if any, is subject and subordinate to the claims of plaintiff herein.

The second cause of action incorporates within itself, by reference, the first to the thirteenth paragraphs, inclusive, and the twenty-second paragraph of the first cause of action. It is there alleged that the Universal Oil Land Company paid no consideration for the assignment to it of the overriding royalties, but "agreed with this plaintiff that it would hold the said overriding royalties in trust for the plaintiff"; that the California Kettleman Oil Royalties, Inc., was the alter ego of the Universal Oil Land Company; that each corporation had the same stockholders and directors; that the California Kettleman Oil Royalties, Inc., succeeded to the office of trustee for plaintiff formerly held by the Universal Oil Land Company, and "now repudiates its trust and denies that this plaintiff has any interest in the 'overriding royalties' ".

Plaintiff has incorporated by reference into the third cause of action, paragraphs one to nine, inclusive, of the first cause of action and has added thereto a second paragraph which is a substantial repetition of paragraph twenty-two of the first cause of action.

[1-3] It is too elemental to need the citation of supporting authorities, that a demurrer admits the truth of all of the well pleaded allegations of a complaint, subject to the exception hereafter mentioned. It is also equally well settled that the courts must take judicial notice of the public and private official acts of the legislative, executive, and judicial departments of this state and of the United States government (Code

Civ.Proc., § 1875); that judicial notice must be taken of the records of the General Land Office of the United States (Southern Pacific Co. v. Lipman, 148 Cal. 480, 83 P. 445) and of regulations of the Department of the Interior (Whittaker v. Pendola, 78 Cal. 296, 20 P. 680); that the judicial notice comes to the aid of a pleading when such aid is necessary (Ohm v. City and County of San Francisco, 92 Cal. 437, 28 P. 580); that facts alleged, which are contrary to those facts of which judicial notice is taken, cannot be regarded as true. French v. Senate of California, 146 Cal. 604, 80 P. 1031, 69 L.R.A. 556, 2 Ann.Cas. 756; Fey v. Rossi Improvement Co., 23 Cal.App. 766, 139 P. 908; Sheehan v. Vedder, 108 Cal.App. 419, 292 P. 175; Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987, 992.

[4, 5] It is therefore clear that we must measure the vulnerability of each count of the complaint to demurrer by those facts which are well pleaded and also by those additional facts of which both the trial court and this court must take judicial notice, for, as said in Livermore v. Beal, supra, "complaints must each one be read as though they incorporated everything of which the courts are bound to take judicial knowledge". See Chavez v. Times-Mirror Co., 185 Cal. 20, 195 P. 666.

[6] We are required to take judicial notice of the following facts, among others, that have an important bearing on the issues here presented.

That all of the various assignments were of record in the Land Office and were approved by the Secretary of the Interior, except the oral assignment of the royalties to plaintiff.

That on January 24, 1924, actual drilling for oil was started by the General Petroleum Corporation on the permit property and the first well was abandoned on March 17, 1926; that a second well was started by the General Petroleum Corporation of California, after the approval of the assignment of the permit to it, on April 26, 1927, and was brought in as a large producer on January 8, 1930; that royalties were thereafter paid to the United States of America.

That on March 5, 1929, a third well was started which was placed on production on January 14, 1930; that royalties were paid to the United States of America.

That on July 23, 1930, the United States of America issued a lease on 640 acres of the permit land to the General Petroleum Corporation of California, and on January 9, 1931, executed another lease to the same corporation on another 1898.24 acres of the permit land, both being based on the discovery of oil as a result of the successful drilling operations; that royalties were paid to the United States of America.

That various land owners, including the United States of America, operating permittees, lessees, and owners of participating interests in the oil rights, formed the Kettleman North Dome Association; that this association was made the agent for the prudent and orderly drilling for, producing and marketing of the petroleum products produced in the district which included the land here involved, together with the payment of royalties; that in 1931 the Secretary of the Interior approved the formation of this association and so reported to the Congress.

[7] It has been held that persons interested in the subject matter of the records and orders of the Land Office and the actions of the executive officers of the United States concerning them, of which the courts are required to take judicial notice, are also charged with notice of them and that laches may be predicated on such notice. Livermore v. Beal, supra. See, also, Socrates Quicksilver Mines v. Carr Realty Co., 9 Cir., 130 F. 293.

Defendants rely principally on the laches of plaintiff in pressing her claim, and on the bar of the statute of limitations.

[8] The question of laches may be raised by demurrer if laches appears on the face of the complaint and in the facts of which the courts must take judicial notice. Seculovich v. Morton, 101 Cal. 673, 36 P. 387, 40 Am.St.Rep. 106; Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516; Superior California Fruit Land Co. v. Grossman, 32 Cal.App. 357, 162 P. 1046; Livermore v. Beal, supra.

[9, 10] In speaking of laches in the last cited case, the court used the following language:

"In view of the fact of the change in the value of lands by reason of the discovery of oil or gas therein, the language of Justice Brewer, quoted in the case of Troll v. City of St. Louis, 257 Mo. 626, 168 S.W. 167, 175, and approved in the Grossman Case, is applicable here, to wit: 'No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claims. It gives to the actual and longer possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds,' etc. Or, in other words, one is not permitted to stand by while another develops property in which he claims an interest, and then, if the property proves valuable, assert a claim thereto, and if it does not prove valuable, be willing that the losses incurred in the exploration be borne by the opposite party. This thought was expressed in one case by the following language: 'If the property proves good, I want it; if it is valueless, you keep it.'"

[11] Plaintiff claims to have purchased the overriding royalties from Ochsner in 1923. She is charged with notice of the various transfers of interests in the permit property appearing in the Land Office; that oil was discovered on the property in 1929; that two wells were placed on production in January, 1930; that the leases based on production were granted; that royalties were being paid; that the Kettleman North Dome Association was organized in 1931 to manage property of which the Ochsner permit property was a part; that royalties were being paid regularly to the United States as owner of Ochsner's permit property.

A simple letter to the General Petroleum Corporation of California would have disclosed that large quantities of petroleum products had been produced from the permit land and from other land under the management of the Kettleman North Dome Association. Before plaintiff's action was filed the General Petroleum Corporation of California had realized a gross income of about $14,000,000 from the permit property. Morrow v. Coast Land Co., supra.

Plaintiff gives two excuses for her utter failure to make any effective inquiry concerning, or to take the slightest interest in, the valuable property she claims to have purchased for the not inconsiderable sum of $30,000, between August, 1923, and June, 1937, a period of almost fourteen years. In this time the character of the land in which she claimed an interest had changed from sheep pasture of little value to a great oil producing property. She urges first that she was grievously ill, and second, that she was lulled into a sense of security by her great trust and confidence in the honesty and integrity of her husband, which lasted until 1937, unshaken by the vicissitudes of divorce proceedings and a lengthy attempt to discover his assets and secure a property settlement from him. Such childlike simplicity and faith are indeed remarkable in a case where the wife knew that the trusted husband had been faithless to his marriage vows and for several years had lavished his affections on another woman.

Plaintiff's allegations as to her illness are contained in paragraph eighteen of the first cause of action where it is very generally alleged that she had been ill since 1925 from cancerous infections and had undergone many serious operations which made it impossible "for her to take any active part in connection with her business affairs". Paragraph twenty of the first cause of action assigns this serious illness as one of the reasons why she did not discover the true condition of the record ownership of her overriding royalties. Neither of these allegations was incorporated in either of the other two causes of action, so those causes of action fail to allege this reason why she failed for a number of years to discover the fraud perpetrated upon her.

It should be observed that there was no change in her alleged physical condition between 1925 and the time the complaint was filed. The allegation that she could take no "active part" in her business affairs is most indefinite and does not necessarily disclose the extent of her disability. Many persons, not in the best of health, are not active in the management of business but are able to supervise agents who do so. Because of this uncertainty we may measure the degree of her disability by her alleged activities during this time.

According to the allegations of her complaint, she was well enough in 1928 to institute an action for divorce against her husband in the courts of New York. Under the laws of that state she had either to file the action in propria persona or employ attorneys to represent her. She was successful in securing an award of over $3,000 a month as temporary alimony and spent almost three years in investigating the "involved condition" of her husband's property in order to arrange a property settlement with him. Whether she acted for herself or through attorneys does not appear. If she was well enough to manage this litigation and the negotiations for a property settlement herself, or to direct her attorneys to do so, it would seem that she was well enough either to write herself or to direct her attorneys to write to the land office to inquire about the oil development on the Ochsner permit property.

During this time she is charged with notice that oil had been developed in large quantities on this property and that royalties were being paid out of this production. She must have known that she was not receiving any part of these royalties to which she now claims she was entitled. The failure to pay these royalties was a breach of the trust which she now claims existed in her favor. Still she did nothing for more than six years.

Her husband died in 1931. After that time she had no right to rely on the representations he had made, as she alleges she did, "believing that he would fully account to her at the proper time". The "proper time" for an accounting, at the latest, was when she was entitled to payments on the overriding royalties. The two wells were brought in in January, 1930, entitling her to royalties. She did nothing for over six and one-half years. She waited to file her action for more than six years after the death of the last person, other than herself, who had knowledge of the terms of her purchase.

The complaint in this action was verified in Los Angeles County in 1939. Some time before, and during the period of her alleged disability, she had traveled from her eastern abode to California, had employed attorneys and had instituted this action. According to her complaint she was still suffering from the same physical disabilities which had prevented her from taking any active part in the management of her financial affairs since 1925.

[12] These allegations show rather clearly that her illlness was not so sufficiently severe as to incapacitate her from at least employing others to investigate her oil interests. Charged with notice of the value of her investments in 1930, and having done nothing about them until after June, 1937, her laches sufficiently appear from the allegations of her complaint, and the facts of which we must take judicial notice, to justify the sustaining of the demurrer without leave to amend.

[13, 14] What we have already said is sufficient to support the conclusion that plaintiff's demand was barred by the statute of limitations. This is particularly true as to the second and third causes of action.

The beach of trust occurred at least as early as 1930 when her trustee failed to account to her for the royalties to which she claims she was entitled. She is charged with notice that she should have been receiving them. She had available a simple method of discovering the facts. She was required to learn those facts which could easily have been brought to light, and she must be presumed to have known that which, with reasonable diligence, she could have learned. Simpson v. Dalziel, 135 Cal. 599, 67 P. 1080; Henigan v. Yolo Fliers Club, 208 Cal. 697, 284 P. 906. Therefore, knowledge of the fraud must be imputed to her at least six years before her action was filed. It follows that the plea of the bar of the statute of limitations was properly sustained.

[15] Some, but not all, of the defendants moved for judgment on the pleadings. The motion was granted. Plaintiff urges that this was error for the reason that where the defendants have appeared by demurrer only, a motion for judgment on the pleadings is inappropriate. Conceding the soundness of this argument, it furnishes no ground for a reversal of the judgment as the proper sustaining of the demurrer without leave to amend sufficiently supports the judgment.

The judgment is affirmed.

We concur: BARNARD, P. J.; GRIFFIN, J.

45 Cal.App.2d 460

PEOPLE v. SOLDAVINI.

Cr. 2172.

District Court of Appeal, First District, Division 2, California.

June 19, 1941.

1. Criminal law ⚷566, 737(1)

The proof of identity of defendant as perpetrator of crime need not be made positively or in a manner free from inconsistencies, and the strength or weakness of identification and uncertainties of witnesses is a matter for the jury.

2. Burglary ⚷41(6)

In burglary prosecution, evidence was sufficient to prove identity.

3. Criminal law ⚷1172(2)

Where evidence indicated that burglary was committed some time before 5:50 a. m., and that for the first hour immediately preceding his arrest on same morning, defendant was either attempting to destroy evidences of his crime or to escape apprehension, instruction on subject of flight using language "flight of a person after the commission of a crime" was not prejudicial, because word "immediately" did not precede word "after". Pen.Code, § 1127c.

4. Criminal law ⚷1172(2)

In burglary prosecution, failure of instruction quoting a portion of statutory definition of term "reasonable doubt" to include portion of section of Penal Code stating that a defendant is presumed to be innocent, that he is entitled to an acquittal in case of reasonable doubt whether guilt is satisfactorily shown, and that presumption places upon state burden of proving guilt beyond a reasonable doubt, was reversible error. Pen. Code, §§ 1096, 1096a.

5. Criminal law ⚷769, 824(1)

The court on its own motion should give instructions on general principles of law pertinent to case even though not requested, but court is not required to give instructions upon specific points developed through evidence in absence of request.

◆

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

James Soldavini was convicted of burglary, and he appeals.

Judgment reversed and cause remanded.

Nathan C. Coghlan, of San Francisco, for appellant. Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was tried before a jury upon an information charging burglary of an oil service station located at 200 Carl street in San Francisco. From the judgment following a verdict of guilty and from the order denying a new trial he brings this appeal.

The oil station was entered and valuable property taken therefrom during the night of June 7th, or early in the morning of the 8th. At about 5:54 a. m. of the 8th defendant was seen near the corner of Tenth avenue and Quintara street where he stopped an old automobile which he was driving and endeavored to destroy a cash tray which had been taken from the oil station, and also endeavored to break open a telephone pay box which was taken from the same place. A little later he was observed by another witness near 22nd avenue and Balboa driving the same automobile, which he abandoned at that corner because the left front wheel was broken. This witness got into his own car and drove around several blocks until he again saw the defendant running into a tradesmen's entrance. A little later he saw him back out of a garage in another car. The witness gave chase, but the defendant abandoned the second car and started running, when a police officer gave chase, over several back yard fences until both defendant and the officer were near exhaustion. The defendant was taken into custody and gave an assumed name. His excuse for the flight and for the false name was that he was on parole and did not want the officer to know it.

[1, 2] The first point raised on the appeal is that the evidence is insufficient to prove identity. The witnesses all testified that they observed a man in a dark blue suit and a light hat. One witness testified that he thought the man he had seen was heavier than the defendant, but that, to the best of his knowledge, the defendant was the same man that he had seen get out of the automobile in the

morning of June 8th. "In order to sustain a conviction it is not necessary that the identification of the defendant as the perpetrator of the crime be made positively or in a manner free from inconsistencies. It is the function of the jury to pass upon the strength or weakness of the identification and the uncertainties of the witnesses in giving their testimony." People v. Addington, 43 Cal.App.2d 591, 111 P.2d 356, 357. The evidence of the identity of the defendant was sufficient to support the conclusion of the jury that he was the same party who had been seen running about the neighborhood just before the arrest, and there is no contention that that party was not the same person who alighted from the automobile in which the stolen goods were found. All the circumstances point to this party as the one who committed the burglary and the inferences compel the conclusion that the defendant was that party. This evidence being sufficient to support the verdict the motion to advise the jury to return a verdict of not guilty, made at the conclusion of the People's case, was properly denied.

[3] The appellant criticises the instruction given on the subject of flight. The objection seems to be that the language used, "The flight of a person, after the commission of a crime", was erroneous because the word "immediately" was not inserted before the word "after". The evidence was that the burglary was committed some time before 5:50 a. m., and that, for the first hour immediately preceding his arrest, the appellant was either attempting to destroy the evidences of his crime or to flee from those who were trying to apprehend him. Though the instruction as given was not in the precise language of section 1127c of the Penal Code it was not in any sense prejudicial to appellant under the circumstances.

[4, 5] Objections are made to the instructions on reasonable doubt, presumption of innocence, burden of proof, and the credibility of witnesses. On the subject of reasonable doubt it is claimed that the court belittled the issue in the use of the expression "there is nothing mysterious about the term at all". This language was followed by an exact quotation of a portion of the definition of the term found in section 1096 of the Penal Code and the trial court followed with an attempt to explain the definition. But it omitted the essential portion of the section reading: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt." There was here a failure to instruct on the essential elements of the presumption of innocence and the burden of proof. These subjects were not covered in any other instruction given, and for that reason the judgment cannot stand. The accepted rule is stated in 8 Cal.Jur. page 309 reading: "It is the duty of a court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, where they are not proposed or presented in writing by the parties themselves. But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them." The rule is approved in People v. Scofield, 203 Cal. 703, 709, 265 P. 914; People v. Curran, 24 Cal.App.2d 673, 676, 75 P.2d 1090. The basis of the rule is found in section 1096 of the Penal Code which declares the presumption of innocence places upon the state the burden of proof. This is followed by section 1096a which reads: "In charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." The clear purport of this section is that the court may meet the requirements of the above rule stated in California Jurisprudence by reading section 1096 to the jury without further instructions on those subjects. But there has been no relaxation of the rule that the jury must be instructed upon these general principles of law notwithstanding a failure of the defendant to propose instructions covering them. No other point raised by appellant requires discussion.

The judgment is reversed, and cause remanded for a new trial.

We concur: STURTEVANT, J.; SPENCE, J.

MALONEY v. MASSACHUSETTS BONDING & INS. CO. *

Civ. 11509.

District Court of Appeal, First District,
Division 1, California.

June 23, 1941.

Hearing Granted Aug. 22, 1941.

1. Judgment 🔑518

A contention in action upon bonds of guardian of former incompetent that order restoring the incompetent to competency was void because guardian had not been properly served, constituted a "collateral attack" on the order, and the order would be binding unless invalidity appeared on face thereof.

> See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

2. Insane persons 🔑42(2)

Where order had been entered in 1932 restoring an incompetent to competency, a recital in subsequent order sustaining the incompetent's objection to answer to a citation for an accounting by guardian that incompetent was restored to competency by a second order entered in 1935 did not constitute an adjudication of invalidity of the 1932 order.

3. Judgment 🔑475

Decrees in probate, like other judgments, are not subject to collateral attack in subsequent probate proceedings.

4. Judgment 🔑495(1)

Where an order is collaterally attacked, jurisdictional facts not appearing in record, including proof of service, will be presumed, unless record affirmatively shows that some necessary jurisdictional act was not performed, or that some necessary act was done in a manner so irregular as to make it void.

5. Judgment 🔑497(1)

Where an incomplete record shows one form of service and judgment recites in effect that all that was necessary to obtain jurisdiction was done, jurisdiction will be presumed against collateral attack.

6. Insane persons 🔑45
Judgment 🔑497(2)

Where affidavit of service of notice of hearing on petition for restoration of former incompetent to capacity recited service by mail upon guardian and her attorney five days before hearing, and order of restoration, which revoked letters of guardianship, recited that notice of hearing had been regularly given, order was binding in former incompetent's action upon guardian's bonds, and that action, which was not brought for more than three years after entry of order, was barred by provision of Probate Code requiring that such actions be brought within three years after discharge or removal of guardian by court order. Probate Code, § 1487.

7. Guardian and ward 🔑137

The terms "discharge" and "remove" are sometimes used synonymously in reference to guardians without exonerating them from liability to account.

> See Words and Phrases, Permanent Edition, for all other definitions of "Discharge" and "Remove".

8. Insane persons 🔑45

An action by a former incompetent on guardian's bonds, brought more than three years after order which restored former incompetent to capacity and directed that guardianship should terminate upon proper accounting and discharge of guardian and administration of estate, was barred by provision of Probate Code requiring such an action to be brought within three years after discharge or removal of guardian by court order, notwithstanding that order of restoration did not remove guardian, where that was unnecessary because guardian was dead at time order was entered. Probate Code, § 1487.

9. Constitutional law 🔑70(3)

A reviewing court may not stretch mandate of the legislative body to conform to judicial theory of what the statute should provide.

10. Insane persons 🔑45

Where former incompetent's action on guardian's bonds was otherwise barred by limitations, action could not be maintained on theory that the bonds, under terms thereof, remained in full force until guardian should account for proceeds of sale, and that action could be maintained because there had been no accounting and payment, since effect of such a construction would be that surety agreed to waive all statutes of limitation. Probate Code, § 1487.

PETERS, P. J., dissenting.

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* Subsequent opinion 123 P.2d 449.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Action by Bernard F. Maloney against the Massachusetts Bonding & Insurance Company to recover upon two bonds given by the plaintiff's former guardian. Judgment for the defendant, and the plaintiff appeals.

Judgment affirmed.

Hubbard & Hubbard, of San Francisco, for appellant.

W. P. Caubu, of San Francisco, for respondent.

WARD, Justice.

Plaintiff appeals from a judgment wherein it was held that an action brought by him against defendant as surety upon two bonds given by his former guardian was barred by the statute of limitations (Probate Code, sec. 1487).

The court found that on October 3, 1929, Nellie M. Maloney was appointed guardian of the person and estate of her husband, the plaintiff herein; that defendant bonding company as surety provided two bonds in the sums of $4,000 and $500 respectively as additional security for the faithful performance by the guardian of her duties; that plaintiff was discharged as a patient from a state hospital on April 1, 1932; "That on October 20th, 1932, after notice given in accordance with the order of this Court, an order was made by this Court providing that said Bernard F. Maloney be restored to competency, that the guardianship cease, that the order appointing guardian be set aside, that Letters of Guardianship be revoked, and that the guardian file an account of her administration"; that on July 27, 1935, the guardian died without filing an accounting of her administration; that on December 27, 1935, a second order was made and entered restoring plaintiff to competency, adjudging him sane and capable of managing his person and estate and directing an accounting by the guardian; that on June 22, 1937, the former guardian was adjudged in default in the payment to plaintiff in the sum of $8,477.33. By reference to the answer the court found that following the order of 1932 the guardian as such performed no further act; that the guardianship ceased and that no further proceedings were had until after her death. The court also found that the assets of the estate of the incompetent person had been delivered to him upon the adjudication of the order of restoration to capacity in 1932. The evidence indicates support of this finding. Incidentally, the answer and the supplemental answer of the executor of the guardian's estate shows that the real property of appellant, with the exception of one parcel devised him by his guardian and wife, was lost to his estate by reason of the expenses of his care, the payment of taxes, interest on obligations, through foreclosure of existing mortgages, attorneys' fees, etc. The court further found "That more than three (3) years have elapsed since the date of restoration to competency of said Bernard F. Maloney and the date of the filing of this action." As a conclusion of law the court found that the present action was barred by the provisions of section 1487 of the Probate Code, and that defendant was entitled to judgment. It did not specifically find, however, whether the statute of limitations began to run from the making of the first order or from the second. On the trial the defense relied primarily upon the date of the first order. On appeal petitioner stresses the finding as relating to the second, and respondent's brief accordingly is principally a reply based upon such premise.

Assuming that the time runs from the first order—that of October 20, 1932—the record does not disclose that this order restoring plaintiff to capacity, terminating the guardianship, setting aside the order appointing the guardian, revoking the letters of guardianship, directing that the guardian surrender to this plaintiff all of the estate and file an account within twenty days, has been vacated or set aside, or that it has even been directly attacked except by way of argument in the present appeal. The order recites that due proof of notice of the hearing had been regularly given "in the manner and for the time required by law", and neither the second (1935) order of restoration, nor the order sustaining plaintiff's objections to the supplemental account filed by the executor of the estate of the guardian, nor the present judgment, purports to vacate the 1932 order of restoration. On the contrary the present judgment confirms the averment in defendant's answer "that thereafter, and on the 20th day of October, 1932, after proceedings duly and regularly had therefor before the above entitled Court, said

Bernard F. Maloney was ordered restored to capacity".

[1] Appellant's contention is that the order of 1932 is void because the guardian was not served with a citation five days before trial on the issue of capacity. The attack on such order in the present action, however, is collateral, and unless the invalidity appears on the face of the judgment the order is binding herein. The affidavit of service of the 1932 notice of hearing on petition for restoration to capacity recites service by mail upon the guardian and her attorney five days before the time appointed for the hearing, and, as stated, the order of 1932 recites that the notice of hearing "has been regularly given in the manner and for the time required by law". If there was an imperfection in the notice or in the manner of its service it was the fault of petitioner, a fault of which neither the guardian, nor the executor of her estate, nor respondent herein has ever complained.

Appellant deemed the 1932 order to be valid, his verified petition for citation filed in 1935 alleging that the guardian had converted $10,000 to her own use, praying that the executor of her estate account therefor, and setting forth that: "On or about the 20th day of October, 1932, your petitioner was duly restored to competency by said court." The affidavit of the attorney which culminated in the 1935 order, in referring to the original petition for restoration, simply alleged "it is necessary that said petition be placed on the calendar for hearing" and prayed for an order that notice be given in the manner and for the time provided in section 1200 of the Probate Code. There was no new proceeding and the pleadings did not raise any issue as to the validity of the 1932 order. The second order of restoration sets forth that petitioner was restored to capacity in 1932 "by this court". However, the order also contains the following: "* * * that a question has been raised by a title company as to the sufficiency of the notice upon which said Order restoring to capacity was made". (The order sustaining the ward's objections to the guardian's supplemental "answer to citation for accounting" set forth that the "said incompetent was restored to competency by this court on December 27th, 1935".) The record fails to disclose the question "raised by the title company". As stated, there is no disaffirmance of the 1932 order, and the only information on the question raised by the title company is from statement of counsel in the present appeal.

[2] Both the 1932 and the 1935 orders are in the same proceeding; they are successive and not in conflict. On the contrary, they agree that petitioner should be restored to competency. The recital in the order sustaining the ward's objections to the answer to the citation for an accounting, that appellant was restored to competency in 1935, is not an adjudication of the invalidity of the 1932 order; it is simply a statement of a matter that was not an issue in that proceeding.

[3-5] Since decrees in probate, like other judgments, are not subject to collateral attack in subsequent probate proceedings, unless the order of 1932 is void on its face, it is good in the present appeal. The judgment roll of the incompetency proceeding was not introduced, but various instruments offered at that time were marked as single exhibits in the present proceeding. These exhibits do not contain proof of all of the necessary steps; for instance, there is no proof of posting to obtain jurisdiction for the 1932 order; the issuance of a citation to the guardian does not appear, nor does it appear that such a citation was not issued. Unless the record shows the contrary, jurisdictional facts not appearing therein, including proof of service, will be presumed. "Unless the record shows affirmatively that something necessary to the jurisdiction of the court was not done, or that something which was required was done in a manner so irregular as to make it void, the presumption is that the thing concerning which the record does not speak was properly done. Thus, where the affidavit of service is merely of service of a copy on the defendant, without showing how service was made, it will be conclusively presumed to have been in the manner required by law." 15 Cal. Jur., p. 69. If it be assumed that the record—incomplete as in the present case—shows one form of service, and the judgment recites in effect that all that was necessary to obtain jurisdiction was done, jurisdiction will be presumed against collateral attack. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138; Kaufmann v. California Mining & Dredging Syndicate, 16 Cal.2d 90, 104 P.2d 1038; City of Salinas v. Luke Kow Lee, 217 Cal.

252, 18 P.2d 335. In any event petitioner and his guardian accepted and treated the 1932 order as effective. The guardian ceased to collect the petitioner's pension and he asserted his rights in that regard. The record is silent relative to the presence of the guardian at the 1932 hearing, but circumstances indicate her acquiescence therein. If there was any well-founded claim that the guardian was continuing to act as such, or retained any of the property of the ward, petitioner did not attempt legal proceedings in that regard during the life of the guardian. The necessity for the issuance of a citation in the 1932 proceeding is not an issue raised by any of the pleadings in this case and we therefore refrain from expressing an opinion thereon. We are concerned only with the validity of the 1932 order as it appears upon its face.

[6] Under the circumstances in this case, the order of 1932 is binding in the present proceeding, and the present action against the surety is barred under the provisions of Probate Code section 1487. Cook v. Ceas, 143 Cal. 221, 77 P. 65; Keck v. Keck, 16 Cal.App.2d 521, 61 P.2d 79. However, in view of the failure of the findings to designate the particular order barred by the statute of limitations, let us assume, but not concede, the invalidity of the first order and pass to a consideration of the second, that of 1935. The facts as they relate to the second order are similar to those of Keck v. Keck, supra, and the opinion in that case, 16 Cal.App.2d pages 523, 524, 525, 526, 61 P.2d page 80, expresses the views of this court in the present proceeding:

"Manifestly these decrees, and especially the latter, operated as a removal of the guardian, and set in motion the statute of limitations prescribed in said section 1805 [now section 1487 of the Probate Code]. The trial court properly held, therefore, that the action against the sureties was barred by the provisions of said Code section.

"The negative answer to plaintiff's contention that neither of said decrees amounted to a 'discharge or removal of the guardian,' within the meaning of said Code section 1805, is to be found in the case of Cook v. Ceas, 143 Cal. 221, 77 P. 65, 68, wherein, in considering the meaning of the expression 'discharge or removal of the guardian' as used in said section 1805, the court said, in part: 'The guardian of an insane person may be "discharged" by order of court when it appears that the guardianship is no longer necessary. Code of Civ.Proc. § 1802. Guardians of either sort may be "removed" for incapacity or mismanagement, etc. ([Code of Civ.Proc.] § 1801), and so for the same and other causes executors and administrators may be "removed." It will thus be seen that the words "remove" and "discharge" are used indiscriminately in the statute to designate orders of court which have the effect of simply removing guardians, executors, etc., from office, without exonerating them from liability to account. To such orders section 1805 has a just and reasonable relation, and no doubt it is to them that it refers. As to the word "removal," there can be no doubt that the reference is to an order removing the guardian from office, and, as "discharge" is sometimes used in the statute in the sense of "removal," it is here to be construed in that sense on the principle of noscitur a sociis.' Furthermore, and aside from the provisions of section 1802 above referred to authorizing the 'discharge' of the guardian when the guardianship is no longer necessary, section 253 of the Civil Code (now section 1580 of the Probate Code) provides that: 'A guardian may be removed by the superior court for any of the following causes: * * * 8. When it is no longer proper that the ward should be under guardianship;' and in the present case the decree entered in the guardianship proceeding on January 18, 1927, contains two distinct findings to the effect that it was no longer proper that plaintiff should be under guardianship. The first was that by virtue of the decree in the restoration proceeding entered 'on the 19th day of April, 1926, and recorded on said 19th day of April, 1926, in Book 244 of Judgments, page 78 thereof, said Arthur W. Keck was adjudged to be fully competent and fully restored to competency, and said order has become final'; and the second was that '* * * this court does hereby further order, adjudge and decree that said Arthur W. Keck is fully competent and qualified to manage and care for his person and estate.' Clearly, therefore, in view of those findings it cannot be successfully maintained, as plaintiff argues, that the court's decree based thereon, revoking the guardianship, did not operate as a removal of the guardian within the meaning of section 1805 of the Code of Civil Procedure. * * *

"Plaintiff devotes much of his brief in furtherance of an effort to differentiate the case of Cook v. Ceas, supra, from the present one, and it may be conceded that in some respects which are not at all important here the facts are dissimilar. But he has utterly failed to demonstrate wherein the legal principles declared therein, and particularly the construction placed on said section 1805, are not controlling here."

In the present case the second order provided that the guardianship should cease and terminate upon a proper and legal accounting. In Keck v. Keck, supra, 16 Cal. App.2d page 525, 61 P.2d page 80, the court said: "Nor did the incorporation in said decree of the provision ordering an accounting and retaining jurisdiction over the guardian until the final settlement of her accounts add anything of value thereto, because, even without said provision, such jurisdiction was retained in the probate court by virtue of section 1774 of the Code of Civil Procedure (now section 1555 of the Probate Code)."

[7-9] Section 1487 of the Probate Code is explicit that unless at the time of the discharge or removal of the guardian there exists a legal disability to sue, an action against sureties on a bond given by a guardian must be commenced within three years. It must be conceded that there was no legal disability on the part of petitioner. Two orders of court had declared him to be capable of managing his property and person. The guardianship had in fact ceased in 1932. If there is any doubt on that question, it must be concluded that it ceased in 1935 upon the death of the guardian. No other guardian was appointed. It would have been a futile act to decree in the 1935 order that the dead guardian be removed. "Discharge" and "remove" are sometimes used synonymously in reference to guardians "without exonerating them from liability to account". Cook v. Ceas, supra, 143 Cal. page 229, 77 P. page 68. In Keck v. Keck, supra, 16 Cal. App.2d page 525, 61 P.2d page 80, the court said: "It is true, of course, that an adult ward may not commence his action against the sureties on his guardian's bond until there has been a settlement of the guardian's accounts showing a balance due the ward and the time for appealing from the order of settlement has elapsed. Cook v. Ceas, supra. But evidently the Legislature deemed a period of three years after the removal of the guardian as ample time within which an adult ward might secure such final accounting and commence his action; and, as pointed out in the above case, the delay on the part of the ward, following a removal of his guardian, in procuring a settlement of the guardian's accounts, does not toll the statute of limitations governing the commencement of the action against the sureties." In the present case there was no guardian to remove. The direction in the "order restoring an incompetent to capacity"; namely, "that the guardianship of said petitioner cease and terminate upon the proper and legal accounting and discharge of the guardian and the administration of the estate of the guardian" must be read in conjunction with section 1487, requiring that in order to hold the sureties liable, the "legal accounting" should be obtained within a period of three years. This may seem to be a severe and stringent rule, particularly if there should be delay in obtaining the settlement of an account; but reviewing courts may not stretch the mandate of the legislative body of the state to conform to judicial theory of what the statute should provide.

[10] Appellant finally contends that under the terms of the bonds they remained in full force and effect until the guardian should account for the proceeds of sales, etc., thereby continuing liability until the settlement of the guardian's account and the exoneration by full payment to the ward. The effect of such a construction would be that the surety agreed to waive any and all statutes of limitation. We are unable to so construe the bond. State Loan, etc., Co. v. Cochran, 130 Cal. 245, 62 P. 466, 600; Woollomes v. Gomes, 26 Cal.App.2d 461, 79 P.2d 728; People v. Ventura Refining Co., 204 Cal. 286, 268 P. 347, 283 P. 60.

In the present case plaintiff waited approximately seven years from the date of the first order restoring him to capacity before filing this action against the bonding company. No action for an accounting was instituted prior to the death of the guardian, although about three years intervened between the date of appellant's first restoration to competency and her demise, and more than three years between the second order of restoration and the present claim against the surety.

The judgment is affirmed.

I concur: KNIGHT, J.

PETERS, Presiding Judge.

I dissent.

The majority opinion holds: (1) that the order of October 20, 1932, restoring Maloney to competency "is binding in the present proceeding", and that for that reason the statute of limitations provided by section 1487 of the Probate Code started to run on that date; and (2) that in any event, the statute started to run on December 27, 1935, when the second order restoring to competency was made. I disagree with both conclusions. It is my view that a statute of limitations (but not section 1487 of the Probate Code) started to run on June 22, 1937, and that this action is not barred by any statute of limitations.

There are five pertinent dates that must be kept in mind:

(1) October 20, 1932, when the first order restoring Maloney to competency was made; (2) June 27, 1935, death of former guardian; (3) December 27, 1935, when the second order restoring Maloney to competency was made; (4) June 22, 1937, when the order fixing the default of the guardian was made; and (5) August 23, 1939, when the present action was filed against the bonding company.

The majority opinion holds that the order of October 20, 1932, is binding and conclusive in this proceeding, and that the order discharging the guardian contained in that decree started the running of the statute of limitations provided by section 1487 of the Probate Code. This conclusion, in my opinion, is unsound and is completely refuted by the record. It is of some importance that respondent on this appeal does not urge this contention. It is content to rest its case on the contention that the statute started to run on December 27, 1935.

The appellant urges that the record demonstrates that the guardian, in the proceeding culminating in the order of October 20, 1932, was not properly served as required by section 1471 of the Probate Code. The judgment roll in that proceeding shows that notice was given only in compliance with section 1200 of the Probate Code—by posting and mailing a copy to the guardian. It is urged that under sections 1206, 1207 and 1471 of that Code personal service is required, and that this failure renders the judgment void. I do not find it necessary to pass upon this contention. There are other factors which demonstrate to a certainty that the 1932 order cannot be relied upon in this proceeding.

The 1935 order refers to the 1932 order and recites that "a question has been raised by a title company as to the sufficiency of the notice upon which said Order [of 1932] restoring to capacity was made", and it is then provided that Maloney is restored to competency as of December 27, 1935. This order has long since become final. Thus, in 1935, we have the probate court considering the question as to whether the 1932 order was void because of lack of notice, and then entering an order which it had jurisdiction to enter only if the 1932 order was void. Is that not an adjudication that the 1932 order was void? All presumptions of validity must be indulged in to support the 1935 order as well as the 1932 order. The majority opinion indulges in presumptions to support the 1932 order but refuses to indulge in any presumption to support the 1935 order. It is my opinion that the 1935 order amounted to an adjudication that the 1932 order was void. Whether that 1935 adjudication is correct or incorrect is immaterial in this proceeding. The rule is well-settled that, "A determination as to whether or not a prior adjudication is res judicata, or is valid or void, is conclusive on this issue in subsequent litigation." 2 Freeman on Judgments, 5th Ed., p. 1498, sec. 709. In Geibel v. State Bar, 14 Cal.2d 144, 148, 93 P.2d 97, 99, the rule is stated: "A determination as to the validity of a former adjudication is res judicata in a subsequent proceeding attacking it."

There is still another reason why the 1932 order cannot stand in this proceeding. On June 22, 1937, the probate court made its order fixing the default of the guardian. That determination has long since become final, and is binding on the surety. Smith v. Fidelity & Deposit Co., 130 Cal.App. 45, 19 P.2d 1018. That order recites that letters of guardianship were issued to the named guardian on October 10, 1929, and that, "Said incompetent was restored to competency by said Court on December 27th, 1935." Is that not an adjudication of that fact? We are thus faced with a 1932 order which purports to have restored Maloney to competency and to have discharged the guardian, and two subsequent orders in conflict therewith. The 1935 order purports to restore Maloney to competency as of that date, and the 1937 order finds that he was restored in 1935. In such a situation involving conflicting judgments, the last one is conclusive. The rule is thus stated in 15 Cal.Jur., page 57, section 143: "Generally, in case of successive and conflicting judgments in different proceedings between the same parties upon the same issues the last one is conclusive." See, also, cases commented on in 15 Cal.Jur., p. 104, sec. 171.

It is my view that for any one of these several reasons the conclusion contained in the majority opinion that the statute of limitations started to run from the 1932 order is wrong. That order must be disregarded in this proceeding.

It is also my opinion that the peculiar statute of limitations contained in section 1487 of the Probate Code did not start to run from the date of the 1935 order. That section provides for a three-year period starting from the date when the guardian is discharged or removed by court order. I refer to that statute of limitations as "peculiar", because it is settled in this state that an action may not be maintained on a guardian's bond against the surety until the probate court has made an order determining the amount with which the guardian is chargeable. That was one of the points decided in Cook v. Ceas, 143 Cal. 221, 77 P. 65, referred to in the majority opinion. But under section 1487 of the Probate Code the statute of limitations starts to run from the date of the court order discharging or removing the guardian. The result is that, if the guardian's account is not filed and acted upon by the court within three years of the discharge or removal of the guardian, the action against the surety is barred before it could have been commenced. The period of limitations starts to run before the cause of action accrues.

I agree with the holding in the majority opinion that under Cook v. Ceas, supra, and Keck v. Keck, 16 Cal.App.2d 521, 61 P.2d 79, the period provided by section 1487 of the Probate Code starts to run from the date of the *court order removing or discharging the guardian*. The point is that in December of 1935 the court made no order removing or discharging the guardian. There was no occasion to make such an order because the guardian had died in June of that year. For that reason, under the rules laid down in Cook v. Ceas, and Keck v. Keck, supra, the statute did not start to run in December of 1935.

Let us see what these two cases actually decided. In Cook v. Ceas, supra, it was held that section 1805 of the Code of Civil Procedure, now section 1487 of the Probate Code, came into operation only when the guardian is discharged or removed by *court order*. The precise point decided was that the peculiar statute of limitations set forth in the above code section did not apply where the guardianship terminated by reason of the ward attaining majority, or by the death of the guardian. The court noted a contrary rule in a number of jurisdictions in which it is held that the statutory period starts to run upon any termination of the guardianship, but expressly refused to follow that rule. That case beyond question establishes the rule that before the harsh provisions of section 1487 came into operation there must be a court order discharging or removing the guardian, or terminating the guardianship.

The case of Keck v. Keck, supra, did not purport to modify that rule. In fact, the court expressly reaffirmed the doctrine of Cook v. Ceas, supra. In the Keck case the plaintiff was adjudged an incompetent and his wife appointed his guardian in 1924. In 1926 the plaintiff was restored to mental competency. That decree, in addition, provided that it is "ordered, adjudged and decreed that the guardianship of the person and estate of Arthur W. Keck, as an incompetent is hereby terminated." 16 Cal.App.2d at page 523, 61 P.2d 79. In January of 1927 an order was made in the guardianship proceeding again purporting to terminate the guardianship, and this order expressly provided that the order appointing the guardian "be, and said order is hereby revoked". 16 Cal.App.2d at page 523, 61 P.2d 79, at page 80. This order further provided that an accounting be had and that jurisdiction over the guardian should be retained until the accounts were settled. The guardian's accounts were settled in March of 1930, showing a shortage, and the suit against the surety was not commenced until December, 1930. This was three years and eleven months after the making of the January, 1927, order, and over four years from the date of the 1926 order. It was contended the statute started to run from March of 1930 when the guardian's accounts were settled and the shortage discovered. This court in its opinion demonstrated to a certainty that this contention was unsound. The court held that either the 1926 or the January, 1927, order started the statute running. The court stated (16 Cal.App.2d at page 523, 61 P.2d 79, at page 80): "Thus it affirmatively appears that the action was commenced more than four years after the rendition of the decree of April 19, 1926, *terminating the guardianship proceedings,* and more than three years after the entry of the decree of January 18, 1927, in the guardianship proceedings *revoking the powers of the guardian.* Manifestly these decrees, and especially the latter, operated as a removal of the guardian, and set in motion the statute of limitations prescribed in said section 1805. The trial court properly held, therefore, that the action against the sureties was barred by the provisions of said Code section." (Italics added.)

That case stands for the rule that when by *court order* the guardian is removed or discharged, the statute of limitations provided by section 1487 of the Probate Code comes into operation. Everything that was said in that case must be read in view of the fact that the court was there considering a court order of 1926 expressly terminating the guardianship, and a court order of 1927 expressly revoking the powers of the guardian. Both Cook v. Ceas, and Keck v. Keck, supra, recognize the rule that before section 1487 can come into operation there must be a court order discharging or removing the guardian.

The order of 1932 involved in the present case contained an order discharging the guardian. For reasons already stated, that order cannot be considered in this proceeding. The only order that is left is the order of December, 1935. That order did not discharge or remove the guardian. There was no reason for discharging or removing her. Her powers had long since terminated by death. All that the order of December, 1935, did was to restore Maloney to competency. That did not, by court order, automatically discharge or remove the guardian. The guardian's powers had terminated by operation of law by reason of the death of the guardian. Section 1555, Probate Code. Since, under the rule of Cook v. Ceas, supra, section 1487 has no application to the termination of the guardian's powers other than by court order, it follows that the section can have no application where there is no effective court order of removal or discharge before the guardian dies or the ward attains majority.

The only reference to the guardianship in the order of December of 1935 is that the guardianship shall cease and terminate upon the guardian rendering an account. As was said in Keck v. Keck, supra, such a provision is meaningless because the court would retain jurisdiction of the guardian without such provision. But holding such a provision to be without legal effect is not the same as holding that it can be distorted into an order discharging the guardian. In the Keck case, supra, the order discharged the guardian and then retained jurisdiction over him for accounting purposes. The court properly held that the order discharging the guardian was not limited by the clause retaining jurisdiction over him. But, in the present case, there is no clause discharging or removing the guardian or terminating the guardianship. If the clause in question be deleted from the order, there is no reference therein to the guardian at all.

The question still remains as to what statute of limitations is applicable, and when did it start to run? In my opinion, section 1487 of the Probate Code has no application at all because no court order removing or discharging the guardian was ever entered. Under such circumstances, as suggested in both Cook v. Ceas, supra, and Keck v. Keck, supra, the general statute of limitations of four years on a written instrument would apply. The cause of action for the purposes of this provision arose on June 22, 1937, when the order finding the guardian in default was made. The action was brought well within the statutory period.

In my opinion the judgment should be reversed.

45 Cal.App.2d 439

COLOMBO et al. v. AXELRAD.

Civ. 11610.

District Court of Appeal, First District,
Division 2, California.

June 19, 1941.

Hearing Denied Aug. 7, 1941.

1. Negligence ⟹136(27)

Evidence presented question for jury as to whether customer, who was injured when she fell down stairway in store while looking at linoleum display, which was located near stairway, was guilty of contributory negligence, so as to preclude recovery from store owner for her injury.

2. Negligence ⟹48

An owner or occupant of land who by invitation induces others to go upon the premises for any lawful purpose is liable for injuries occasioned by unsafe condition of the land or its approaches if such condition was known to him and not to them.

3. Appeal and error ⟹996

The defense of contributory negligence cannot be treated as established as a matter of law unless appellate court is impelled to say from facts reasonable men can draw but one inference pointing unerringly to negligence of plaintiff contributing to her injury.

4. Negligence ⟹134(3)

Evidence that plaintiff together with her daughter-in-law was brought into store by store owner's agent for purpose of showing them linoleum and rug which plaintiff proposed to purchase for her son, and that both women were treated as customers, supported finding that plaintiff was an "invitee" and not a mere "licensee", as regards owner's liability for injuries sustained by plaintiff when she fell down stairway when looking at linoleum display.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee" and "Licensee".

5. Negligence ⟹32(2)

An "invitee" is one who enters upon the property of another by express or implied authority, as when customer enters grocery store to purchase provision; while a "licensee" is a person whose presence is not invited but merely tolerated.

6. Negligence ⟹32(2)

An "invitation" will be implied when one visits another's premises for purpose which is of mutual benefit to both parties, and not as the mere caprice or for visitor's sole pleasure.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitation".

◆

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Action by Antonio Colombo and Emelia Colombo against Joseph M. Axelrad, for personal injuries sustained by plaintiff Emelia Colombo when she fell downstairs in defendant's store. From a judgment for plaintiffs, the defendant appeals.

Affirmed.

Victor Hyatt, of Los Angeles, and S. Norman Hays, for appellant.

Ernest I. Spiegl, of San Francisco, for respondents.

NOURSE, Presiding Justice.

On the afternoon of April 25, 1939, at about two o'clock plaintiff, Emelia Colombo, and her daughter-in-law were taken by Mr. Moise to defendant's furniture store for the purpose of selecting and purchasing linoleum for plaintiffs' son; this plaintiff testified that she intended to buy the linoleum as a gift for the junior Colombos. Moise was an independent salesman who worked for various furniture stores on a commission and who had an arrangement with defendant to bring customers to the latter's store, to display its merchandise and to make sales on a commission basis. The premises were illuminated by six ceiling lights suspended to a point nine feet six inches above the main floor level. At the rear or east end of the store was a stairwell running north and south and open on the south end giving access to the basement. The stairs were protected on the west side by a railing two feet nine inches in height, and on this same side were arranged rolls of linoleum one foot in diameter and six feet high and placed in two rows three feet apart parallel with the stairway. The north end of the stairwell was also protected by a railing which was obscured by a rug display. On the east side of the stairwell was a ledge between the stairs and the rear wall of the store upon which bookcases were displayed. At the time of the accident the light over the stairway and the lights in the basement were not lit, and there is a conflict of testimony as to whether the southeast light of the store which was fifteen feet four inches west of the center of the stairwell was lit. Plaintiff, accompanied by Moise. approached the linoleum display from the front of the store and inspected the nearest roll of linoleum from the westerly side. She walked sideways in a southerly direction and the condition of the lighting was such that she had to look at the merchandise at a distance of from twelve to fifteen inches in order to see the patterns. Upon reaching the end of the row she walked around it and approached the easterly row of linoleum. As she started to walk around the southerly part of the second row to get to the east side she took a step north and was precipitated to the basement causing her injuries. The court entered a judgment upon the verdict awarding plaintiffs damages and defendant appeals.

Appellant states two grounds of appeal—whether Emelia Colombo was guilty of contributory negligence as a matter of law, and whether she was not a mere licensee. Both questions must be answered in the negative.

[1] The question of contributory negligence was one that was properly left to the jury. Appellant's theory is that Mrs. Colombo failed to look where she was walking and that she voluntarily walked into darkness in unfamiliar surroundings. Both of these are matters of fact upon which the evidence was conflicting. She went to the premises upon invitation to examine the merchandise displayed there. She had no reason to assume that the premises were not maintained in a safe condition for that purpose. She had no warning of the danger which admittedly was known to the owner and his agent. Because of the darkness she was required to look more directly and closely at the merchandise.

[2] The liability of the appellant rests upon the well known rule stated in 20 R.C.L. pp. 56 and 57 as follows: "The law is well settled that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them. * * * The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted." Cases following the text are cited in Harris v. Smith, Cal.App., 112 P.2d 907.

[3] It is true that this liability may not attach if the danger is obvious or if the invitee is guilty of contributory negligence. But this defense may not be treated as established as a matter of law unless the appellate court "is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury". Reaugh v. Cudahy Packing Co., 189 Cal. 335, 343, 208 P. 125, 128.

[4-6] Mrs. Colombo was an invitee and not a mere licensee. A clear definition of these respective relations is found in Strong v. Chronicle Pub. Co., 34 Cal.App.2d 335, 339, 93 P.2d 649, 652, as follows: "An invitee is one who enters upon the property of another person by either expressed or implied authority as when a customer enters a grocery store to purchase provisions. A licensee is a person whose presence is not invited but merely tolerated. Latham v. R. Johnson & Nephew, 1 K.B., Eng., 398; 36 A.L.R. 37, note. An invitation will be implied when one visits the premises of another for a purpose which is of mutual benefit to both parties and not as the mere caprice or for the sole pleasure of the visitor." The undisputed evidence is that appellant's agent called for her and her daughter-in-law and took them to appellant's premises to show them linoleum and rugs which Mrs. Colombo proposed to purchase for her son. The two women were both treated as customers and hence the trial court properly instructed the jury that Mrs. Colombo was an invitee if she entered the premises for the purpose of purchasing or because she was assisting her daughter-in-law in the purchase of merchandise. There is no evidence which would have supported appellant's contention that Mrs. Colombo was a mere licensee.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

45 Cal.App.2d 260

BOOGE v. REINICKE.

Civ. 6585.

District Court of Appeal, Third District, California.

June 10, 1941.

Hearing Denied Aug. 7, 1941.

1. Parties 🔑7(2)

Plaintiff who was named trustee in a trust agreement purporting to create an express trust in personalty including a note could maintain an action on note against maker thereof notwithstanding that agreement was void where note was taken in plaintiff's name for benefit of payee, who attempted to create trust, since, by force of statute, the taking of note in plaintiff's name for payee's benefit constituted plaintiff a "trustee" of an "express trust". Code Civ. Proc. § 369.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee" and "Express Trust".

2. Parties 🔑7(2)

The test to be applied under the circumstances in determining whether trustee of an express trust in a note could maintain action on note against payor thereof was whether payor could be subjected to another action on note. Code Civ.Proc. § 369.

3. Parties 🔑7(2)

Evidence sustained finding that plaintiff was a trustee under an express trust in note by reason of note being taken in plaintiff's name for payee's benefit, and hence plaintiff was entitled to maintain action on the note. Code Civ.Proc. § 369.

4. Trial 🔑396(3)

In action on note, where complaint alleged that plaintiff was a trustee under a trust agreement creating a trust in personalty including note, trial court's findings that agreement was void but that plaintiff was trustee under an express trust by reason of circumstances under which note was taken by plaintiff were not in fatal conflict with allegations of complaint, especially where findings were based upon allegations of cross-defendants' answer, and relief granted conformed to prayer of answer, and the findings were made in favor of prevailing parties and disposed of all issues. Code Civ. Proc. § 369.

5. Trial 🔑396(3)

In making its findings in action wherein judgment was awarded plaintiff, trial court was not bound to follow allegations of complaint where findings were properly based upon allegations of cross-defendants' answer.

6. Trusts 🔑61½

In action on note by trustee under void trust agreement purporting to create an express trust in personalty including note, evidence sustained implied finding that trustor did not intend that beneficiaries should have title immediately from and after execution of agreement, and hence the void trust was not converted by law into an immediate grant to beneficiaries or remaindermen. Code Civ.Proc. § 369.

7. Perpetuities 🔑7(2)

A trust agreement purporting to set up a trust in personalty and providing that trust should remain in force during lives of trustor and wife, that upon its expiration one-fifth of trust property and accumulations therefrom should be paid to trustor's son and four-fifths in equal shares to trustor's daughters, and providing that if survivor of trustor and wife died intestate the four-fifths should go to daughters direct, the share of a deceased daughter to go as might have been directed by her will and in default thereof to her children, and if no children to her surviving brother and sister and issue of a deceased brother and sister, was void as in violation of "rule against perpetuities." Civ. Code, § 716.

See Words and Phrases, Permanent Edition, for all other definitions of "Rule Against Perpetuities".

8. Trusts 🔑61½

Where a trust is void as an illegal restraint upon alienating, no title or right is acquired either by the trustee or any of the beneficiaries. Civ.Code, § 715.

9. Trusts 🔑61½
Wills 🔑849

If a conveyance in trust is for any reason invalid or ineffectual, legal title, so far as trustees are concerned, must be deemed to have remained in grantor, and in case of a testamentary trust, the property descends to testator's heirs or passes under a residuary clause of will.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by J. H. Booge against George R. Reinicke on a promissory note, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Laurence B. Martin, of Los Angeles, for appellant.

Manierre & Cuthbertson, of Los Angeles, for respondent.

TUTTLE, Justice.

This action was brought to recover upon a promissory note. Judgment went in favor of plaintiff, and against defendant and appellant.

On February 8, 1927, Francis Lackner loaned appellant the sum of $3,000. No evidence of said indebtedness was given at the time. On February 28th of the same year, Francis Lackner executed an instrument which purported to set up a trust in certain personal property in which J. H. Booge was named trustee, and the beneficiaries were the sister, the son, and four daughters of the trustor. This trust provided that it should remain in full force during the lives of the trustor and his wife, Nannie Lackner; that upon its expiration, one-fifth of the trust property and some accumulations therefrom, were to be paid over to said son, and four-fifths were to go in equal shares to the four daughters; that "should the survivor of the two parties above named, that is, the grantor and his wife, die intestate, then said four-fifths of this Trust Estate shall go to my daughters direct; the share of a deceased daughter to go as may have been directed by her last will, and in default thereof to her children, the issue of her body, and if there be no children, to her surviving brother and sister and the issue of a deceased brother and sister". It was also provided that during the life of the trust, certain cash payments were to be made monthly to all beneficiaries except the son. The property mentioned in the trust included "Note dated Feb. 8th, 1927, $3,000.00, on or before ten years. Interest at 7% after Feb. 8th, 1928, signed George R. Reinicke". A month or two after the trust agreement was executed, appellant executed and delivered to the trustee, Booge, his promissory note in favor of "J. H. Booge, trustee", for the sum of $3,000. It bore interest at the rate of 7 per cent per annum, and was payable ten years from the date thereof—February 8, 1927.

On December 20, 1928, the trustor died. His will was duly probated, and under the decree of distribution the residue thereof was left to his widow, Nannie Lackner cross-defendant and respondent herein. The said note was not specifically mentioned in the will or decree, but it may be considered an established fact in the case that if said note was a portion of the estate, any title thereto which the decedent may have had therein now vests in his widow.

Upon default in the payment of said note, this action was commenced. It was brought in the name of "J. H. Booge, Trustee". Appellant was named the sole defendant. The first paragraph of the complaint alleges that plaintiff is the trustee under the trust mentioned above. The remaining allegations are in the usual form of such an action. The answer of appellant set up as a defense that the said trust was void as being in violation of the rule against perpetuities, and that plaintiff was not authorized to bring said action. Thereafter, appellant filed a cross-complaint, bringing in as cross-defendants all the beneficiaries under said trust, and also Nannie Lackner. The allegations thereof are similar to those set up in the special defenses of appellant's answer. It was prayed therein that the corpus of the estate be distributed to the beneficiaries under said trust. The cross-defendants filed an answer alleging that Nannie Lackner was the equitable owner of said note; that said trust agreement was void; and praying that judgment be rendered in favor of Nannie Lackner and Booge as trustee. It was agreed by all parties, at the trial, that the trust was void. The court found that said trust agreement was void, and that "no rights or interests either present, prospective, or contingent was created thereby either in the purported trustee or purported beneficiaries", and that Nannie Lackner and J. H. Booge, as her trustee, are the sole owners of said note. The court adjudged that Nannie Lackner was the real owner of said note; that Booge held the same for her use and benefit; and ordered judgment for the amount of said note, interest and counsel fees. It appears that during said time, one of the beneficiaries under said trust, Else Lackner, died. Appellant appears not only personally, but also as the executor of her estate.

[1] It is first contended by appellant that plaintiff could not maintain the action. He argues that as the trust was void, Booge had no interest in the corpus of said trust, which included the note in question. There is no merit in the contention. Section 369 of the Code of Civil Procedure pro-

vides as follows: "An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

[2, 3] Although the trust was void, the facts show beyond dispute that the note was taken in the name of Booge for the benefit of the payee, Lackner. By force of the statute this constituted the former a trustee of an express trust, and he had a right to bring and maintain the action. Furthermore, the equitable owner of the note appeared in the action, and consented thereto. The test to be applied under such circumstances is whether or not the payor could be subjected to another action on the note. We are of the opinion that he could not be. We do not deem it necessary to discuss the authorities cited by appellant on this phase of the cause, other than to state that, as we have seen, there was ample evidence to sustain the finding that plaintiff was the trustee under an express trust, and therefore entitled to bring the action.

[4, 5] It is contended by appellant that the findings conflict with the allegations of the complaint in that the latter alleges that plaintiff was the trustee under the trust agreement, while in the latter it is found that such agreement was void, but that plaintiff was trustee under an express trust. The finding is based upon the allegations of the answer of the cross-defendants, and the relief granted conforms to the prayer of said answer. Appellant seems to assume that the court in making its findings, was bound to follow the allegations of the complaint, although it found in favor of the cross-defendants upon all the issues raised in their answer. Obviously this is not a proper test to apply to the findings in the matter of disposing of the issues. They were made in favor of the prevailing parties, and they disposed of all the issues before the court. That was sufficient.

It is next contended by appellant that the trust, although void, created vested remainders in the beneficiaries; that vesting of these remainders was accelerated by the avoidance of the trust to the extent that title to the trust property immediately vested in the remaindermen or beneficiaries. In other words, the void trust was converted by law into an immediate grant. On the other hand, respondents urged that "the law in California declares with admirable persistency and consistency that once a thing is dead, or 'void in its creation', it can say nothing, carry nothing, and give nothing".

[6] The significance of the position taken by appellant lies in the fact that he is the executor of the estate of Else Lackner Reinicke, who was one of the beneficiaries under said trust, and who would, he contends, be therefore entitled to a one-fifth interest in the note. He claims title to such interest in the note under the theory that it was the intention of the trustor that the remainder should be vested from and after the execution of the trust agreement, and that the law accelerates the vested interest of the remaindermen on the theory that such would have been the normal intent of the trustor had he envisaged the possibility that prior interests attempted to be created would become ineffective. The trial court found impliedly that there was no such intent, and there is evidence to support such finding. The instrument itself recites that: "The grantor, being desirous of creating a fixed income for certain members of his family hereinafter named, has assigned, transferred, and delivered to the trustee the following securities." If the purpose of the trustor was to make a present gift of the property, he would have done so. He chose, however, to set up a trust which would insure the beneficiaries a "fixed income".

[7-9] Appellant relies strongly upon several cases from New York—In re Berry's Will, 154 App.Div. 509, 139 N.Y.S. 186, affirmed in 209 N.Y. 540, 102 N.E. 1099; Brinkerhoff v. Seabury, 137 App. Div. 916, 122 N.Y.S. 481, affirmed in Brinkerhoff v. Green, 201 N.Y. 559, 95 N. E. 1123; Smith v. Chesebrough, 176 N.Y. 317, 68 N.E. 625; In Matter of Hitchcock's Will, 222 N.Y. 57, 118 N.E. 220, and Guaranty Trust Co. v. Goetting, Sup.Ct., 185 N.Y.S. 663. He also claims support for his contention in Restatement of Property, Vol. 11, Chap. 16. The cases mentioned all involve trusts which are set up in wills, and where acceleration of the vesting of title has been permitted it has been done under the rule relating to the construction of wills—"The cardinal rule in the construction of wills and codicils is that the intention of the testator must be ascertained if possible". 69 C.J., page 52, sec. 1117. Assuming that a similar rule applies to the construction of trust agree-

ments, there was ample evidence, as we have pointed out, to sustain an implied finding that the trustor did not intend that the beneficiaries should have title immediately. All of the authorities mentioned by appellant either involve a failure of a preceding interest, or trusts of a character which permit of a severance of valid and invalid provisions. Here, there is no failure of a prior interest, nor are there valid and invalid provisions which are severable. The entire agreement is void. Neither can there be an acceleration of the vesting, based upon the theory that the prior interest is invalid, but the directions to convey valid, for the same reason. Whatever may be the rule in other jurisdictions, it has been definitely held in this state that where a trust is void as an illegal restraint upon alienating (sec. 715, Civ.Code), no title or right whatever is acquired either by the trustee or any of the beneficiaries. The general rule in California is thus stated in 25 Cal.Juris. page 298, sec. 153: "If a conveyance in trust is for any reason invalid or ineffectual, the legal title, so far as the trustees are concerned, must be deemed to have remained in the grantor. In the case of a testamentary trust, the property descends to the testator's heirs, or passes under a residuary clause of the will."

In re Estate of Walkerly, 108 Cal. 627, 41 P. 772, 780, 49 Am.St.Rep. 97, several trusts were set up in the will. The testator sought to establish a trust for a period of time prohibited by section 715 of the Civil Code. The trustees were directed to manage the property and to apply the proceeds for the use of the persons designated as beneficiaries, and at the termination of the trust to sell the property and distribute the proceeds among the beneficiaries. The Supreme Court held that the attempted trust being void, no gift or conveyance of any kind was effected and that the property remained at all times the property of the putative grantor and would have to be distributed under the laws of succession. The decree of the trial court distributing the estate to the intended beneficiaries because they had what would normally be vested interests, was reversed. In concluding the opinion, the court said: "The determination that the trusts are void renders unnecessary any consideration of the other points presented. The trusts being void, it follows as to the property attempted to be devised in trust, that the testator died intestate. It therefore descends to the heirs living at the time of his death. For the foregoing reasons the decree is reserved."

It is further noted in this case that the respondents were contending that a different rule should apply because of the fact that the remainders were vested. The court said: "But, if we understand the position of respondents, it is contended that the nephews and nieces [beneficiaries of the proposed trust] take a future estate, which future estate is vested * * *."

The trial court had ordered distribution to these nephews and nieces under that theory. This was held error.

In Campbell-Kawannanakoa v. Campbell, 152 Cal. 201-207, 92 P. 184, 186, a trust was held void as violating section 715 of the Civil Code. Referring to the result, the court said: "The trust here therefore was void as to the real property of deceased situated within the state of California. If follows that as to such property the deceased died intestate, and the same descended by succession to his heirs at law (Estate of Walkerly, 108 Cal. 627, 652, 660, 41 P. 772, 49 Am.St.Rep. 97), one-third to his surviving wife, and one-sixth to each of his four children (subdivision 1, § 1386, Civ.Code) subject only to proper administration of his estate."

The other cases following the same rule are: In re Whitney's Estate, 176 Cal. 12, 167 P. 399; In re Maltman's Estate, 195 Cal. 643, 234 P. 898, and Estate of Van Wyck, 185 Cal. 49, 196 P. 50.

It is conceded that appellant received the money on his note, and we are of the opinion that the trial court justly and legally ordered payment thereof.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

45 Cal.App.2d 480

CRAGUN et al. v. KROSSOFF et al.
DAVIS v. SAME.

Civ. 11524.

District Court of Appeal, First District,
Division 1, California.

June 20, 1941.

Rehearing Denied July 19, 1941.

Hearing Denied Aug. 18, 1941.

1. Automobiles 🔑197(7)

In determining whether traveling salesman was in the course of his employment at time and place of automobile accident, so as to make his employer liable for damages sustained by third persons in accident, each case must be decided on its own peculiar facts and circumstances.

2. Automobiles 🔑197(7)

In determining whether traveling salesman was in the "course of employment" at time of automobile accident occurring after salesman's business activities for week had ended and while salesman was proceeding to city to which he usually went for the week-end, so as to make his employer liable for damages sustained by third persons in accident, whether salesman was doing anything in furtherance of his employment as a salesman, or whether salesman was at liberty from service and was pursuing his own ends exclusively, must be determined.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

3. Automobiles 🔑244(28)

Evidence warranted finding that traveling salesman, who had concluded his business activity for week and was returning to city to which he usually went for the week-end, was not in "course of employment" at time of automobile accident, on ground that salesman was not engaged in business of nor under control of employer, but had entered upon performance of an independent purpose of his own, and hence employer was not liable for injuries sustained by third persons in accident.

4. Courts 🔑89
Master and servant 🔑302(1), 332(2)

The question of departure from scope of employment is ordinarily a "question of fact" and a strict, concise rule cannot be framed to cover all states of fact, and previous decisions may act as an advisory guide but not as an injunctive limitation.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Appeal and error 🔑1008(1)

Where arrangements between employer and employee relative to manner, method and time of work were entirely oral, a "question of fact" was presented within province of trial judge as to whether employee was acting in scope of employment at time of automobile accident, so as to make employer liable for damages sustained by third persons in accident.

6. Appeal and error 🔑996

If from the evidence offered a reasonable deduction may be drawn that trier of facts has reached a conclusion based upon substantial evidence, duty of appellate court is at an end.

7. Appeal and error 🔑1012(1)

The trier of facts is judge of weight and value of evidence.

8. Appeal and error 🔑996

When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

9. Appeal and error 🔑996

Any attempt on the part of an appellate court to draw an inference of fact constitutes a usurpation of the province of the trial court.

PETERS, P. J., dissenting.

◆

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Alice R. Cragun and Cal Cragun, husband and wife, against Constantine A. Krossoff and R. J. McDonald, for damages sustained in an automobile accident. R. J. McDonald filed a cross complaint against W. C. Davis. W. C. Davis filed a cross-complaint against Constantine A. Krossoff and R. J. McDonald. The plaintiffs amended their complaint to include Sigmund Eisner Company, Western, as a defendant, and W. C. Davis added Sigmund Eisner Company, Western, as a defendant in his cross-complaint. A judgment was entered, and the plaintiffs and W. C. Davis appealed. Myrtle Davis, administratrix of the estate of W. C. Davis, deceased, was substituted as cross-complainant and appellant.

Affirmed.

Rehearing denied; PETERS, J., dissenting.

Sullivan & Ferrario and A. K. Whitton, all of Oakland, for appellants Alice R. and Cal Cragun.

Johnson & Harmon, of San Francisco, for appellant W. C. Davis.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for respondent.

WARD, Justice.

Appeals by plaintiffs, Alice R. Cragun and Cal Cragun, wife and husband, and cross-complainant W. C. Davis, from judgments severally entered against them in a personal injury action in favor of defendant and cross-defendant Sigmund Eisner Company, Western, a corporation. Since the rendition of the judgment, Myrtle Davis, administratrix of the estate of W. C. Davis, has been substituted as cross-complainant and appellant.

Mr. and Mrs. Cragun were riding with appellant Davis in his car when it collided in an intersection of streets in the city of Oakland with an automobile owned by R. J. McDonald and operated by Constantine Krossoff. The Craguns, Davis and McDonald were injured, and both automobiles were damaged. Mr. and Mrs. Cragun filed an action for personal injuries, medical expenses, etc., against Krossoff and McDonald, who answered, the latter with the permission of the court also filing a cross-complaint against Davis, praying for damages for personal injuries and expenses incurred in the repair of his car. Davis answered this cross-complaint and in turn cross-complained against McDonald and Krossoff, seeking to recover for personal injuries and for damages to his automobile. The Craguns amended their complaint to include Sigmund Eisner Company, Western, as a defendant, and Davis added the Eisner company as a defendant in his cross-complaint. When all of the answers to the complaints, amended complaints and amended cross-complaints had been filed, the matter was tried without a jury.

The court found negligence on the part of Krossoff who was operating McDonald's car at the latter's request. It also found "That at the time and place of the aforesaid accident defendant R. J. McDonald was not in the course of or in the discharge of any duty or duties of his employment as a salesman upon commission for said Sigmund Eisner Company, Western, a corporation, or otherwise; that defendant R. J. McDonald in requesting and employing defendant Krossoff to drive the said automobile of defendant R. J. McDonald from Tracy, California, to San Francisco, California, on said 16th day of January, 1937, during the course of which trip the aforesaid accident and collision occurred, was not acting for or on behalf of defendant Sigmund Eisner Company, Western, a corporation, and defendant McDonald was without any authority whatsoever to employ or permit defendant Krossoff or any other person to drive or operate said automobile for or on behalf of said defendant Sigmund Eisner Company, Western, a corporation, on said trip; that said trip from Tracy, California, to San Francisco, California, during the course of which the aforesaid accident and collision occurred, was made solely for the personal and individual interest of defendant R. J. McDonald, and was not made at the request of nor in the interest of nor upon any business of defendant Sigmund Eisner Company, Western, a corporation." Judgment was entered in favor of plaintiffs Alice R. Cragun and Cal Cragun and cross-complainant Davis against Krossoff and McDonald, and in favor of Sigmund Eisner Company, Western, against the plaintiffs and cross-complainant.

The evidence disclosed that McDonald was a traveling salesman for cross-defendant Sigmund Eisner Company, Western, having its principal place of business in New Jersey and a branch office in San Francisco. McDonald's duties were to place clothes, the output of the company, in stores throughout territory assigned to him in California. This territory commenced at Stockton or Manteca on the north and extended to Bakersfield on the south, and he covered it approximately once a month, without, however, having any specified route or regular or definite working hours, although he usually kept the San Francisco office advised personally or by mail as to his itinerary. McDonald used his own automobile for these trips, and it in fact appears that respondent company understood he would, although he had the privilege of selecting his own mode of conveyance. When he commenced selling for the company, no mention was made of the period of his employment, and he was paid no regular salary, merely a commission. He was, however, allowed a drawing account of $50 a week and if his commissions did not equal this advance his account was debited the difference. He continued to receive this weekly advance during his several weeks of illness following the accident. The company furnished him with sample cases of goods to take on his trips, and he replenished the cases from time to time from the stock of the company. At the time of the accident he had these cases with him. There is no evidence in the record that McDonald ever delivered merchandise, extended credit or made collections. Week-ends, McDonald ordinarily returned from the valley trip to San Francisco, usually going to the same hotel, from which he was registered as a voter, and where he paid only for the time he occupied the room assigned him. He testified that these trips to San Francisco might be on personal business; that if he happened to be in San Francisco during business hours, he would report to the company, but that his written reports of sales, etc., did not have to be made at any time or place; that they could be made by mail. He further testified that while he fixed his own itinerary, he would have changed it to comply with any request or direction of his employer to call on a particular customer; that on completing his territory on the north, he never varied the route taken to San Francisco. On the day of the accident, Saturday, McDonald called on a customer at Manteca, the northernmost town of his route, and they had several drinks. On resuming his trip north, he was given a "tag" at Tracy for reckless driving; his car was taken from him, parked near the court house and he was advised to get something to eat. He testified that this occurrence made him uneasy about driving the rest of the way to San Francisco; that he engaged and paid Krossoff to drive for him, and it was while Krossoff was driving that the accident occurred.

The finding that McDonald was not in the course of or in the discharge of any duty or duties of his employment as a salesman for respondent company at the time or place of the accident may be sustained upon reasonable inferences drawn from the evidence unless the proof presented establishes as a matter of law that he was at the time acting within the scope of his employment.

[1] Appellants contend that in determining the liability of respondent company the negligence of defendant Krossoff must be regarded as that of the defendant McDonald. This contention need be considered only if it should be determined that McDonald was in the course of his employment at the time and place of the accident. Appellant also presents as one of the questions on appeal: "Was the status of the defendant McDonald that of an employee for the respondent company as distinguished from an independent contractor?" There is no direct finding on this question, and it does not appear that a finding on the subject was necessary in view of the finding that McDonald was not in the course of or in the discharge of any duty of "his employment as a salesman upon commission" during his journey from Manteca to San Francisco. If the evidence supports the finding that McDonald was not acting in the course of his employment as an agent, servant or employee of respondent company at the time of the accident, then appellants' contentions have been met. It is not necessary to consider the numerous opinions written differentiating acts performed within or without the scope of employment. It is sufficient to say that each case was decided upon its own peculiar facts and circumstances.

[2] The question for decision here may be stated briefly: In driving from Tracy, or even Manteca, through Oakland toward San Francisco was McDonald doing anything in furtherance of his employment as a salesman on a commission basis or was he "at liberty from service and pursuing his own ends exclusively"? Slater v. Friedman, 62 Cal.App. 668, 672, 217 P. 795, 796. His business activity for the week had ended; he had driven in a car of which he "was the registered owner but the finance company had a good part of it" beyond the zone of his employment; in passing through Tracy he had received a "tag" for driving his car in a "wobbly" fashion and had been advised to get something to eat; he had taken at least a glass of wine at Tracy and believed it advisable to pay someone to operate the car to his destination. The purpose of the proposed trip to San Francisco was not in the interest of respondent company. McDonald testified:

"Q. You intended to call at the office on the following Monday morning, did you not? A. I don't believe so, no sir.

"Q. Except for the accident I mean you would have called at the office on the following Monday morning? A. No sir, that was not my usual custom. My custom in coming in on Saturday was to go directly back on the road on Monday morning.

"Q. You got your check every Monday morning at the office, didn't you? A. No, sir. It was mailed to me from the office." McDonald was not charged with the duty of returning on week-ends or otherwise to report to respondent company's office at San Francisco.

The many cases cited by appellants distinguishing between an employee and an independent contractor are not of assistance to them. The present case was not decided by the trial court upon that distinction; that is, that McDonald was an independent contractor. It held that McDonald was an employee, and classified his employment with respondent company as "salesman upon commission", but held that at the time of the accident he was not in the course of his employment. It is appellants' theory that a traveling salesman is in the course and scope of his employment for the entire period of time between starting from and returning to his home or business headquarters. This general rule has found approval notably in California C. I. Exchange v. Industrial Accident Commission, 5 Cal.2d 185, 53 P. 2d 758, but in each case cited by appellants facts and circumstances showed that the employee was on a roving commission, or had made a necessary stop, overnight or otherwise, in the interest or advancement of the employer's business, while en route to his home or place of business. In the present case it is true that McDonald voted in San Francisco and that usually he stopped at the same hotel if a room was available, but in doing so he was no more than a transient guest, and it was not necessary that he should come to San Francisco for the business of his employer. The purpose of the week-end trips was primarily for pleasure as distinguished from business. He could, without injury to the interests of his employer, have stopped at any intervening city or town or left his regular route for other parts had his pleasure so dictated. He was a free lance, subject to no control by his employer from the time he left Manteca. His return to San Francisco was a mere incident, not necessarily or at all connected with his employment.

[3] In many respects Ryan v. Farrell, 208 Cal. 200, 280 P. 945 and Hiner v. Olson, 23 Cal.App.2d 227, 72 P.2d 890, 73 P.2d 945 are similar to the present case. In the Hiner case the circumstances furnished "persuasive evidence" that the traveling salesman at the time of the accident there involved was under the control of his employer. On appeal there was evidence to substantiate the conclusions reached by the trier of the facts. In the present case there was persuasive evidence to convince the trier of the facts not that the salesman was an independent contractor, for he was not engaged in business of his own, but that he was an employee, although not engaged in the business nor under the control of his employer at the time of the accident. There was evidence to indicate that McDonald "had stepped aside from his employer's business and had entered upon the performance of an independent purpose of his own". Helm v. Bagley, 113 Cal.App. 602, 298 P. 826, 827; see, also, Kish v. California S. Automobile Ass'n, 190 Cal. 246, 212 P. 27; Chamberlain v. Southern California Edison Co., 167 Cal. 500, 140 P. 25; Slater v. Friedman, supra; Newman v. Sunde, 23 Cal.App.2d 332, 73 P.2d 260; Martinelli v. Bond, 42 Cal.App. 209, 183 P. 461; Lee v. Nanny, 38 Cal.App.2d 90, 100 P.2d 832; Fuller v. Lindenbaum, 29 Cal.App.2d 227, 84 P.2d 155; Lane v. Bing, 202 Cal. 577, 262 P. 317; Peccolo v. City of Los Angeles, 8 Cal.2d 532, 66 P.2d 651.

[4, 5] The question of departure from the scope of employment is ordinarily one of fact. A strict concise rule may not be framed to cover all states of fact. Previous decisions may act as an advisory guide but not as an injunctive limitation, due to the varied circumstances that successive cases present. In the present case the arrangements between the employer and employee relative to the manner, method and time of work, being entirely oral, a question of fact was presented within the province of the trial judge. Robinson v. George, 16 Cal.2d 238, 105 P.2d 914.

[6-9] If from the evidence offered a reasonable deduction may be drawn that the trier of the facts,—who is the judge of the weight and value of the evidence,—has reached a conclusion based upon substan-

tial evidence, the duty of an appellate court is at an end. "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184. "* * * Any attempt on the part of an appellate court to draw an inference of fact constitutes 'a usurpation of the province of the trial court.'" Hamilton v. Pacific Elec. Ry. Co., 12 Cal.2d 598, 602, 86 P.2d 829, 831; see, also, Webster v. Board of Dental Examiners of Calif., Cal.Sup., 110 P.2d 992.

The judgment is affirmed.

I concur: KNIGHT, J.

PETERS, Presiding Justice (dissents).

I dissent.

The trial court was presented with three main questions: (1) Was McDonald an employee of respondent or an independent contractor? (2) Was McDonald, if an employee, acting in the course and scope of his employment at the time of the accident? and (3) If McDonald was an employee and acting in the course of his employment at the time of the accident, is the respondent liable for the negligence of Krossoff? The trial court failed to make any express finding at all on the question of whether McDonald was an independent contractor or employee, but held that, assuming he was an employee, he was not acting in the course and scope of his employment at the time of the accident. The majority opinion is based on the same theory. Respondent, however, in its brief, assumes that the trial court found that McDonald was an independent contractor, and spends the major portion of its brief arguing that that question is one of fact, and that the assumed finding is supported by the evidence.

For the purposes of this dissent, it may be conceded, as contended by respondent, that the question whether a commission salesman is an employee or an independent contractor is ordinarily for the determination of the trial court. It has been held that this question is a mixed question of law and fact, and that the trial court's finding is binding on appeal if supported. Lee v. Nanny, 38 Cal.App.2d 90, 100 P.2d 832; Counihan v. Lufstufka Bros. & Co., 118 Cal.App. 602, 5 P.2d 694; Barton v. Studebaker Corp. of America, 46 Cal.App. 707, 189 P. 1025; Fuller v. Lindenbaum, 29 Cal.App.2d 227, 84 P.2d 155. For the purposes of this dissent, it may be conceded that, had the trial court found that McDonald was an independent contractor that finding would find support in the record. It must also be conceded, however, that, had the trial court found that McDonald was an employee, that finding would also be supported by substantial evidence. Fischer v. Havelock, 134 Cal.App. 584, 25 P.2d 864; Phillips v. Larrabee, 32 Cal.App.2d 720, 90 P.2d 820; Cook v. Sanger, 110 Cal.App. 90, 293 P. 794; Hiner v. Olson, 23 Cal.App.2d 227, 72 P.2d 890, 73 P.2d 945; California C. I. Exch. v. Industrial Acc. Comm., 5 Cal.2d 185, 53 P.2d 758. As already pointed out, however, and this is pointed out in the majority opinion, the trial court did not make an express finding on this point. After finding that the accident was caused by the negligence of Krossoff, and that McDonald was liable for the negligence of Krossoff, the trial court found:

"That defendant Constantine A. Krossoff was not at the time of the aforesaid collision and accident or at any time an employee or agent or servant of defendant Sigmund Eisner Company, Western, a corporation; that in driving and operating the automobile of defendant McDonald said defendant Krossoff was not acting as an agent or servant or employee or representative of said Sigmund Eisner Company, Western, a corporation. That at the time and place of the aforesaid accident defendant R. J. McDonald was not in the course of or in the discharge of any duty or duties of his employment as a salesman upon commission for said Sigmund Eisner Company, Western, a corporation, or otherwise;". That finding certainly does not find that McDonald was an independent contractor—if anything, it is, by implication, a finding that McDonald was an employee but not acting in the course and scope of his employment at the time of the accident. However, in fairness to the respondent, I do not think that the finding should be distorted into a finding that McDonald was an employee. I believe that it should be held that no finding was made on this basic issue, and that the theory of the trial court was that, assuming McDonald was an employee, he was not acting in the course and scope of his employment at the time of the accident. The majority opinion properly interprets the finding in this manner.

The majority opinion holds that this finding, so interpreted, is supported by the evidence. I disagree with this holding. I believe that, as a matter of law, a traveling salesman who is an employee, with a limited and designated territory, is within the course of his employment when going to or returning from that territory by the most direct route. This rule would be clearly applicable if McDonald had a fixed permanent abode in San Francisco. California C. I. Exch. v. Industrial Acc. Comm., supra; Hiner v. Olson, supra; Rafferty v. Dairymen's League Co-Op. Ass'n, 200 A. 493, 16 N.J.Misc. 363; State v. District Court, 141 Minn. 61, 169 N.W. 274. In California C. I. Exch. v. Industrial Acc. Comm., supra, a traveling salesman was on his way home from a completed sales trip. He stopped for the night at an auto camp where he was asphyxiated. In holding that his death was compensable the Supreme Court stated, 5 Cal.2d at page 186, 53 P.2d at page 759:

"There seems no reason for denial that the death of the employee occurred in the course of his employment. 'As a rule commercial travelers may be regarded as acting in the course of their employment so long as they are traveling in their employer's business, including the whole period of time between their starting from and returning to their place of business or home.' Bradbury on Workmen's Compensation, p. 105. Within this rule the traveler, when overtaken by night, may reasonably seek the protection of an inn and still be regarded as acting in the course of his employment." This, and the other cases cited, establish the rule that traveling salesmen, who are employees, are acting within the course of their employment so long as they are traveling in the employer's business, including the whole period of time between their starting from, and returning to, their place of business or home. In other words, in going to his designated district or returning therefrom, the employee is performing an act incidental to the employment. It is true that if the employee does not return directly home, and engages in a purely personal trip, this rule has no application. Such are the cases relied upon by respondents. See Newman v. Sunde, 23 Cal.App.2d 332, 73 P.2d 260; Helm v. Bagley, 113 Cal.App. 602, 298 P. 826.

It is also well-settled that a person who is injured by the negligence of such employee while he is returning from his road trip or errand is entitled to recover against the employer. Brown v. Montgomery Ward & Co., Inc., 104 Cal.App. 679, 286 P. 474; Ryan v. Farrell, 208 Cal. 200, 280 P. 945; Humphry v. Safeway Stores, Inc., 4 Cal.App.2d 589, 41 P.2d 208.

The majority opinion states that, "The purpose of the proposed trip to San Francisco was not in the interest of respondent company." The point is, that the above cases establish, as a matter of law, that in going to his designated territory, or returning to his home therefrom, the employee traveling salesman is performing an act incidental to, and growing out of, his employment. The majority opinion, apparently in recognition of this principle of law, makes much of the fact that McDonald had no fixed abode in San Francisco. What does the uncontradicted evidence show on this point? McDonald had been in the employ of the respondent for five or six months prior to the accident. The office of the respondent was in San Francisco, and McDonald was hired in that city. His territory was in the San Joaquin Valley, Manteca being the northernmost town in his territory. At the time he was employed he lived in an apartment in a hotel at 542 Mason street, San Francisco. To avoid double expense, he gave up his apartment when he went on the road, but he returned to San Francisco nearly every week-end, and always at the end of each trip, and usually stayed at the hotel at 542 Mason street. The respondent knew this fact. McDonald had his trunk in the basement at that address. Before going to work for respondent he had worked for another employer in San Francisco for a period of about ten years. He was born in San Francisco and testified that, "naturally I consider it my home", and again, "I considered San Francisco my home, yes sir". At the time of the accident he was proceeding on the most direct route from Manteca to San Francisco. He was a registered voter at the time of the accident and gave 542 Mason street as his residence when he registered. When he was employed by respondent he gave the Mason street address as his home address. He gave it as his conclusion that at the time of the accident he had no permanent address.

This evidence shows conclusively that the employee treated San Francisco as his home and that the respondent employer knew this fact. The respondent knew of the employee's custom of returning to San Francisco after every trip, and acquiesced therein. It must be held, as a matter of law, that in returning to San Francisco on the occasion in question he was within the course of his employment within the meaning of the above-cited cases.

If this conclusion is sound, and I submit that it is, then it necessarily follows that the admitted negligence of Krossoff is attributable to McDonald, as found by the trial court, and that the latter's negligence is attributable to respondent. The court expressly found that Krossoff was driving "at the request and for and on behalf of said defendant McDonald". That finding is admittedly supported by the uncontradicted evidence. The court also found that Krossoff was not an employee of respondent and that McDonald was without authority to hire Krossoff for the trip in question. That is partially a finding of fact and partially a conclusion of law. In so far as it is a finding of fact it is unsupported by any evidence. The uncontradicted evidence is to the effect that the respondent at no time ever issued any order prohibiting McDonald from hiring a person to assist him in driving his car. In so far as the so-called finding embodies a conclusion of law it is contrary to the rule adopted in this state. The rule is well-settled in this state that in the absence of any prohibition an agent acting in the course of his employment in operating an automobile, may secure a third person to drive, and if the third person is negligent while the car is being operated in the presence and under the supervision of the agent, the employer is liable. Gates v. Daley, 54 Cal.App. 654, 202 P. 467; Gibbons v. Naritoka, 102 Cal.App. 669, 283 P. 845.

The applicable principles are clearly and concisely stated in Gibbons v. Naritoka, supra, 102 Cal.App. at page 673, 283 P. at page 847, as follows:

"The authorities are not in strict harmony as to the master's liability to third persons for the negligent acts of an unauthorized stranger procured by the employee to assist him within the scope of his employment. 45 L.R.A. (N.S.) 382, note; 13 L.R.A. (N.S.) 572, note; [Am.] Decennial Digests, Master and Servant, 🔑301(2). Clearly the master is not liable when the services of a stranger are performed out of the presence and independent of the employee, or when the services are not within the scope of the servant's employment, or when the assistance is secured contrary to the direct instructions of the master. Emison v. Wylam Ice Cream Co., 215 Ala. 504, 111 So. 216; Butler v. Mechanics' Iron Foundry Co., 259 Mass. 560, 156 N.E. 720, 54 A.L.R. 849. Some cases go so far as to hold that the master is liable for such negligence only when there is either express or implied authority for the agent to procure assistance. 18 R.C.L. 785, § 245; 39 C.J. 1271, §§ 1458b–1459.

"The liability of the master has sometimes been denied upon the specific ground that the servant was not present at the time of the performance of the tortious acts complained of. Blumenfeld v. Meyer-Schmid Grocer Co., 206 Mo.App. 509, 230 S.W. 132. These cases, however, do not involve the principle of the co-operating negligence of an employee who is personally present with knowledge of the tortious acts of his assistant and possessing the ability to restrain or regulate such acts. By the weight of authority and in accordance with good reason, a master is liable to a third person for the results of the negligent acts of a stranger whose services are procured without the master's authority by the servant to assist him within the scope of his employment, under his supervision and in his presence. [Citing many cases.]" The same rule is announced in Gates v. Daley, supra.

If my analysis of the legal problems in this case is sound, the legal situation is this:

The findings that McDonald was not acting in the course of his employment at the time of the accident, and that McDonald had no authority to employ Krossoff, are unsupported by the evidence. There is no finding on the basic issue of whether McDonald was an employee or an independent contractor. The failure to find on this basic issue is, under the circumstances, reversible error. 24 Cal.Jur., p. 940, § 186. In my opinion, the judgment should be reversed.

45 Cal.App.2d 497

JONES et al. v. YUMA MOTOR FREIGHT TERMINAL et al.

Civ. 13051.

District Court of Appeal, Second District, Division 2, California.

June 20, 1931.

Hearing Denied Aug. 18, 1941.

1. Negligence ⚷83

For the "last clear chance doctrine" to apply, it must appear that plaintiff, as a result of his negligence, is in a position of danger from which he cannot escape by exercising ordinary care, that defendant has knowledge of plaintiff's situation and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape, and has the last clear chance to avoid the accident by exercising ordinary care and fails to exercise it, and that the accident results and plaintiff is injured as the proximate result of defendant's failure to exercise ordinary care.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance Doctrine".

2. Appeal and error ⚷989

In passing on the question whether the record contained sufficient evidence to justify the giving of an instruction on the last clear chance doctrine in automobile accident case, the reviewing court was required to consider all of the evidence before the court, regardless of which party presented it and, disregarding conflicts, to view the evidence in the light most favorable to the contention that the doctrine was applicable, indulging every reasonable inference supporting the application of the doctrine.

3. Automobiles ⚷246(58)

In an automobile accident case, if, under any reasonable view of the evidence, the last clear chance doctrine could apply, it was proper to give instructions on that doctrine.

4. Automobiles ⚷246(58)

Evidence was sufficient for jury to find that plaintiff motorist was contributorily negligent in turning to the left across highway without observing defendants' oncoming truck and that plaintiff was left in a position of peril, that defendant truck driver knew of plaintiff's perilous situation, that plaintiff could not through the exercise of ordinary care escape from the danger, and that by sounding his horn and slackening his speed truck driver could have prevented collision, and hence an instruction on the "last clear chance doctrine" was justified.

5. Negligence ⚷83

Knowledge of the dangerous situation of the plaintiff within the last clear chance doctrine can be imputed to the defendant when the circumstances are such that they convey to the mind of a reasonable man that the plaintiff is in a position of peril.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Ovie Ruff Jones and another against the Yuma Motor Freight Terminal and another to recover damages for the wrongful death of Ila Mae Jones, deceased, and for injuries sustained by the named plaintiff. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Chas. E. R. Fulcher and Reginald I. Bauder, both of Los Angeles, for appellants.

Frank E. Carleton and Elmer P. Bromley, both of Los Angeles, and M. Richard Imes, of Indio, for respondents.

WOOD, Justice.

This action was commenced by Ovie Ruff Jones and Naomi Brantley, husband and mother respectively of Ila Mae Jones, deceased, to recover damages for the wrongful death of Ila Mae Jones and for personal injuries suffered by plaintiff Ovie Ruff Jones, alleged to have been caused by the negligent operation by the defendants of a motor truck and trailer. A jury returned a verdict in favor of Ovie Ruff Jones in the sum of $4,981.85 for his personal injuries and in favor of both plaintiffs in the sum of $3,200 for the wrongful death of Ila Mae Jones. For the sake of clarity and brevity the driver of the Ford car involved in the accident, Ovie Ruff Jones, will be referred to as plaintiff and the driver of the truck will be referred to as defendant.

The accident occurred at about 8 o'clock in the morning of January 9, 1940, on Highway 99 in Riverside county. Plaintiff and his wife were driving in a southerly direction on the highway in an old Model T Ford and defendant was driving the truck and trailer in a northerly direction on the highway. Plaintiff decided to drive to the left across the highway to buy gasoline at a service station and as he made the turn his car was struck by the oncoming truck. The testimony of the various witnesses concerning the circumstances of the collision is highly conflicting. The two drivers gave very different versions of what took place at the time of the accident and each made statements before the trial which were contradictory of the statements he made on the witness stand. Defendant concedes that there is substantial evidence of defendant's negligence and also substantial evidence of the absence of negligence on the part of plaintiff and that if no instruction had been given to the jury upon the doctrine of the last clear chance the verdict could be sustained. But he insists that the record contains no evidence to justify the giving of this instruction and therefore asks to have the judgment reversed. He does not contend that the doctrine was erroneously stated by the court to the jury. The only question for our decision is whether the court was justified in instructing the jury on the doctrine of last clear chance.

[1] Both parties concede that under the decisions of the reviewing courts of California it is reversible error to give instructions to the jury on the last clear chance doctrine in the absence of substantial evidence from which it might be found that all of the necessary elements of the doctrine are present. Poncino v. Reid-Murdock & Co., 136 Cal.App. 223, 28 P.2d 932; Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A.L.R. 117. The necessary elements of the last clear chance doctrine are stated in the frequently cited case of Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915, 917; "That plaintiff has been negligent and, as a result thereof, is in a position of danger from which he cannot escape by the exercise of ordinary care; and this includes not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape; that defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape from such situation, and has the last clear chance to avoid the accident by exercising ordinary care, and fails to exercise the same, and the accident results thereby, and plaintiff is injured as the proximate result of such failure." In the Girdner case the plaintiff was driving a touring car towards the highway at a speed of twelve or fifteen miles per hour. In that case the plaintiff testified that as he approached the highway he looked to the north and saw no cars approaching; he then looked south down the highway; he did not look again to the north but drove onto the highway still looking to the south when he was struck by defendant's truck; he did not see the truck of the defendant before the collision. The driver of the defendant's truck testified that he saw Girdner when he was about fifty feet north of the intersection traveling at about fifteen miles per hour; that Girdner did not look in his direction; that he took his foot off the gas accelerator and let the truck drift toward the intersection; that when he got about fifteen feet from the point of collision he applied his brakes and turned his truck to the right when about four or five feet from the point of collision; that he did not sound his horn as he approached the intersection. The court found on sufficient evidence that the truck driver was proceeding at a speed rate of twenty miles per hour. The Supreme Court held that the facts in the case justified a recovery under the doctrine of the last clear chance.

[2-5] In passing upon the question whether the record contains sufficient evidence to justify the giving of the last clear chance doctrine we must consider all of the evidence before the court regardless of which party presented it and, disregarding conflicts, must view the evidence in the light most favorable to the contention that the doctrine is applicable, indulging every reasonable inference supporting the application of the doctrine. If under any reasonable view of the evidence the doctrine could apply it was proper to give instructions on the subject. Bearing in mind this rule, we find evidence in the record furnishing justification for giving the instructions in question. A finding that plaintiff was himself negligent could be based upon the fact that he turned to the left across

the highway without observing the oncoming truck which he could have seen if he had exercised due care. Defendant testified that he first saw plaintiff's car when approximately a quarter of a mile away; that when he was within 150 to 200 feet from defendant he saw defendant's arm extended for a left turn; that his truck and trailer had a combined weight of approximately seven tons and were equipped with air brakes; and that he did not sound his horn at any time. He admitted that he did not promptly apply his brakes but claims that plaintiff first turned to the left and then suddenly turned back sharply to the right, at which time he applied his brakes. Plaintiff testified that as he extended his arm to indicate the left turn he looked up and down the highway and saw nothing approaching; that his speed was approximately ten miles per hour; that he first knew of the approaching truck when his wife screamed, at which time the truck was closer than thirty or forty feet, coming across the road and bearing down on him; realizing there would be a collision he suddenly veered to the right, when the truck hit his car. Other witnesses testified that defendant was traveling in excess of forty-five miles per hour and that his speed was not slackened before the collision; there were skid marks on the highway made by the truck beyond the point of collision but there were no skid marks on the line of the truck's approach to the point of collision; that defendant for some distance beyond the point of collision was driving slightly to the left of the center line of the highway and straddling the center line. From these circumstances the jury could reasonably draw the inferences that plaintiff, having been guilty of contributory negligence, was in a position of peril; that defendant knew of plaintiff's perilous situation and that plaintiff could not through the exercise of ordinary care escape from the danger; and that by sounding his horn and slackening his speed defendant could have prevented the collision. Knowledge of the dangerous situation of the plaintiff can be imputed to the defendant when the circumstances are such as to convey to the mind of a reasonable man that the plaintiff is in a position of peril. Nicolai v. Pacific Electric Ry. Co., 92 Cal.App. 100, 267 P. 758.

The judgment is affirmed.

We concur: MOORE, P. J.; McCOMB, J.

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45 Cal.App.2d Supp. 821

PEOPLE v. McMILLAN.

C. A. 1785.

Appellate Department, Superior Court, Los Angeles County, California.

June 11, 1941.

1. Reformatories ⚷3

A supervisor of one of correctional schools for reception of wards of juvenile court maintained by state under Welfare and Institutions Code, placed by department of institutions in charge of some of inmates of school, could, except as restrained by superior authority, exercise all the powers of the department over inmates. St.1937, pp. 1056, 1058, §§ 1000, 1001, 1004, 1101.

2. Reformatories ⚷7

A correctional school for reception of wards of juvenile court maintained by state under supervision of state department of institutions was within scope of Penal Code prohibiting corporal, cruel or unusual punishment of persons confined in prisons, reformatory institutions, jails, state hospitals or any other state, county or city institutions, or any treatment or lack of care which would injure or impair health of persons confined. St.1937, pp. 1056, 1058, §§ 1000, 1001, 1004, 1101; Pen.Code, § 681.

3. Reformatories ⚷7

The provision of Penal Code prohibiting cruel, corporal or unusual punishment in certain institutions should be construed as making unlawful the use of any corporal punishment in institutions mentioned, no matter how moderate or reasonable, and words "which would injure or impair the health" relate only to provision in Penal Code prohibiting any treatment or lack of care which would injure or impair health of persons confined, in view of use of disjunctive "or" in statute. Pen.Code, § 681.

See Words and Phrases, Permanent Edition, for all other definitions of "Or".

4. Statutes ⚷188

The natural and ordinary meaning of language used in statute will be followed, unless reason appears for departing therefrom.

5. Reformatories ⚷7
Statutes ⚷225

The provision of Penal Code prohibiting cruel, corporal or unusual punishment in certain institutions was not repealed, in so far as it applied to correctional schools, by subsequent enactment of provision of Welfare and Institutions Code giving state department of institutions general powers of discipline, government, etc., without specifically authorizing use of any particular means for those purposes, but rather provisions would be construed together and effect given to both. St.1937, p. 1056, § 1004; Pen.Code, § 681.

6. Statutes ⚷158

Repeals of statutes by implication are not favored.

7. Statutes ⚷162

A general statute will not repeal by implication a former one which is special or which is limited in its application unless there is something in general law that makes it manifest that Legislature intended a repeal.

8. Reformatories ⚷7

The provision of Penal Code prohibiting cruel, corporal or unusual punishment in certain institutions relates only to acts done by way of punishment, and does not prohibit force used to keep order or prevent misconduct by persons confined. Pen.Code, § 681.

9. Criminal law ⚷1159(4)

In prosecution of supervisor of correctional school for violating statute prohibiting corporal punishment in reformatories and for battery, fact that several of inmates of school, who testified, contradicted themselves on stand and were impeached by evidence of other statements contrary to parts of their testimony adverse to defendant, did not make their testimony "inherently improbable", so as to necessitate rejecting it altogether. Pen.Code, § 681.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Improbable".

10. Assault and battery ⚷48
Reformatories ⚷7

Evidence that supervisor of correctional school, on discovering that inmate committed infraction of rules, asked inmate if he did not know it was against the rule, to which inmate replied that he did, and supervisor then slapped inmate three times across face with open hand, established infliction on inmate of "corporal punishment", in violation of provision of Penal Code prohibiting corporal punishment in reformatories, and, being an unlawful use of force upon person of inmate, act of supervisor was also a "battery" within Penal Code. Pen.Code, §§ 242, 681.

See Words and Phrases, Permanent Edition, for all other definitions of "Battery" and "Corporal Punishment".

11. Criminal law ⚷1137(2)

In prosecution of supervisor of correctional school for violating statute prohibiting corporal punishment in reformatories and for battery, both charges arising out of same act, where at defendant's request an instruction was given that defendant in no event could be found guilty of both counts, defendant was not in position to claim that verdicts finding defendant guilty of committing a battery and not guilty of violating statute prohibiting corporal punishment in reformatories were inconsistent, so that conviction on charge of battery could not stand. Pen. Code, §§ 242, 681.

12. Criminal law ⚷878(3)

Where trial court instructed jury that to warrant a conviction of supervisor under charge of violating statute prohibiting corporal punishment in reformatories, certain facts were required to appear which were unnecessary to establish battery charged in other count, verdicts finding defendant not guilty of violating statute prohibiting corporal punishment in reformatories and guilty of battery were not inconsistent, so as to require acquittal on both counts. Pen.Code, §§ 242, 681.

13. Criminal law ⚷824(1)

In prosecution of supervisor of correctional school for violating statute prohibiting corporal punishment in reformatories and for battery, both charges arising out of same act, where there was evidence tending to show three different occasions when defendant used force on particular inmate mentioned in counts, trial court erred in failing to instruct jury that all must agree on same incident as a basis for verdict, even though such instruction was not requested by defendant. Pen.Code, §§ 242, 681.

14. Reformatories ⚷7

In prosecution of supervisor of correctional school for violating statute prohibiting corporal punishment in reformatories, allegation in complaint that punishment administered "did injure and impair the health of" the victim was "surplusage", and hence no proof of it was necessary to sustain a conviction. Pen.Code, § 681.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

Appeal from Municipal Court of Los Angeles; R. Morgan Galbreth, Judge.

Ivan B. McMillan was convicted of violating statute prohibiting corporal and various other punishments in reformatories and of battery, and he appeals.

Affirmed in part, and, in part, reversed and remanded.

Harry F. Sewell, of Los Angeles, for appellant.

John F. Dockweiler, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHAW, Presiding Judge.

The complaint in this case contains ten counts, which are in pairs, each even numbered count charging an offense on the same date and against the same person as the offense charged in the immediately preceding odd numbered count. The odd numbered counts charge violations of section 681 of the Penal Code (the first of that number) prohibiting corporal and various other punishments in reformatory and other institutions, and the even numbered counts charge battery. Defendant was acquitted of all charges except those set forth in Counts IV, V, and X, and on them he was convicted. He appeals from those convictions.

It appears without dispute that at the time when, it is claimed, the offenses charged were committed, defendant was a supervisor in charge of inmates of Whittier State School and the alleged victims were inmates of that school. On these facts defendant bases his most fundamental contention, which is that in his capacity as supervisor at the school he stood in loco parentis to the inmates, that he therefore was authorized to use reasonable physical force for their discipline, correction and punishment, and that the force used by him, as shown in the evidence, appears to have been used for those purposes and was not shown to have been unreasonable, and hence he committed no offense in using it. With this contention we do not agree.

[1] Whittier State School is one of the "correctional schools for the reception of wards of the juvenile court" maintained by the State (sec. 1000, Welfare and Institutions Code St.1937, p. 1056), and to it boys over 8 years of age may be admitted. Sec. 1101, Welfare and Institutions Code, St. 1937, p. 1058. It is under the charge of the State Department of Institutions (sec. 1001, Welfare and Institutions Code), and that department has "charge of the persons committed to each such institution, and shall provide for their care, supervision, education, training, employment, discipline, and government. It shall exercise its powers toward the correction of their faults, the development of their characters, and the promotion of their welfare." Section 1004, Welfare and Institutions Code. In the section last cited defendant claims to find support for his contention as to the law. No doubt defendant, as a supervisor placed by the department of institutions in charge of some of the inmates of the school, may, except as restrained by superior authority, exercise all the powers of the department over them, and it may well be that if section 1004 of the Welfare and Institutions Code were the only law to be applied those powers could be regarded as including the power of reasonable corporal punishment.

[2-4] But Whittier State School is within the scope of section 681 (the first section of that number) of the Penal Code, under which some of the charges here are made and which reads as follows: "It shall be unlawful to use in the prisons, reformatory institutions, jails, State hospitals or any other State, county, or city institution any cruel, corporal or unusual punishment or to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate or person confined; and punishment by the use of the straight-jacket, gag, thumb-screw, shower-bath or the tricing up of prisoners, inmates or persons confined is hereby prohibited. Any person who violates the provisions of this section or who aids, abets, or attempts in any way to contribute to the violation of this section shall be guilty of a misdemeanor." Here no qualification or limitation is attached to the prohibition of corporal punishment. The section plainly makes unlawful the use of *any* corporal punishment in the institutions mentioned, no matter how moderate or reasonable the amount of force used for punishment. We do, it is true, find in the section the words "which would injure or impair the health", and defendant contends that they are descriptive of and limit the corporal punishment which is forbidden by the section; but the natural construction of the language used precludes such application of

this clause. The section as now constituted divides the prohibited acts into three groups. The third group, following the semicolon in the first sentence, is contained in a clause which is grammatically independent of the others, and does not concern us here. The first group is found in the words, "to use * * * any cruel, corporal or unusual punishment", and the second in the words, "to inflict any treatment or allow any lack of care whatever which would injure or impair the health of the prisoner, inmate or person confined". These two groups are both introduced by the one phrase "It shall be unlawful", but they are separated by the disjunctive "or" and each is headed by a separate verb in the infinitive form. Corporal punishment is referred to only in the first group, and the words, "which would injure or impair the health" etc., appear only in the second group. To extend the application of the last-mentioned words back past the disjunctive "or", past their nearest antecedents and past the verb which heads them would do violence to accepted rules of statutory construction. See Hopkins v. Anderson, 1933, 218 Cal. 62, 65, 21 P.2d 560; County of Los Angeles v. Graves, 1930, 210 Cal. 21, 26, 290 P. 444. Obviously the legislature regarded certain modes of punishment as improper in the institutions mentioned, no matter how moderate in degree, and expressly prohibited them; and then to prevent the ingenuity of guards and others from devising equally undesirable substitutes and yet to permit punishment in some form it inserted the qualified prohibitions of treatment and lack of care which would injure or impair the health. No reason appears for departing from this natural and ordinary meaning of the language used, and such meaning will therefore be followed. People v. Stanley, 1924, 193 Cal. 428, 225 P. 1. The history of the section tends to confirm this interpretation. As first enacted it contained only the first and third groups of punishment above mentioned, without the word "corporal" in the first. By the amendment of 1933, the whole provision for a second group, as above quoted, was added and the word "corporal" was inserted in the first group. Had it been intended that the condition as to impairment of health should apply to corporal punishment, it would have been easy and natural to insert the prohibition of such punishment in the second group, where this condition was placed, but this was not done.

[5-7] Our conclusion on this matter is not at all disturbed by consideration of the provisions of section 1004 of the Welfare and Institutions Code on which defendant relies, even though that section appears as the later enactment. Section 681 of the Penal Code was amended into its present form including the addition of the prohibition of corporal punishment, in 1933, Stats.1933, p. 2396, while the Welfare and Institutions Code containing section 1004 was adopted in 1937, Stats.1937, pp. 1005, 1056. But section 1004 was not then entirely new. The act under which Whittier State School was organized, Stats. 1889, p. 111, provided for a Board of Trustees with power "to control, manage and direct * * * government and discipline of all * * * inmates of said institution" (sec. 3) and "see * * * that strict discipline is maintained" (sec. 7), and for a Superintendent of the School who "shall discipline, govern, instruct, employ and use his best efforts to reform the children and youth under his care" (sec. 12). As far as section 1004 provides for discipline and government of the inmates of this school, it is substantially a re-enactment of the former statute, and section 2 of the Welfare and Institutions Code provides that in such case it is to be construed as a "continuation" of such statute and not as a new enactment. So construing the Welfare and Institutions Code, we find in section 1004 thereof no intention to repeal, either in whole or in part, section 681 of the Penal Code, which was in force at the date of enactment of the first-mentioned code. See People v. Fowler, 1938, 32 Cal.App.2d Supp. 737, 741, 84 P.2d 326; Home for Inebriates v. Reis, 1892, 95 Cal. 142, 149, 30 P. 205. Repeals by implication are not favored. 23 Cal.Jur. 694–696. "A general statute will not repeal by implication a former one which is special or which is limited in its application unless there is something in the general law that makes it manifest that the Legislature contemplated and intended a repeal." Boyd v. Huntington, 1932, 215 Cal. 473, 482, 11 P.2d 383, 386; Home for Inebriates v. Reis, supra; 23 Cal.Jur. 706, 707. This principle is plainly applicable here. Section 1004 of the Welfare and Institutions Code is a general statement of the powers of the State Department of Institutions over several "correctional schools" (see

secs. 1000, 1001) and gives that department general powers of discipline, government, etc., without specifically authorizing the use of any particular means for those purposes. Section 681 of the Penal Code deals specifically with the means of punishment and prohibits several such means. These sections may all be construed together and effect given to both, and this will be done, under the rule above stated. See also Riley v. Forbes, 1924, 193 Cal. 740, 227 P. 768.

[8] Defendant further insists that such force as he used was not for punishment but for the purpose of keeping order. If this were the fact, he would not be a violator of section 681, Penal Code, for it relates only to acts done by way of punishment, and does not prohibit force used to keep order or prevent misconduct by inmates. O'Brien v. Olson, 1941, 42 Cal. App.2d 449, 109 P.2d 8. But we find in the record evidence tending to show, regarding each count on which defendant was convicted, that such force as defendant used was applied just after the objects of it had violated some rule of the institution and apparently for the purpose of punishing them for the violation and not to prevent one.

[9, 10] Defendant further contends that the evidence is inherently incredible and must be rejected altogether. We have carefully read the evidence relating to the counts on which defendant was convicted, and while several of the witnesses contradicted themselves on the stand and were impeached by evidence of other statements contrary to the parts of their testimony adverse to defendant, and in some cases their memories required considerable refreshing before they were able to give such testimony, yet we cannot say that the stories told by them are in themselves impossible. Their self-contradictions did not make their testimony inherently improbable. People v. Moreno, 1938, 26 Cal.App.2d 334, 336, 79 P.2d 390; People v. Becker, 1934, 140 Cal.App. 162, 166, 35 P.2d 196. They related conduct such as, unhappily, does occur occasionally among those to whom the power to discipline others is committed. The question whether it did occur here is one on which the decisions of the jury and of the trial judge, who denied a new trial, must be accepted by us as binding. Moreover, as to Count X, which, as will presently appear, is the only count on which a conviction can be sustained, such conviction is warranted by the testimony of the defendant himself, who stated on the stand that after the inmate mentioned in that count had committed an infraction of the rules, defendant, on discovering it, asked the inmate if he did not know it was against the rule, to which the inmate replied that he did, and defendant then slapped the boy three times across the face with his open hand. Tr. pp. 524, 525. Upon the construction which we give to section 681, Penal Code, this was corporal punishment in violation of that section. Being thus an unlawful use of force upon the person of this boy, it was also a battery, as charged in Count X upon which the conviction was had, battery being defined in section 242, Penal Code, as "any willful and unlawful use of force or violence upon the person of another."

[11] As already indicated, defendant was charged in Count IX with violation of section 681, Penal Code, committed upon the same boy and at the same time as the battery charged in Count X. He was acquitted on Count IX and convicted on Count X. He now contends that these verdicts are inconsistent, that the acquittal on Count IX was in effect an acquittal also on Count X, and that the conviction on the latter cannot stand. We think defendant is not in a position to take advantage of this contention. He requested and the trial court gave an instruction which, after referring to Counts IX and X, instructed the jury "that in no event can the defendant be found guilty of both of said counts." Tr. p. 594. The jury obviously followed this instruction. By it they were put to an election, if they considered defendant guilty in this matter, whether to return such a verdict on Count IX or on Count X. Both counts were before them for action and verdict, and if they could not convict on both, as this instruction told them, they must acquit on one. The defendant who thus required them to elect and made necessary the verdicts now said to be inconsistent cannot be heard to complain of the result. See People v. McCollum, 1931, 116 Cal.App. 55, 58, 2 P.2d 432.

[12] Furthermore, the trial court, in instructing the jury, followed the construction of section 681, Penal Code, for which defendant has contended here, and instructed them that, to violate section 681 "the punishment inflicted, in addition to being wilful and unlawful, must * * * impair or injure the health of the victim", and that "In battery as herein alleged, the

punishment need not impair or injure the health of the victim". Tr. p. 578. By a formula instruction undertaking to state all facts necessary for a conviction on Count IX, one of those listed was that "the defendant did wilfully and unlawfully inflict and use upon said [naming the victim] cruel or corporal or unusual punishment which did injure or impair the health of said" victim. Tr. p. 589. We cannot ascertain from the record who requested these instructions. But regardless of the party requesting them, they told the jury that to warrant a conviction under Count IX, charging a violation of section 681, Penal Code, certain facts must appear which were unnecessary to establish the battery charged in Count X. These facts were also alleged in Count IX, and although such allegations were unnecessary, they were before the jury and were emphasized by these instructions. Since these facts were not shown by the evidence as to Count IX, the jury, if it followed these instructions, was required to acquit the defendant on that count. Under these circumstances, its doing so cannot be construed as an acquittal on Count X also. Seeming inconsistency in verdicts has occasioned much judicial casuistry, but, under the circumstances of this case, a verdict of guilty supported by the evidence should not be reversed on that ground. People v. Horowitz, 1933, 131 Cal.App. Supp. 791, 19 P.2d 874; People v. Smith, 1931, 117 Cal.App. 530, 533, 534, 4 P.2d 268; People v. Stovall, 1928, 94 Cal.App. 635, 271 P. 576.

[13] Counts IV and V, on both of which defendant was convicted, relate to the same inmate, Count IV charging a battery committed on May 15, 1940, and Count V charging a violation of section 681, Penal Code, on July 25, 1940. There is evidence tending to show three different occasions when defendant used force on this particular inmate. One of these incidents is described in substantially the same manner and dated some time in May by all the witnesses who testified to it; but the testimony regarding the others, while placing them in July, makes them different in so many respects that the jurors might reasonably have considered them to be two separate incidents. Thus there may have been, in the eyes of the jury, three separate incidents on which to found their verdicts of guilty on Counts IV and V. They should, therefore, have been instructed that all must agree on the same incident as a basis for either verdict, even though such instruction was not requested by the defendant. See People v. Scofield, 1928, 203 Cal. 703, 710, 265 P. 914; People v. Heddens, 1936, 12 Cal.App.2d 245, 247, 55 P.2d 230. No such instruction was given. Failure to give it was aggravated by the giving of the following instruction: "The Court instructs the jury that it is wholly immaterial on what day or night the offenses charged in the various counts of the complaint were committed, provided you believe from the evidence beyond a reasonable doubt they were committed, and that they were committed within one year prior to the filing of the complaint in this case." Tr. p. 617. This instruction permitted the jury to apply any of the three incidents which they could find in the testimony to either Count IV or Count V, and under the circumstances of this case, where there was proof tending to establish more offenses than were charged, the giving of it, without an instruction clearly informing the jury that they must all agree on the same act as the basis of any verdict, was error. People v. Elgar, 1918, 36 Cal.App. 114, 171 P. 697; People v. Williams, 1901, 133 Cal. 165, 168, 65 P. 323; see also People v. Whiteacre, 1926, 79 Cal.App. 27, 32, 248 P. 924; People v. Becker, 1934, 140 Cal.App. 162, 165, 35 P.2d 196.

[14] Defendant also contends that the evidence is insufficient to support his conviction on Count V, which charges a violation of section 681 of the Penal Code, because evidence is lacking to prove the allegation in that count that the punishment administered "did injure and impair the health of" the victim. For the purpose of a possible new trial we state our opinion that, since the allegation itself is surplusage, an offense under section 681 being fully charged without it, no proof of it is necessary to a conviction. People v. Handley, 1893, 100 Cal. 370, 372, 34 P. 853; People v. Stevens, 1926, 78 Cal. App. 395, 400–403, 248 P. 696.

The judgment entered on Count X of the complaint and the order denying a new trial as to said count are affirmed. The judgments entered on Counts IV and V of the complaint and the orders denying a new trial as to said counts are reversed and the cause is remanded to the Municipal Court for a new trial on Counts IV and V.

BISHOP, and FOX, JJ., concur.

18 Cal.2d 193

McCOY v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY et al.

S. F. 16563.

Supreme Court of California.
June 30, 1941.

1. Counties 🔑66
Officers 🔑69

The emergency statutes, entitling state civil service employees to leaves of absence for military service and relating to resignation of county officers and employees to serve in United States armed forces and their right to return to public service, show Legislature's policy to expedite and encourage enlistment of public employees in such forces and insure restoration of their positions to them on return to civil life. St.1940, 4th Ex. Sess., c. 2, p. 355, § 152.5; Pol.Code, §§ 4026, 4026.1 to 4026.3, as added by St.1941, p. 1244.

2. Army and navy 🔑31

The courts take liberal view of emergency statutes for protection of persons in military or naval service against loss of civil rights, so that such protective purposes may be fulfilled without undue imposition of constitutional limitations or hindrance through narrow judicial construction.

3. Officers 🔑30

The constitutional provision that no person holding lucrative office under United States shall be eligible to any civil office of profit under state cannot be construed or applied so as to discourage public employees from rendering military or naval service, deter them from answering or induce them to evade call to such service, or impede federal government's efforts to mobilize citizenry to meet major emergency. Const. art. 4, § 20.

4. Officers 🔑30

The primary purpose of constitutional provision that no person holding lucrative office under United States shall be eligible to any civil office of profit under state is to prohibit conjunction of federal and state office of profit in same person, without any condition whatever, that is, to prevent dual office holding by one person under two separate and distinct governments and separation of allegiance justly due one government by its officers from that due to another power. Const. art. 4, § 20.

5. Officers 🔑30

The constitutional provision that no person holding lucrative office under United States shall be eligible to any civil office of profit under state is inapplicable to state officer whose duties, compensation, rights and opportunity to exert influence as such are suspended and inchoate while he is rendering temporary patriotic service to his country under military or naval commission. Const. art. 4, § 20.

6. Officers 🔑30

The constitutional provision that no person holding lucrative office under United States shall be eligible to any civil office of profit under state does not mean that state officer, on whom additional duties are imposed by President of United States under Federal Constitution and laws in aid of raising and maintenance of army for prosecution of war, forfeits his office. Const. art. 4, § 20.

7. Officers 🔑30

A county officer, not performing duties or exercising powers of his office, performing any state or county function, or claiming or drawing compensation as such officer while on leave of absence, granted by county board, during active naval and marine corps service, is not holding or claiming eligibility to "civil office of profit under this state" within constitutional provision that no person holding lucrative office under United States shall be eligible to any civil office of profit under state, but his occupancy or holding of such office is suspended. Const. art. 4, § 20.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Office of Profit Under this State".

8. Counties 🔑65

The granting of leave of absence by county board to county officer while in active naval and marine corps service did not create vacancy in his office, but merely suspended his occupancy thereof for period of his absence, especially in view of amendment of county charter to require reinstatement of county officers entering United States armed forces during war or national emergency after being relieved from such service. Senate Concurrent Resolution, No. 2, St.1941, p 3236, § 34, par. 10.

◆

In Bank.

Proceeding by Charles A. McCoy for a writ of mandate commanding the Board of Supervisors of the County of Los Angeles to declare vacant the office of Chief

Engineer of Building and Construction of such county and appoint another to fill the vacancy.

Alternative writ discharged, and application for peremptory writ denied.

Ivan L. Hiler, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard and Harold W. Kennedy, Asst. Co. Counsels, and W. B. McKesson, Deputy Co. Counsel, all of Los Angeles, for respondents.

Andrew J. Copp, Jr., and Emmett E. Doherty, both of Los Angeles, amici curiae for respondents.

Spencer C. Olin, of Los Angeles, amicus curiae for respondent Major William J. Fox.

PULLEN, Justice pro tem.

Petitioner, a taxpayer, seeks a writ of mandate commanding respondent Board of Supervisors of the County of Los Angeles to declare vacant the office of Chief Engineer of Building and Construction of that county, and to appoint another to fill the vacancy.

The facts are presented by stipulation. William J. Fox was a major in the Marine Corps Reserve, a component of the United States Marine Corps, available for active duty. At the same time he was Chief Engineer of Building and Safety of the County of Los Angeles. On October 1, 1940, pursuant to federal statutes and the regulations governing the Marine Corps Reserve, he was ordered by the secretary of the navy to enter active service for a twelve months' period of training and duty with the United States Marine Corps. As a duly commissioned reserve officer he was obliged to and did obey the order of the secretary of the navy, and ever since said first day of October he has been in active Naval and Marine Corps service. About September 27, 1940, he applied to respondent board of supervisors for a leave of absence without pay or duty for the period of his absence from his position as chief engineer and while in Naval and Marine Corps active service, with the right to be restored to his civil position, or a position of like seniority, status and pay, upon the termination of such active service. The application was approved and granted by respondent board prior to October 1, and since that date Major Fox has performed no duties under said civil employment and has neither received nor been entitled to receive any pay whatsoever from the County of Los Angeles on account of said civil employment position.

The Constitution of this state, article IV, section 20, provides that "no person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this State * * *." Petitioner contends that the position of Chief Engineer of Building and Safety of the County of Los Angeles is a "civil office of profit under this State", and that the office of major in the Marine Corps Reserve is a "lucrative office under the United States", as those terms are employed in the constitutional provision, and that therefore Major Fox forfeited his county position when he accepted the federal office. Respondents deny that there has been a forfeiture. They say that even if it be assumed that the position of chief engineer is an office "under this state", as distinguished from a mere local county position, Major Fox is not holding that office in violation of the constitutional provision while he is on leave of absence without pay for the term of his enforced marine and naval duty.

[1, 2] The arguments offered in support of this contention are persuasive. At the time Major Fox was called to active service a limited national emergency, recently declared to be unlimited, had been proclaimed by the President of the United States. The citizen groups comprising the reserve army, naval and marine forces of the country were rapidly being mobilized for active duty in the national defense, and this state was endeavoring to cooperate to the fullest extent in promoting the federal aims and legislation. As an encouragement to publicly employed citizens to respond to the call to patriotic service, the state legislature enacted, as an emergency measure, section 152.5 of the State Civil Service Act, also known as chapter 2 of the Fourth Extraordinary Session of the Legislature in 1940, approved October 2, 1940, providing as follows: "Whenever the United States is engaged in war or whenever the Governor finds and proclaims that an emergency exists in preparing for the national defense, any permanent civil service employee of the State, in good standing, shall be entitled to a leave of absence for military service. * * *" Thus, in previously granting leaves of absence to Major Fox and those similarly situated, the board

of supervisors but anticipated the will of the legislature. At the 1941 legislative session further emergency measures were passed relating to resignations of county officers, deputies, assistants, and employees to serve in the armed forces of the United States, and their right to return to the public service. Sections 4026, 4026.1, 4026.2 and 4026.3 of the Political Code. These emergency measures show clearly that it was and is the policy of the legislature to expedite and encourage the enlistment of public employees in the armed forces of the United States, and to insure the restoration of their positions to them upon return to civil life. A study of similar enactments in other jurisdictions, of various soldiers' and sailors' relief acts, and of the trend of judicial decision, reveals a growing recognition of the necessity of protecting those in military or naval service against the loss of civil rights, and of the potency of a national emergency to justify broad and appropriate relief. Not only have state and national legislative bodies been alert to meet the need for special protective measures, but state and federal courts have kept pace and have evinced a firm intention to take a liberal view of these emergency enactments in order that their protective purposes may be fulfilled without undue imposition of constitutional limitations or hindrance through narrow judicial construction. 88 A.L.R., note p. 1519.

[3-5] It was never the intent or purpose of article IV, section 20, of the Constitution of this state to discourage public employees from rendering military or naval service, to deter them from answering, or induce them to evade such a call, or to tend to impede the federal government in its effort to mobilize the citizenry, or interfere with efforts to meet a major emergency. The constitutional provision can neither be construed nor applied to effect such a result. Its primary object, as declared in the early case of People v. Leonard, 73 Cal. 230, 14 P. 853, 854, is to prohibit a conjunction of a federal and a state office of profit in the same person, without any condition whatever; that is, to prevent "dual office-holding by one person under two separate and distinct governments, and the separation of the allegiance justly due one by its officers from that due to another power". The reason for the prohibition ceases and the constitutional provision is inapplicable in a case where the duties, compensation and rights of the holder of a state office, and his opportunity to exert any influence therein, are suspended and inchoate while he is rendering temporary patriotic service to his country under a military or naval commission.

[6] As said by the court in State v. Joseph, 143 La. 428, 78 So. 663, 665, L.R.A. 1918E, 1062, where a similar constitutional provision was under consideration, "Should article 164 of our Constitution be interpreted to mean that a citizen, holding a state office, upon whom, under the Constitution and laws of the United States, additional duties are imposed by the President in aid of the raising and maintenance of an army for the prosecution of a great and necessary war, forfeits his office by reason of his acceptance of that which it would be unlawful and unpatriotic for him to decline? We think not, and are of opinion that, to answer otherwise would be an unwarranted reflection alike upon the intelligence and the patriotism of those by whom the article in question was incorporated in the Constitution." See, also, Kennedy v. Cook, 285 Ky. 9, 146 S.W.2d 56, 132 A.L.R. 251; Carpenter v. Sheppard, 135 Tex. 413, 145 S.W.2d 562.

[7] While Major Fox is on leave of absence from his county position, he is not performing any of the duties or exercising any of the powers of that office, or performing any state or county function, or claiming or drawing any compensation. Under the circumstances shown, it can only be concluded that during the period of his leave he is not holding or claiming eligibility to a "civil office of profit under this State", as that term is used in the constitutional provision, but that his occupancy or holding of such office is suspended. His position is analogous to that in which the court found a retired army officer to be in the early case of Reed v. Schon, 2 Cal.App. 55, 83 P. 77, 79. In that case the election of John L. Schon, as mayor of San Diego, was contested on the ground that he was holding the incompatible office of a first lieutenant of infantry of the United States Army, retired with the rank of captain, in violation of article IV, section 20, of the Constitution. The court found that the rank or position of Captain Schon, retired, was not a lucrative office, and refused to attribute to the constitutional provision an intention of disfranchising a class of eminently deserving citizens. The court recognized that the reason for the prohi-

bition was that an officer of the state, presumably employed to devote himself exclusively to the duties of his office, should not be permitted to assume other duties incompatible therewith, but it concluded that the position of retired army captain carried no duties incompatible with the state office, saying: "It also seems clear to us that, under the provisions of the statute cited, the position of the defendant is a mere sinecure without any duties attached to it; and hence that it cannot properly be called an office. * * * We see no reason, therefore, in the language used, to attribute to the constitutional provision an intention of disfranchising a class of eminently deserving men and depriving the state of their services."

[8] From the conclusion that the occupancy or holding of the county office by Major Fox is suspended during the period of his leave of absence, it does not follow that the office must be declared vacant. The effect of a leave of absence was considered in the case of Whitehead v. Davie, 189 Cal. 715, 209 P. 1008, 1010, and this court there approved the theory that under certain circumstances it may be held that one who is on leave of absence is not actually holding an office but is merely retaining the right to reoccupy such office at the termination of his period of leave.

In the Whitehead case the question arose of whether a battalion chief might hold the position of fire chief without violating the Oakland City Charter, which provided that no person holding an office or position under the city government should be eligible to hold any other elective or appointive office under the city. In practice, if a battalion chief was to be appointed to the position of chief of the fire department, he would take a leave of absence as battalion chief for the purpose of retaining his retirement right as a member of the fire department. In passing upon the effect of the leave and concluding that there was no violation of the charter provision, this court said: "It is contended that the effect of this arrangement is to permit the chief of the fire department to hold two offices at the same time, that of chief of the fire department and that of battalion chief. This suggestion entirely overlooks the purpose of the so-called leave of absence, and the civil service rules with relation thereto. These rules mean nothing more or less than that, during the period while the battalion chief is acting as chief of the fire department, and thus continues as a member of the department, his position of battalion chief shall be deemed to be temporarily filled by his successor, and he retains the right to permanently occupy that place whenever his incumbency as chief of the fire department is terminated. The chief of the fire department did not hold two positions or draw two salaries or perform the duties of the two offices because of such leave of absence. The civil service rule in question is merely for the purpose of establishing that the chief of the fire department is continuously eligible to reappointment as permanent battalion chief, and also that his successor is appointed to fill a vacancy in that permanent employment existing by reason of the temporary transfer of the battalion chief to the higher office of chief of the fire department."

The charter of the county of Los Angeles, paragraph 10, section 34, article IX, has been amended to provide that "* * * all persons holding positions subject to the provisions of this article * * * who shall have entered the armed forces of the United States during war or national emergency * * * and who shall have been honorably discharged or placed on the inactive or reserve list or relieved from such service with a certificate of satisfactory service, shall be reinstated without loss of status, seniority or efficiency ratings to the permanent positions held by them prior to entry into such Federal service. * * *" Senate Concurrent Resolution No. 2, Stats. 1941. This fortifies the view that the effect of the leave of absence granted to Major Fox was not to create a vacancy in the county office, but was merely to suspend his occupancy of that office for the period of his absence, leaving him with certain inchoate rights which he may assert upon the termination of his federal service.

The alternative writ of mandate heretofore issued herein is discharged, and the application of petitioner for a peremptory writ is denied.

We concur: GIBSON, C. J.; CARTER, J.; SHENK, J.; TRAYNOR, J.; EDMONDS, J.

18 Cal.2d 105

ASBURY RAPID TRANSIT SYSTEM v. RAILROAD COMMISSION.

CITY OF LOS ANGELES v. SAME.

S. F. 16506, 16507.

Supreme Court of California.
June 18, 1941.

1. Automobiles ⚿62

Where a part only of operations of a common carrier is within an incorporated city, public interest requires that entire operations of carrier be subject to regulation by State Railroad Commission, and in such case, a portion of operations of carrier which is within the city ceases to be strictly a "municipal affair" and is affected with a larger public interest. St.1927, pp. 73, 74, §§ 2¼(b), 50¼; Const. art. 12, § 23.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

2. Automobiles ⚿62

Under statute giving Railroad Commission exclusive jurisdiction over the regulation of passenger stage corporations not operating wholly within corporate limits of a single city, jurisdiction of Commission extended to a separate intra-city passenger service afforded by a carrier which also furnished inter-city passenger service on other lines owned by it. St.1927, pp. 73, 74, §§ 2¼ (b), 50¼; Const. art. 12, § 23.

3. Automobiles ⚿62

A separate classification of passenger stage corporations, concluding both intra-city and inter-city operations, for purpose of regulation by State Railroad Commission, and exempting from regulation those corporations conducting only intra-city operations, was not unreasonable, and did not violate city's constitutional rights to exercise autonomous rule in municipal affairs. St.1927, pp. 73, 74, §§ 2¼(b), 50¼; Const. art. 12, § 23.

4. Automobiles ⚿62

The changes in the language of provision of Public Utilities Act defining a passenger stage corporation, when considered in light of prior legislation, indicates legislative intent that jurisdiction of State Railroad Commission shall extend over the intra-city operations of a passenger stage corporation not operating wholly within corporate limits of a single city. St.1927, p. 73, § 2¼(b).

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In Bank.

Separate petitions by the Asbury Rapid Transit System against the Railroad Commission of the State of California and others, and by the City of Los Angeles, against the Railroad Commission of the State of California, to review and annul an order of the respondent Railroad Commission requiring the Asbury Rapid Transit System to cease operations as a common carrier of passengers until it should have obtained a certificate of public convenience and necessity.

Order affirmed.

Bert F. Wade, Rodney F. Williams, Ware & Berol, Wallace L. Ware, and DeWitt M. Manning, all of Los Angeles, for petitioner Asbury Rapid Transit System.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for petitioner City of Los Angeles.

Ira H. Rowell, Roderick Cassidy, and George E. Howard, all of San Francisco, for respondent Railroad Commission.

Gibson, Dunn & Crutcher, S. M. Haskins, Woodward M. Taylor, and Max Eddy Utt, all of Los Angeles, for respondent Los Angeles Ry. Co.

Frank Karr and C. W. Cornell, both of Los Angeles, amici curiae.

SHENK, Justice.

Asbury Rapid Transit System, a corporation, and City of Los Angeles filed separate petitions to review and annul an order of the Railroad Commission requiring the petitioner, Asbury Rapid Transit System, to cease and desist from certain operations as a common carrier of passengers by motor transportation until it should have obtained a certificate of public convenience and necessity. The issues presented by both petitions and the return to the writ of review issued herein were consolidated for argument and decision.

It appears that in December, 1939, Asbury Rapid Transit System operated several lines of motor vehicle passenger service between Los Angeles and other cities and adjoining unincorporated territory in Los Angeles county as a certificated carrier under the supervision and regulation of the Railroad Commission, pursuant to the Public Utilities Act. During that month and without obtaining a certificate of public convenience and necessity, it inaugurated and began the operation of an additional motor vehicle common carrier passenger service between the downtown and the Highland Park and Garvanza sections of the City of Los Angeles, terminating at a point two blocks within the city limits, and without any transfer privileges to or from any of its other lines. For convenience this additional service is called the Highland Park line. The operation of that line was commenced and conducted pursuant to a permit granted by order of the Board of Public Utilities and Transportation of the City of Los Angeles dated July 14, 1939. Before the commencement of the operation of the Highland Park line and on October 18, 1939, and thereafter in March, 1940, two competing lines, Los Angeles Railway Corporation and Pacific Electric Railway Company, filed complaints before the Railroad Commission protesting the operation by the Asbury Rapid Transit System of its Highland Park line without first obtaining a certificate of public convenience and necessity. The competing companies serve in part the same territory as the Highland Park line, and the Highland Park line also parallels portions of the service afforded by other lines operated by the Asbury Rapid Transit System. Hearings were had before the Commission, which issued its order directing the Asbury System to cease and desist from operating its Highland Park line until it obtained a certificate of public convenience and necessity.

It is contended by the petitioners that the Commission has misconstrued and misapplied sections 2¼ (b) and 50¼ of the Public Utilities Act, St.1915, p. 115, as added by St.1927, pp. 73, 74, and that it has exceeded its powers by taking jurisdiction of a purely intra-city passenger transportation service.

In the cases of Los Angeles Rwy. Corp. v. City of Los Angeles, 16 Cal.2d 779, 108 P.2d 430, and Bay Cities Transit Co. v. City of Los Angeles, 16 Cal.2d 772, 108 P. 2d 435, we were called upon to determine the jurisdiction of the Railroad Commission over passenger transportation companies operating lines partly within and partly without an incorporated city. We are now to consider whether the jurisdiction of the Commission extends to a separate intra-city passenger service afforded by a carrier which also furnishes inter-city passenger service on other lines owned by the same corporation.

Section 50¼ of the Public Utilities Act was added in 1927. Stats.1927, p. 72. It provides that no "passenger stage corporation" shall operate any passenger stage over any public highway in the state without first having obtained from the Railroad Commission a certificate that public convenience and necessity require such operation. Subsection (b) of section 2¼ of the act, also added in 1927, defines "passenger stage corporation." Its pertinent portion reads: "The term 'passenger stage corporation' * * * includes every corporation * * * engaged as a common carrier, for compensation, in the ownership, control, operation or management of any passenger stage over any public highway in this state between fixed termini or over a regular route; provided, however, that this term shall not include those whose operations are exclusively within the limits of a single incorporated city * * *."

[1,2] The Commission construed the language of said section 2¼(b) as expressing an intent to exclude the operation of said Highland Park line by the Asbury Rapid Transit System from the jurisdiction of the Commission only if all the operations of its entire system were conducted within the territorial confines of the City of Los Angeles. The petitioners contend that the word "operations", contained in said subsection, refers to the operations of any separate intra-city service, although such operations may be conducted by a corporation owning and operating a system also furnishing services which are subject to the jurisdiction of the Railroad Commission. They assert that incongruities would result from the construction adopted by the Commission. They say, for example, that the operation by one owner of two widely separated strictly intra-city services would become subject to the jurisdiction of the Commission because such operations were not confined to a single incorporated city. Whether those or other operations, by reason of identity of ownership, could be regulated through the medium of the Railroad Commission under appropriate legislation need not now be considered. In any event, we may not refuse to apply the plain and unambiguous language of the statute to facts and circumstances which obviously were intended

to be covered thereby. Pursuant to the plenary power vested in the Legislature by section 23, article XII, of the Constitution, it could properly consider that all of the operations of a passenger stage corporation were subject to the jurisdiction of the Railroad Commission where, as in this case, some of its operations as a passenger transportation corporation were subject thereto. In the case of Los Angeles Ry. Corporation v. City of Los Angeles, supra, it was held that when a part only of the operations of a common carrier was within an incorporated city, the public interest requires that the entire operations of the carrier be subject to regulation and supervision by the Railroad Commission; that in such a case the portion of its operations which was within the city ceased to be strictly municipal in character and was affected with a larger public interest. The holding in that case is applicable here. The fact that the intra-city portion of the operations is separate from the inter-city operations of the system presents no valid ground for distinction. The financial and other responsibilities of the entire system and its duties and obligations to the public may become and in fact were found by the Commission to be affected by the intra-city operations. A reasonable restriction on competition in its intra-city as well as its inter-city operations may well be required if a responsible financial structure of the entire system is to be established and maintained. Under its plenary power the legislature had the right to foresee and provide against any ineffective regulation which might ensue if the operations of such transportation companies were not brought under the jurisdiction of the Railroad Commission.

[3] The showing that more than a municipal interest attaches to the activities of a company conducting passenger operations of both an inter-city and intra-city character, including the intra-city operations of the petitioning system in this case, is a sufficient answer to the contention that the constitutional rights of the petitioners have been violated. It is not unreasonable for the legislature to classify separately for the purposes of Commission regulation corporations, concluding both intra-city and inter-city operations, and thereby exempt from such regulation those conducting only intra-city operations. Such a classification does not violate the city's constitutional rights to exercise autonomous rule in municipal affairs.

[4] A further indication that the legislature intended the jurisdiction of the Commission to extend over the intra-city operations of a passenger stage corporation in a case such as is now before us, is disclosed by the changes in the language of section 2¼(b) of the Public Utilities Act adopted in 1927, when considered in the light of prior legislation. Before 1927, passenger stage transportation companies were certificated and regulated by the Railroad Commission under the provisions of the Auto Stage and Truck Transportation Act. Section 1(c) of that act (Stats.1917, p. 330) defined the term "transportation company" as every corporation or person owning or operating any auto bus, stage or truck used in the business of transporting persons or property over any public highway in the state between fixed termini or over a regular route "and not operating exclusively within the limits of an incorporated city." Section 5 of that act provided, however, that no certificate should be required for operations exclusively within the limits of an incorporated city. By the 1927 enactment the legislature, in transferring passenger stage corporations to the Commission's jurisdiction under the Public Utilities Act, substantially altered the language last above quoted to exempt "those whose operations are exclusively within the limits of a single incorporated city." It is also to be noted that by adding sections 2¾ and 50¾ to the Public Utilities Act in 1935 (Stats.1935, p. 1830) the legislature transferred from the Auto Truck and Transportation Act to the Public Utilities Act the Commission's regulation of common carriers of property by motor truck without any change in the provision exempting "operations exclusively within the limits of an incorporated city." § 50¾(c). The studied alteration in the wording of the provision relating to passenger stage corporations as it was embodied in subsection (b) of section 2¼ of the Public Utilities Act is a plain indication of the purpose of the legislature to provide a substantive change, and in accordance with the construction placed thereon by the Railroad Commission. We are not, of course, passing upon the construction of any language not directly involved herein.

Other points do not require discussion.

We conclude that the respondent Commission properly construed and applied the provisions of the Public Utilities Act to the facts presented and that it has regularly pursued its authority.

The order is affirmed.

We concur: GIBSON, C. J.; CURTIS, J.; TRAYNOR, J.; EDMONDS, J.; CARTER, J.

18 Cal.2d 179

GATES et al. v. McKINNON.

L. A. 17864.

Supreme Court of California.

June 25, 1941.

1. Appeal and error 🔑1010(1)

Where there is any substantial evidence supporting the judgment of the court in a case tried before the court without a jury, such judgment must be affirmed.

2. Appeal and error 🔑931(1)

In determining whether there was sufficient evidence to support a judgment of the court in a case tried before the court without a jury, all reasonable inferences supporting the judgment must be given effect.

3. Appeal and error 🔑989

In determining whether there was sufficient evidence to support a judgment of the court in a case tried before the court without a jury, the Supreme Court is not concerned with conflicts in the evidence.

4. Appeal and error 🔑1008(1)

Where 7 year old boy, while descending 10-foot wide stairway, the foot of which was 7 feet 8 inches from street curb, stumbled and proceeded into street in a stooping position a distance of 12 feet before being struck by the defendant's automobile, which was traveling about 15 miles per hour, and there was evidence that defendant was looking at ocean on opposite side of street from which child came, whether defendant was guilty of negligence proximately causing child's injuries was question of fact for trial court, and Supreme Court would not disturb a determination of such issue against defendant, particularly where trial court viewed the scene of the accident.

5. Trial 🔑375

When a view of the scene of an accident is had by the trier of facts, the conditions observed and properly bearing on the case are "independent evidence" which may be considered by the trier of facts in arriving at a decision.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Evidence".

6. Automobiles 🔑244(7, 36)

In action, tried before the court without a jury, for injuries sustained by 7 year old boy, who stumbled while descending stairway, the foot of which was 7 feet 8 inches from east curb of street, and proceeded in a stooping position 12 feet into street before being struck by automobile being driven by defendant in a northerly direction at a speed of 15 miles per hour, conflicting evidence sustained court's findings that defendant was negligent in failing to keep a lookout, observe the child and avert the accident, and that such negligence was proximate cause of child's injuries.

◆

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge.

Action by Lloyd W. Gates, etc., and others against Melvin E. McKinnon to recover damages for personal injuries sustained by the named plaintiff when struck by defendant's automobile. From a judgment in favor of plaintiffs, after trial before the court without a jury, defendant appeals.

Judgment affirmed.

Prior opinion, 108 P.2d 934.

Kenneth J. Murphy, of Los Angeles (Henry E. Kappler, of Los Angeles, of counsel), for appellant.

John L. Flynn and Roger Arnebergh, both of Los Angeles, for respondent.

CARTER, Justice.

Plaintiff, a minor of seven years of age, and his father, also a plaintiff, recovered judgment for damages against defendant arising out of personal injuries suffered by the minor when struck by an automobile being driven by defendant. The action was tried before the court without a jury. The court found that the defendant was negligent and that such negligence was the proximate cause of the injuries suffered by the minor.

The sole issue presented on this appeal from that judgment, according to defendant's contention, is whether or not the evidence is sufficient to support that finding.

[1-3] In considering that question it must be kept in mind that if there is any substantial evidence supporting the judgment it must be affirmed, that all reasonable inferences supporting the judgment must be given effect, and that with conflicts in the evidence, this court is not concerned. Viewing the evidence in the light of that rule, the facts are as follows:

The accident occurred July 23, 1939, in the daytime, the weather being clear, on a street known as Appian way in Santa Monica, California. Appian way is a surfaced street running north and south, being thirty feet in width from curb to curb. The sidewalk adjoining the east curb of the street is five feet in width. There is no park area between the sidewalk and the street. Buildings are located along the east side of the sidewalk, and the bottom step of a stairway leading down from the roof of one of those buildings to the sidewalk is two feet eight inches from the east edge of the sidewalk. The stairway is ten feet wide. South of the stairway there is a concrete wall six feet high extending along the east edge of the sidewalk. The stairway accommodates persons living in apartments on the east side of Appian way. It is also used to reach a passageway extending to the street lying east of Appian way, and it is commonly used by persons traveling east or west at this point. The ocean lies west of Appian way and is visible to one looking west when proceeding north along Appian way. Just prior to the accident some children were playing with a ball on the roof near where the stairway descended. In order to retrieve the ball which had gone out on the street, plaintiff minor, at the request of one of the boys playing with the ball, ran down the stairway, crossed the sidewalk in a stooping or crawling position, apparently stumbling at the bottom step, and proceeded to about three feet east of the center of the street directly west of the stairway where he was struck by the left front wheel and left end of the bumper on defendant's car. Just prior to the accident defendant was driving his car, a 1935 Packard Sedan, equipped with four wheel brakes, in a northerly direction on Appian way and at the time his car struck plaintiff it was to the right of the center of the street. Five people were riding with him, two in the front seat besides the defendant and three in the rear. An automobile was proceeding in the same direction as defendant about sixty feet ahead of him. There were no cars parked on either side of the street in the vicinity of the scene of the accident. A car was proceeding south on the street and was about even with defendant's car when the minor was struck. Another car was also proceeding south immediately to the rear of the last-mentioned car. There is evidence that immediately prior to the accident, defendant was looking west toward the ocean. Defendant testified that he was looking straight ahead. The evidence adduced by defendant was to the effect that he did not see the minor before the collision; and that he first knew of his presence when he felt the car strike something; that he was traveling 15 miles per hour; and that his car was stopped one to two car lengths beyond the point of impact; that defendant's car was five to ten feet south of the stairway when plaintiff minor left the west edge of the sidewalk, and that the minor darted from the sidewalk in a falling and stooping position directly in front of defendant's car, and was struck a split second after leaving the sidewalk. Defendant's evidence consisted in part of testimony by eyewitnesses to the impact. Plaintiff produced no eyewitnesses to the actual impact. The trial court before rendering its judgment viewed the site of the accident, and undoubtedly took such view, and the observations there made, into consideration as evidence.

[4, 5] Is is trite, but nevertheless pertinent to observe that in a case such as here presented, issues of negligence and proximate cause are questions of fact to be determined by the trial court, and in view of its determination, we are not disposed to conclude as a matter of law that the defendant was not negligent or that such negligence was not the proximate cause of plaintiff minor's injuries. It is not unreasonable to infer that the defendant was negligent in failing to keep a proper lookout to the north up Appian way prior to and at the time of the accident. Indeed, as above stated, there is evidence to the effect that immediately before the accident he was looking west to-

ward the ocean rather than in the direction he was driving. It is also not unreasonable to conclude that such failure was the proximate cause of the accident, inasmuch as defendant had an opportunity, if he had been keeping a proper lookout, to observe the plaintiff minor at least when the latter emerged from the bottom step of the stairway and passed the space of two feet and eight inches before reaching the retaining wall running south along the east side of the sidewalk, or while he passed over the sidewalk a distance of five feet more before reaching the street. And if he had seen plaintiff minor darting in a crouching, crawling or falling position out to the street, it is not unreasonable to say that he, as a man of ordinary prudence, should have anticipated that he (the minor) would continue his course out into the street. So anticipating that result he could have avoided the accident. He would have had sufficient time inasmuch as the minor had to travel across five feet of sidewalk and twelve feet of street before the left front wheel of defendant's car struck him. The trial court could have reasonably concluded that, because of the distance to be covered by the child, taking into consideration the physical capabilities of a child under the circumstances, and the speed of the car at fifteen miles per hour, the range in which the child would have been visible to defendant, the defendant was negligent in failing to keep a lookout, observe the child, and avert the accident. Defendant's evidence that the child shot out into the street directly in front of the defendant's car and that he could not have avoided hitting him, created nothing more than a conflict in the evidence. Inasmuch as the trial court viewed the scene of the accident and in view of the fact that the stairway was ten feet wide, the court may have ascertained that the defendant could have first seen the child when he was at the bottom step of the stairs thus adding about three feet more that the child traveled before the impact or even that he could have seen the child when he was on and running down the stairs. The law is clear that when a view of the scene of an accident is made by the trier of facts the conditions observed and properly bearing on the case, is independent evidence which may be considered by the trier of facts in arriving at its decision. MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 271 P. 509; Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 28 P.2d 919; 24 Cal.Jur. 749–753, 921. It is hardly credible that defendant did not see the child if he had been looking. His view was unobstructed at least when the minor reached the retaining wall.

Defendant particularly relies upon Moss v. Stubbs, 111 Cal.App. 359, 295 P. 572, 296 P. 86. In that case the boy, nine years of age, darted out from behind a street car directly in front of defendant's car. Among other grounds the case is clearly distinguishable because the defendant there could not possibly have seen the boy until he was only three feet from his car and the boy approaching from the left was struck by the left front wheel of the defendant's car. Defendant cites other cases. Depons v. Ariss, 182 Cal. 485, 188 P. 797; Zulim v. Van Ness, 3 Cal.App.2d 82, 38 P.2d 820; Van Derhoof v. Chambon, 121 Cal.App. 118, 8 P.2d 925; Hoy v. Tornich, 199 Cal. 545, 250 P. 565. But those cases are all either distinguishable from the case at bar or tend more to support an affirmance of the judgment. Each case necessarily depends upon its particular circumstances. It is apparent from the facts in this case that it is not one in which a child suddenly darts out from a concealed position into the path of a vehicle. Reference may be made to the case of Zulim v. Van Ness, 3 Cal.App.2d 82, 38 P.2d 820, in which the circumstances were somewhat similar to the case at bar, the plaintiff appealed from an adverse judgment, and the court held the issue of negligence to be one of fact, and that the judgment of the trial court was conclusive.

[6] For the foregoing reasons we believe that the evidence was sufficient to support the finding that defendant was negligent and that such negligence was the proximate cause of the accident.

The judgment is affirmed.

We concur: CURTIS, J.; TRAYNOR, J.; SHENK, J.; EDMONDS, J.

18 Cal.2d 174

FOOD & GROCERY BUREAU OF SOUTHERN CALIFORNIA v. GARFIELD.

L. A. 17877.

Supreme Court of California.

June 25, 1941.

1. Appeal and error 🔑460(2)

An injunction which is mandatory in character is automatically stayed by an appeal, and on a mistaken attempt of the trial court to enforce it, the appellant is entitled as a matter of right to issuance of writ of supersedeas.

2. Appeal and error 🔑460(2)

An injunction which is prohibitory is self-executing and its operation is not stayed by appeal.

3. Appeal and error 🔑460(2)

An injunction decree may partake of a dual nature, in which event an appeal will stay operation of the mandatory features but not of the prohibitory.

4. Appeal and error 🔑477

Where a purely prohibitory injunction is granted and there is no automatic stay, and appellant is not entitled to a writ of supersedeas as matter of right, the Supreme Court has inherent power to issue writ of supersedeas if such issuance is necessary or proper to complete exercise of its appellate jurisdiction.

5. Appeal and error 🔑477

Whether the Supreme Court should exercise its inherent power to issue writ of supersedeas in behalf of appellant against whom a prohibitory injunction has been issued does not depend on a balancing of conveniences or hardships but on a consideration of the respective rights of the litigants, viewed in light of the possibility of an affirmance of decree as well as of a reversal.

6. Appeal and error 🔑478

Whether preliminary injunction against alleged violations of the Unfair Practices Act was properly granted and what the ultimate decision should be, were not matters of concern in original proceeding in the Supreme Court for writ of supersedeas to suspend operation of the preliminary injunction pending appeal. Gen.Laws 1937, Act 8781, § 3.

7. Appeal and error 🔑477

Where preliminary injunction was granted against issuance of trading stamps by retail drug store operator, but such issuance was practice of long standing and was carried on likewise by members of association which sought the injunction against operator, the Supreme Court, treating the preliminary injunction as purely prohibitory, would grant writ of supersedeas in exercise of its inherent power, to suspend operation of the injunction pending appeal, notwithstanding that injunction allegedly only restrained operator from violating the Unfair Practices Act and that operator was not injured by being restrained from commission of illegal acts. Gen.Laws 1937, Act 8781, §§ 3, 10.

In Bank.

Action by the Food & Grocery Bureau of Southern California, etc., against Harold B. Garfield, etc., to restrain defendant from using merchandising methods violative of the Unfair Practices Act. A preliminary injunction was granted. On petition by defendant for writ of supersedeas to suspend operation of the preliminary injunction pending an appeal therefrom.

Writ of supersedeas granted.

Desser & Rau, of Los Angeles, for appellant.

Cupp, Hunt & Henderson, of Los Angeles, for respondent.

PULLEN, Justice pro tem.

Petition for writ of supersedeas to suspend the operation of a preliminary injunction pending an appeal from it by petitioner.

Petitioner operates ten retail drug stores in widely separated trade areas in Los Angeles county. The present action was brought to restrain him from using merchandising methods which are allegedly violative of the Unfair Practices Act (Deering's Gen.Laws 1937, vol. 2, Act 8781, p. 4157), with complaint directed particularly against the practice of issuing trading stamps to purchasers, on the ground that such stamps constitute a "gift" within the prohibition of section 3 of the act. By answer and affidavit petitioner admitted the use of trading stamps in his business, but denied that they constitute a "gift", or that they are issued in violation of either the spirit or the letter of the act, or for the purpose of injuring competitors, or destroying competition.

On February 25, 1941, the trial court granted a preliminary injunction directing petitioner to refrain, pending a final determination of the cause, from directly or indirectly "(a) Giving away, or offering or advertising the intent to give away, any article, or product, or commodity, or thing or things of value, or any stamp, or coupon, or certificate redeemable in or exchangeable for any thing or things of value, or any premium, or prize, or gift, for the purpose of injuring competitors or destroying competition," or "(b) Engaging in, or continuing to engage in, the 'Mid-City Profit Sharing Stamp Plan' described in the complaint in this action, for the purpose of injuring competitors or destroying competition." Petitioner appealed from this decree and also asked that its operation be stayed pending the appeal. Upon denial of the application for a stay, this original proceeding for writ of supersedeas was instituted.

Petitioner alleges that although the injunction is prohibitory in form, it is mandatory in effect because it requires him to take the affirmative action of changing his entire method of doing business. Since 1932 it has been his practice to issue trading stamps to those who patronize his chain of drug stores. One stamp of the value of two mills is given with each ten cent purchase except on "double stamp days", when two stamps are given with each such purchase. The stamps may be pasted in a book designated "Profit Sharing Stamp Book", and when 500 are accumulated, petitioner will redeem them for $1 in cash, or for merchandise to the value of $1.25. According to petitioner, the growth of his business has been due in a large measure to attracting trade by use of the stamp plan, and the future prosperity of his chain of stores is dependent upon a continuance of this merchandising practice. More than half of his customers receive and later redeem the stamps, and if he is forced to stop issuing them these customers will be alienated. They will lose the redemption value of the stamps which they have already accumulated and it may be impossible to retain or regain their patronage, even at the expense of costly advertising. Therefore, unless operation of the preliminary injunction is stayed, petitioner will suffer irreparable injury and damage, so severe as to in effect deprive him of the fruits of his appeal, should he be successful in securing a reversal of the injunction. On the other hand, plaintiff will not be harmed by a suspension of operation of the decree. As a trade association, it is merely proceeding under the broad equitable provisions of section 10 of the act, which permits any person to enjoin unfair practices, without allegation or proof of actual damage. Petitioner asserts that many members of plaintiff association are themselves carrying on the business practices here under attack, and have been content for many years to countenance such methods without protest. In fact, it is on this ground that petitioner has raised defenses of laches and estoppel, which will be determined on the hearing of the appeal on the merits.

[1-4] The law governing issuance of the writ of supersedeas to stay operation of an injunction pending an appeal therefrom is well settled. If the injunction is mandatory in character, it is automatically stayed by the appeal, and upon a mistaken attempt of the trial court to enforce it, the appellant is entitled as a matter of right to issuance of the writ of supersedeas. If on the other hand the injunction is prohibitory, it is self-executing and its operation is not stayed by the appeal. The question of whether a decree is of the one character or the other is sometimes a difficult one, as an order which is entirely negative or prohibitory in form may prove upon analysis to be mandatory and affirmative in essence and effect, or the decree may partake of a dual nature, in which event an appeal will stay operation of the mandatory features but not of the prohibitory. Schwarz v. Superior Court, 111 Cal. 106, 43 P. 580; Ohaver v. Fenech, 206 Cal. 118, 273 P. 555; Feinberg v. One Doe Co., 14 Cal.2d 24, 92 P.2d 640; Byington v. Superior Court, 14 Cal.2d 68, 92 P.2d 896; 2 Cal. Jur. § 196 et seq., p. 439 et seq. Even in the case of a purely prohibitory decree, however, where there is no automatic stay and the appellant is not entitled to a writ of supersedeas as a matter of right, this court has inherent power to issue the writ if such action is necessary or proper to the complete exercise to its appellate jurisdiction. Ohaver v. Fenech, supra; People v. Associated Oil Co., 211 Cal. 93, 294 P. 717; Goodall v. Brite, 1 Cal.2d 583, 586, 36 P.2d 190; Dry Cleaners & Dyers Institute v. Reiss, 5 Cal.2d 306, 310, 54 P.2d 470; Nuckolls v. Bank of California, 7 Cal.2d 574, 61 P.2d 927; Clayton v. Schultz, 12 Cal.2d 703, 708, 87 P.2d 355.

[5] The preliminary injunction here under review purports to be purely prohibitory; for purposes of the present proceeding it may be assumed to be wholly of that nature. The sole question then is whether the showing made by petitioner is such as will justify this court in exercising its inherent power in his behalf. We think that it is. This conclusion is not based upon a balancing of conveniences or hardships, which is not the proper test (Hulbert v. California, etc., Cement Co., 161 Cal. 239, 118 P. 928, 38 L.R.A.,N.S., 436; Ohaver v. Fenech, supra; Dry Cleaners & Dyers Institute v. Reiss, supra), but upon a consideration of the respective rights of the litigants, which contemplates the possibility of an affirmance of the decree as well as of a reversal. Clayton v. Schultz, supra.

[6, 7] The merchandising practice employed by petitioner is one of long standing. No doubt its abrupt abolishment would cause disruption in the orderly conduct of his business and a loss of patronage and customer good will, possibly so irreparable as to deprive him of the fruits of a meritorious appeal. This situation is such as to warrant issuance of the writ of supersedeas. The stay of proceedings will remove petitioner's risk of loss, and it may be granted without injury to or destruction of any rights which may be established in behalf of plaintiff trade association if the decree is affirmed. Plaintiff's complaint that the effect of a stay will be to compel members of its association to continue to cope with competition arising from petitioner's activities during pendency of the appeal, carries no weight in view of the many years of delay in instituting this proceeding and petitioner's assertion, undenied by plaintiff, that some of those members are themselves using the very merchandising methods here under attack. Plaintiff admits that of itself it is not injured by petitioner's activities and the preliminary injunction specifically eliminates the requirement for the posting of a bond or undertaking.

Plaintiff argues that the injunction only restrains petitioner from committing violations of the Unfair Practices Act, and therefore petitioner is not entitled to object to the restraint, for one is never injured by being kept from the commission of illegal or criminal acts. This argument overlooks the fact that although the injunction is framed partly in terms of the act, it is directed essentially against the issuance of trading stamps, and the record shows that that practice is the basis of the charge against petitioner. The issuance of these stamps is not forbidden in so many words by the act. Whether it comes within the general language of the provisions and is violative thereof is the main issue to be determined by the appeal. The correctness of the trial court's ruling on the subject, and the question of what the ultimate decision should be, are not matters of concern in this proceeding. The fact that the practice has been countenanced for many years without objection, coupled with other circumstances here shown, impels the conclusion that petitioner is entitled to be protected in the continued operation of his business without disturbance during the period of his appeal.

It is therefore ordered that a writ of supersedeas issue staying all proceedings in the court below until the final determination by this court of the cause on appeal.

We concur: GIBSON, C. J.; SHENK, J.; TRAYNOR, J.; CARTER, J.; EDMONDS, J.

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18 Cal.2d 160

In re BOGUNOVIC.

BOGUNOVIC v. UNITED STATES DEPARTMENT OF LABOR, Naturalization Service.

S. F. 16533.

Supreme Court of California.

June 24, 1941.

1. Aliens 🔑68(6)

Appeal may be taken to a California reviewing court from an order of Superior Court denying application for naturalization. 8 U.S.C.A. § 357.

2. Aliens 🔑60

The opportunity to become a citizen of the United States is a "privilege" as distinguished from a "right", though alien has statutory right to file his application, to submit his evidence to a court, to have the court pass thereon and to receive certificate if the requisite showing be made. 8 U.S.C.A. § 399.

See Words and Phrases, Permanent Edition, for all other definitions of "Privilege" and "Right".

3. Aliens ⟹68(5)

An alien has burden of establishing facts necessary to support his application for admission to citizenship. 8 U.S.C.A. § 399.

4. Aliens ⟹68(6)

In passing upon application for admission to citizenship, court performs a "judicial function" and exercises a "legal discretion" as distinguished from a "personal discretion". 8 U.S.C.A. § 399.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Function", "Legal Discretion" and "Personal Discretion".

5. Aliens ⟹68(6)

In passing upon application for admission to citizenship, court is not necessarily limited in its inquiry to events occurring within five years prior to the application. 8 U.S.C.A. § 399.

6. Aliens ⟹62(1)

In determining whether alien is fitted for citizenship, the court may ascertain, among other things, whether he has intelligence and good character, whether his oath will be taken without mental reservation or inconsistent purpose, whether his views are compatible with the obligations and duties of American citizenship, whether he will observe the laws of the land, and whether he is willing to support the government in time of war as well as in time of peace, or to assist in defense of the country as he may lawfully be required to do. 8 U.S.C.A. § 399.

7. Aliens ⟹68(6)

Though trial court is the best judge of the credibility of witnesses and weight of evidence in naturalization proceedings to justify denial of citizenship, there should be a showing which is the result of an independent inquiry by the court, or a report to the court by the examiner, with opportunity to applicant to meet such showing, as distinguished from an undisclosed investigation by the examiner prior to hearing, which is withheld from the court. 8 U.S.C.A. § 399.

8. Aliens ⟹68(5)

Where the only reason apparent from the record for denial of citizenship to alien was fact that alien had subscribed to and read weekly paper of communist party more than five years before filing of application, and examiner asserted that his confidential file contained matter unfavorable to alien but did not offer such matters in evidence, and there was no inquiry concerning effect of alien's reading on his attitude and no other evidence to rebut his showing of good character and record and his attachment to the principles of our Constitution and Government, inquiry was insufficient and denial of citizenship was error. 8 U.S.C.A. § 399.

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Proceeding in the matter of the application of George Bogunovic for admission to citizenship, on appeal from an order of the Superior Court denying the application, opposed by the United States Department of Labor, Naturalization Service.

Reversed.

Prior opinion, 106 P.2d 247.

Philip Adams, Wayne M. Collins, James J. Cronin, Jr., Charles R. Garry, and Morris M. Grupp, all of San Francisco, and Clarence E. Rust, of Oakland, for appellant.

Frank J. Hennessy, U. S. Atty., R. B. McMillan, and L. R. Mercado, Asst. U. S. Attys., A. J. Phelan, U. S. Immigration and Naturalization Service, Paul Armstrong, and Allen T. Hunter, U. S. Department of Labor, Naturalization Service, all of San Francisco, for respondent.

SHENK, Justice.

The petitioner has appealed from an order of the Superior Court denying his application for naturalization as a citizen of the United States.

[1] Section 357 of Title 8, U.S.C.A., confers exclusive jurisdiction to naturalize aliens upon designated federal courts; "also all courts of record in any State or Territory having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited." No special provision is made concerning appeals. The question first presented is whether an appeal is allowable in such cases and particularly whether an appeal may be

taken from the order of the superior court to a reviewing court of this state. The question seems to be answered by the decision in Tutun v. United States, 270 U.S. 568, 46 S.Ct. 425, 427, 70 L.Ed. 738, where the contention was made that a naturalization proceeding was not a case within the meaning of the Judicial Code relating to appellate jurisdiction of the federal courts. § 225, Title 28, U.S.C.A. The Supreme Court held that "whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character". The court rejected the contrary holding in the case of United States v. Dolla, 5 Cir., 177 F. 101, 21 Ann.Cas. 665, and apparently approved the rule declaring that appellate jurisdiction exists in the state courts when such proceedings are commenced therein, citing In re Fordiani, 98 Conn. 435, 120 A. 338; United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031, 130 Am.St.Rep. 288, 16 Ann. Cas. 279; United States v. Gerstein, 284 Ill. 174, 119 N.E. 922, 1 A.L.R. 318; Ex parte Smith, 8 Blackf., Ind., 395; In re Dean, Petitioner, 83 Me. 489, 22 A. 385, 13 L.R.A. 229; State v. District Court, 107 Minn. 444, 120 N.W. 898, 22 L.R.A., N.S., 1041; Ex parte Johnson, 79 Miss. 637, 31 So. 208, 89 Am.St.Rep. 665; State v. District Court, 61 Mont. 427, 202 P. 387; Rushworth v. Judges of Inferior Court, 58 N.J.L. 97, 32 A. 743, 30 L.R.A. 761; United States v. Breen, 135 App.Div. 824, 120 N.Y.S. 304; In re Karasick, 208 App.Div. 844, 204 N.Y.S. 919; In re Vura, 5 Ohio App. 334; Ex parte Granstein, 1 Hill, S.C., 141. The court also called attention to the cases of In re Wilkie, 58 Cal.App. 22, 208 P. 144, and State v. Superior Court, 75 Wash. 239, 134 P. 916, Ann.Cas.1915C, 425, in which the right of appellate review was denied. The decision in In re Wilkie followed the case of United States v. Dolla, which, as stated, was rejected by the Supreme Court in the Tutun case. Because of the decision in the latter case the question was left open in the case of In re Hullen, 124 Cal.App. 271, 12 P.2d 487, where the appeal was dismissed because not taken in time. The decision in Tutun v. United States indicates the correct rule, namely, that the applicant in a naturalization proceeding is entitled to the appropriate remedies available to litigants in any action or proceeding in the courts of the state, including the right of appeal.

The petitioner is an alien within the racial limitation of naturalization. § 359, Title 8, U.S.C.A. Section 382 of that title provides that no alien shall be admitted to citizenship unless immediately preceding the date of his application he has resided within the United States for at last five years and within the county of his residence at least six months, and that "during all the periods referred to in this section he has behaved as a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States". The reason stated by the trial court for the denial of the application herein was that the applicant was "not attached to the principles of the Government of the United States".

The record shows that the applicant was born in Jugoslavia in 1891 and that he entered this country lawfully in 1909. He married a citizen of the United States, raised a family and settled in Cupertino in Santa Clara county, where he now resides. He has been engaged in farming in that community for about twenty years. He has no police record except for disregarding a stop signal, an infraction of the traffic regulations. He belonged to and was secretary of the Cupertino local of the Croatian Fraternal Union, which appears to be a fraternal and benevolent society.

An examiner on behalf of the United States Government opposed the application and cross-examined the applicant. The cross-examination was designed to disclose that the applicant was attached to the principles of communism rather than to the principles of the Constitution of the United States. About seven years prior to the filing of his application the applicant had subscribed to a weekly paper known as "Rodnik", which was the official publication of the "Communist Party of the United States of America", published in the Jugoslav language. He stated that he did not know at the time he subscribed that the paper was the organ of the communist party, but that he discovered the fact after he received it. He said that he resubscribed to the paper for another year because he wished to finish reading a serial story appearing in it, and had then dropped the subscription. The paper was circulated by a fellow lodge member named Nicholas. The applicant once received a bundle of the papers which he did not circulate. He did not remember whether his wife had burned them or Nicholas had circulated them. In some prior proceeding, whether in naturalization or deportation is not made clear, the applicant was requested to appear before an immigration officer. He appeared with his counsel, but when the latter was not permitted to be present, he followed the advice of his counsel and refused to make any statement. The examination does not disclose the nature of the statement then requested of him.

Witnesses on behalf of the applicant attested his peace loving disposition and habits and his good moral character; that there was no reason to suppose that he was not attached to the principles of the Constitution; that he had never been heard to advocate force or violence to overthrow the existing form of government; that in their estimation he was well disposed and attached to this government. The applicant stated under oath that he was attached to the principles of the United States Constitution and that he was well disposed to the good order and happiness of the United States. His intelligence was not questioned.

[2-5] The applicant contends that the mere reading of the organ of the communist party more than five years prior to his application for citizenship was not sufficient to overcome the showing made by him that he was attached to the principles of the Constitution of the United States; that such fact was insufficient upon which to base the denial of his application, and that upon the foregoing record he was entitled to the statutory right of citizenship. It is to be noted that to accord citizenship to aliens is not to grant a right, but to confer a privilege. The alien has a statutory right to file his application, to submit his evidence to a court, to have the court pass upon the same, and to receive his certificate if the requisite showing be made. The opportunity to become a citizen of the United States is a privilege as distinguished from a right, and the burden is upon the alien to establish the facts necessary to support his application. Tutun v. United States, supra; United States v. Macintosh, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302. It is pointed out in the Tutun case that in passing upon the application the court performs a judicial function. It exercises a legal as distinguished from a personal discretion. United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031, 130 Am.St.Rep. 288, 16 Ann.Cas. 279. The court is not necessarily limited in its inquiry to events occurring within five years prior to the application. Section 399, Title 8, U.S.C.A., gives the United States the right to appear in the court proceeding for the purpose of cross-examining the applicant and his witnesses "concerning any matter touching or in any way affecting his right to admission to citizenship", with the right to call witnesses, produce evidence, and be heard in opposition to the granting of the application. It has been stated that the alien's attachment to the principles of the Constitution of this country, his disposition concerning our theory of government, and his attitude and beliefs pertaining to organized government are the essence of the inquiry; that these are matters usually of growth and development, and that the condition or practices of the applicant during his previous life bear materially upon the truthfulness of the statements made by him. United States v. Bressi, D.C., 208 F. 369.

[6, 7] The question then is whether the facts elicited by the examination conducted before the trial court are sufficient upon which to base its denial of the application, and specifically whether such facts are sufficient to show that the applicant was not attached to the principles of the Constitution. The fact adverse to the positive showing presented by the applicant was his two years' subscription to the communist publication, which had expired more than five years prior to his application. There was no evidence that the alien was a member of the communist party at the time of his application or at any other time. See Schneiderman v. United States, 9 Cir., April 28, 1941, 119 F.2d 500. The examiner made the assertion before the trial court that his "confidential file" contained more of a nature unfavorable to the applicant, but he made no offer and the court did not require him to introduce such matter in evidence. The only reason apparent from the record for the order of denial was the fact that the applicant had read the communist party organ and this more than five years prior to the filing of the application. There was no inquiry into the effect which such read-

ing might have had on the attitude of the applicant and no other evidence to rebut the showing by him of good character and record and his attachment to the principles of our Constitution and government. The case of United States v. Macintosh, supra, at pages 616, 617 of 283 U.S., at page 572 of 51 S.Ct., 75 L.Ed. 1302, indicates the extent of the inquiry and showing deemed sufficient to justify an order denying the application. It was there said: "Clearly, it would seem, in order that the court and the government, whose power and duty in that respect these provisions take for granted, may discover whether the applicant is fitted for citizenship—and to that end, by actual inquiry, ascertain, among other things, whether he has intelligence and good character; whether his oath to support and defend the Constitution and laws of the United States, and to bear true faith and allegiance to the same, will be taken without mental reservation or purpose inconsistent therewith; whether his views are compatible with the obligations and duties of American citizenship; whether he will upon his own part observe the laws of the land; whether he is willing to support the government in time of war, as well as in time of peace, and to assist in the defense of the country, not to the extent or in the manner that he may choose, but to such extent and in such manner as he lawfully may be required to do. These, at least, are matters which are of the essence of the statutory requirements, and in respect of which the mind and conscience of the applicant may be probed by pertinent inquiries, as fully as the court, in the exercise of a sound discretion, may conclude is necessary." The record herein fails to disclose the inquiry referred to in the Macintosh and other cases as necessary or desirable to serve as a basis for the exercise of the discretion of the court adversely to the application. The trial court is of course the best judge of the credibility of the witnesses and the weight of the evidence in this as in other cases. Nevertheless, the nature of the proceeding is such that to justify a denial there should be a showing which is the result of an independent inquiry by the court, or a report to the court by the examiner, with the opportunity afforded to the applicant to meet the same, as distinguished from an undisclosed investigation by the examiner prior to the hearing, and withheld from the court. Otherwise the discretion indulged by the court is an arbitrary and not a legal discretion.

[8] We conclude that the record on the hearing of the application here presented does not meet the required test. A further inquiry and hearing, if requested, should be available to the parties.

The order is reversed.

We concur: GIBSON, C. J.; TRAYNOR, J.; CURTIS, J.; CARTER, J.

EDMONDS, Justice (dissenting).

In my opinion, there is substantial evidence in the record to support the finding of the trial court that the appellant "is not attached to the principles of the Government of the United States." An alien has no right to citizenship unless he complies with the terms imposed by Congress (United States v. Macintosh, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302), and the decisions in naturalization cases for the last 100 years are based upon the principle that the door to citizenship will not be thrown open to an alien unless he proves, to the satisfaction of the court, that he is attached to the principles of the Constitution of the United States. And attachment to our government means much more than a sympathy with or preference for the Constitution and laws of the United States; it implies devotion to those principles upon which our democratic institutions stand and a willingness to support them with more than lip service.

That devotion must, of course, be based upon a depth of conviction concerning law and order which cannot adequately be measured by perfunctory answers to questions framed in the language of the Naturalization Act. Through naturalization high political as well as civil privileges are conferred upon an alien. By it he is invested with most of the rights of a native born citizen. Whereas an alien is ineligible to vote, has no suffrage in public elections, and even in peace time is subject to various disabilities, citizenship confers important and valuable rights. These rights are merited by an alien only when he has complied with the terms which Congress imposes. "Citizenship is a high privilege, and when doubts exist concerning a grant of it * * * they should be resolved in favor of the United States and against the claimant." United States v. Manzi, 276 U.S. 463, 467, 48 S.Ct. 328, 329, 72 L.Ed. 654; Swan & Finch Co. v. United States, 190 U.S. 143, 146, 23 S.Ct. 702, 47 L.Ed. 984.

In the present case, there is evidence from which the court might well have concluded that the applicant is not attached to the principles of the Constitution but is sympathetic with the purposes of communism. To disprove the evidence to that effect he offered no positive, frank, or outspoken avowal of his attachment to the principles of our government. His meager testimony came forth only in response to leading questions from his own counsel to the effect that he is "well disposed to the good order of the United States", and that he has not done "anything detrimental to the best causes and interest of the Constitution, Government and laws of the United States" and did not know anything which he had done for which he could be criticized.

A reading of the record reveals indisputably that the trial court might well be in doubt as to the sincerity and conviction of this testimony. Petitioner was obviously unwilling to submit to examination and he was represented by counsel who strenuously objected to many proper questions. It is significant that he failed to offer testimony expressly disavowing his attachment to the principles of communism. Whether he has the attachment to the principles of this government which is required by the Naturalization Act is a question which it was the duty of the trial court to determine. In reaching its conclusion the court was not limited to a consideration of the words of the applicant's answers. His attitude toward the court and the examination of him, as well as his frankness or evasion in answering questions should have been, and undoubtedly were, considered by the trial judge in passing upon his honesty of mind and intention.

A trial court is not always bound by the positive and uncontradicted testimony of a witness and this is particularly true where the witness is an interested one and the issue concerns his attitude or state of mind. Unquestionably, under the decisions in naturalization cases, if the record in such a proceeding shows affirmatively that there is any substantial reason for the trial court to doubt whether the applicant is attached to the principles of our Constitution, its finding to that effect must be sustained upon appeal.

The test in any naturalization proceeding is whether the applicant is entitled to citizenship, with the purpose of excluding from citizenship persons disbelieving in our government or hostile to it. An applicant should be granted citizenship only when the court is satisfied that his citizenship will be beneficial to our country (In re Sigelman, D.C., 268 F. 217) and, as I read the record, the evidence presented by the appellant shows a person concerning whose allegiance there may reasonably be much more than a grave doubt.

For these reasons I believe that the judgment of the trial court should be affirmed.

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18 Cal.2d 184

In re MARRE'S ESTATE.

PIUMA v. MINETTI et al.

L. A. 17292.

Supreme Court of California.

June 27, 1941.

1. Courts 🔑198

The probate jurisdiction of the superior court is statutory in nature and is strictly limited by the terms of the statute conferring such jurisdiction.

2. Trusts 🔑363

Under statute providing that when a trust created by will continues after distribution, the superior court shall not lose jurisdiction of the estate and that trustee may petition such court for instructions, superior court had jurisdiction of beneficiary's petition for order instructing testamentary trustees as against contention that the statute conferred probate jurisdiction upon superior court for limited purpose of hearing petitions brought by testamentary trustees. Probate Code, § 1120.

3. Trusts 🔑363

The statute, providing that when a trust created by will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for purpose of determining to whom property shall pass or settling accounts and passing upon acts of trustee and for other purposes, broadens the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between trustees and those claiming to be beneficiaries under trust. Probate Code, § 1120.

4. Wills ⚷619

Where testatrix bequeathed and devised residue to trustees who were directed to distribute and pay out of the net income of trust estate such part thereof as trustees should in their judgment deem advisable for proper care, maintenance, support and education of grandson so long as his education was incomplete, the testamentary disposition did not create an "annuity". Probate Code, § 161(3).

See Words and Phrases, Permanent Edition, for all other definitions of "Annuity".

5. Wills ⚷684(7)

The absence of an express testamentary direction that payments out of net income of trust estate to beneficiary were to accrue from date of testatrix' death did not establish conclusively that testatrix had no such intent which was the determining factor in determining beneficiary's right to payments. Probate Code, § 163.

6. Wills ⚷470

Intent of testatrix is to be gathered from instrument as a whole.

7. Wills ⚷684(7)

Where testatrix directed testamentary trustees to distribute and pay out of net income of trust estate such part thereof as trustees deemed advisable for proper care, maintenance, support and education of testatrix' grandson so long as in their judgment his education was incomplete and grandson at date of execution of will and date of testatrix' death was a minor and testatrix had definite plans for future education of grandson whom she had supported, the right to payments accrued from date of testatrix' death. Probate Code, §§ 103, 161(3), 162.

8. Wills ⚷733(1), 734(6)

At common law, where no directions were given by testator, legacies were payable one year after testator's death and bore interest from that date, but legacies for support and maintenance accrued at date of testator's death and bore interest from that time.

9. Wills ⚷734(6)

The common-law rule that where no directions are given by testator, legacies are payable one year after testator's death and bear interest from that date and that legacies for support and maintenance accrue at date of testator's death and bear interest from that time has been incorporated into the Probate Code and in absence of a contrary intent, legacies for maintenance bear interest from date of testator's death, even though the legacy is in trust. Probate Code, § 162.

10. Wills ⚷734(6)

A trust for support and maintenance, created by a residuary devise including both real and personal property is not technically a "legacy" for maintenance since a legacy is ordinarily a bequest of money or personal property.

See Words and Phrases, Permanent Edition, for all other definitions of "Legacy".

11. Wills ⚷684(7)

Although testatrix intended that payments directed to be made by testamentary trustees for beneficiary's support should accrue from date of testatrix' death, during the administration of the estate and prior to the distribution of the trust property to trustees, the beneficiary could not have brought action to compel payment against either the trustees or the executors of the estate.

12. Wills ⚷684(7)

Where testatrix intended that payments for beneficiary's support directed to be made by testamentary trustees should accrue from date of testatrix' death, the beneficiary's remedy during administration of estate and prior to distribution of trust property to trustees was confined to asking the probate court to distribute a portion of the trust funds to the trustees to be used for beneficiary's support.

13. Wills ⚷684(7)

Where testatrix intended that payments directed to be made by testamentary trustees for beneficiary's support should accrue from date of testatrix' death, the rule preventing suit, during administration of estate and prior to distribution of trust property to trustees, to compel payment relates to the time at which the trustees may be compelled to make actual payment rather than to the date at which the right to support commences, and, therefore, after property was distributed to the trustees, payment should have been made for the beneficiary's support and maintenance commencing from the date of testatrix' death.

14. Trusts ⚿177

Courts will not attempt to exercise discretion which has been confided to a testamentary trustee unless it is clear that the trustee has abused his discretion in some manner.

15. Wills ⚿684(10)

Where refusal of testamentary trustees to make payments to beneficiary for period between testatrix' death and date of distribution of trust estate to trustees was based upon belief that such payments would be improper, and trustees who were vested with discretion in fixing amount of payments had made no attempt to fix amount, the amount was to be determined in the discretion of the trustees and order specifying exact amount of payments to be made to beneficiary was improper.

◆

In Bank.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Proceeding in the matter of the estate of Angela L. Marre, deceased, wherein Stephen Milton Piuma filed a petition against Henry L. Minetti and others, as trustees under a testamentary trust, for order requiring the trustees to make certain payments to reimburse petitioner for expenses incurred for support, maintenance and education. From an order directing the trustees under the testamentary trust to make further payments to the petitioner covering the period between decedent's death and entry of decree of final distribution, the testamentary trustees appeal.

Order modified and, as modified, affirmed.

Prior opinion, 108 P.2d 691.

Dockweiler & Dockweiler, of Los Angeles, for appellants.

Canepa & Castruccio, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for respondent.

Andrew F. Burke, of San Francisco, amicus curiæ for respondent.

GIBSON, Chief Justice.

This appeal is brought from an order of the superior court of San Luis Obispo county in a probate proceeding. The order directed appellants, as trustees under a testamentary trust, to make further payments to the respondent beneficiary, Stephen M. Piuma, covering the period between decedent's death and the entry of the decree of final distribution. The decedent bequeathed and devised the residue of her estate to appellants in trust. The will provided in part: "(d) Said trustees shall during the existence of said trust, either monthly, quarterly or semiannually, as the circumstances and conditions of said trust estate will the most conveniently permit, but in any event annually, distribute and pay out of the net income of said trust estate such part thereof as said trustees shall in their sole judgment deem advisable to or for the proper care, maintenance, support and education of my said grandson Stephen Milton Piuma so long as, in their sole judgment, his education is incomplete, and the balance, if any, of said net income to my daughter Rosa J. Marie Piuma. * * *" Decedent died June 14, 1933, and the decree of distribution was rendered on December 21, 1937. At the time of decedent's death the respondent, Stephen M. Piuma, was not yet eighteen years of age and was still a student in high school. In September, 1934, he entered the University of Southern California, where he remained for one scholastic year, and in August, 1935, he entered the University of Santa Clara where he was a student on March 6, 1939, when the petition here involved was filed. The petitioner asked that the court instruct the trustees to make certain payments to reimburse him for expenses incurred for support, maintenance and education during the period prior to the entry of the decree of final distribution. The superior court granted the petition in part, and ordered the appellants to make payments totaling $650 for expenses incurred by the beneficiary during the years 1935, 1936, and 1937. It is from this order that the present appeal was taken.

[1] Appellants urge that the order made in favor of the beneficiary is void because the superior court, sitting in probate, has no jurisdiction over such a petition. It is pointed out that the probate jurisdiction of the superior court is statutory in nature, and is strictly limited by the terms of the statute conferring such jurisdiction. Estate of Davis, 136 Cal. 590, 597, 69 P. 412; Parkman v. Superior Court, 77 Cal.App. 321, 323, 246 P. 334; Estate of Hubbell, 121 Cal.App. 38, 41, 42, 8 P.2d 530. Probate Code, section 1120, provides: "When a trust created by a will continues after distribution, the superior court shall not lose

jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass * * * or settling the accounts and passing upon the acts of the trustee and for the other purposes hereinafter set forth. Any trustee * * * may * * * render for settlement his accounts and report his acts as such trustee. * * * The trustee may also petition such court, from time to time, for instructions as to the administration of the trust. * * *" Appellants contend that this section confers probate jurisdiction upon the superior court for the limited purpose of hearing petitions brought by the trustee. Therefore, it is said, the present petition brought by the beneficiary was outside the jurisdiction of the court, sitting as a probate court.

[2, 3] This contention is disposed of by the decision in Estate of Smith, 4 Cal.App. 2d 548, 41 P.2d 565, a case involving this point which seems to have escaped appellants' attention. In that case a petition brought by one of the beneficiaries under a testamentary trust was heard before the superior court in probate some seven years after the entry of the decree of final distribution in the estate. In answer to the argument that the court had jurisdiction under Probate Code, section 1120, only where the proceeding was instituted by the trustee, the court said (4 Cal.App.2d page 552, 41 P.2d page 567): "The wording of said section 1120 is sufficiently broad in its scope to give the court jurisdiction over the present controversy. * * * We believe the language employed in the present section of the Probate Code was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust." This language was quoted with approval by this court in Estate of Smead, 12 Cal.2d 20, 24, 82 P.2d 182. It follows that appellants' contention in this regard cannot be sustained, and that the court below was acting within the jurisdiction conferred upon it by section 1120 of the Probate Code.

[4] Appellants also contend that even if the court acted within its probate jurisdiction, the order directing payment to the beneficiary for the period prior to the decree of distribution is erroneous. Ordinarily, it is said, the beneficiary has no right to receive payments under the terms of the trust instrument until the trust property is distributed to the trustees. An order directing payments covering the period prior to the decree of distribution is said to be improper unless the will contains an express direction that the payments are to accrue from the date of the testatrix' death, or unless a similar result is reached under established principles for ascertaining the testator's intent as, for example, by the creation of an annuity under Probate Code, section 162. That section provides: "Legacies are due and deliverable one year after the testator's death, and bear interest from that time, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's death. Annuities commence at the testator's death." After pointing out that the will in this case contains no express direction, the appellant trustees devote their briefs to the proposition that the testamentary disposition involved here did not create an annuity, citing Clayes v. Nutter, 49 Cal.App. 148, 192 P. 870, and Estate of Watson, 32 Cal.App.2d 594, 90 P.2d 349. No one, including the respondent beneficiary, challenges the accuracy of this proposition since an annuity must consist of a "bequest of certain specified sums periodically". Prob.Code, sec. 161(3).

[5-7] The absence of an express direction that the payments were to accrue from the date of her death does not establish conclusively, however, that the testatrix had no such intent. The intention of the testatrix is the determining factor (Prob.Code, sec. 163), and that intent is to be gathered from the instrument as a whole. Prob. Code, sec. 103; Estate of Peabody, 154 Cal. 173, 178, 97 P. 184. The terms of the will clearly indicate that this trust was created for the specific purpose of providing maintenance and support for the testatrix' grandson, the beneficiary herein. Indeed, if the will itself did not refer to this bequest as a trust for maintenance and support, the surrounding facts and circumstances would compel that conclusion. See Estate of Ballou, 181 Cal. 61, 183 P. 440. The evidence shows that respondent was the grandson of the testatrix, that he had been supported by her, and that she had definite plans for his future education. Respondent was a minor at the date of the execution of the will and at the date of the testatrix' death, and this trust is the only provision made for the respondent in the

will. Under like circumstances it has been held that the payments under such a trust for support and maintenance were intended to accrue from the date of the testator's death. In Estate of Dare, 196 Cal. 29, 38, 235 P. 725, 729, this court stated the rule which we think governs the present case: "By both reason and authority we are compelled to the conclusion that the respondent's right to the income to be derived from the trust properties must be held to have relation to the death of the testatrix. As to the reason of the situation, it would seem to follow that if, as we hold, the provision in said will and in the trust clauses thereof were intended by the testatrix to be in the nature of a bequest for the maintenance of her adopted daughter who, as has been shown, * * * had theretofore been supported and maintained by her adopting parents during their lifetime, such intention ought to have relation to a time from and after the death of the testatrix, since by that means only could continuity of such maintenance be assured."

[8, 9] The holding in Estate of Dare is based upon an analogy to the common-law doctrine according special consideration to legacies for support and maintenance. Thus, although it was well established at common law, where no directions were given by the testator, that legacies were payable one year after the testator's death and bore interest from that date, legacies for support and maintenance accrued at the date of the testator's death and bore interest from that time. Cooke v. Meeker, 36 N.Y. 15, 18; Ann.Cas.1912B, 245; see, 1930, 39 Yale L.J. 591. This doctrine was based upon the testator's presumed intention under the circumstances to provide uninterrupted support for a beneficiary accustomed to rely upon such support. Brown v. Knapp, 79 N.Y. 136, 142; Reid v. Dodge, 44 App.D.C. 558, 562; Old Colony Trust Co. v. Forsyth Dental Infirmary, 1931, 271 Mass. 511, 171 N.E. 734, 70 A.L.R. 636, 638. This rule has been incorporated into the Probate Code and, in the absence of a contrary intent, legacies for maintenance bear interest from the date of the testator's death. Prob. Code, sec. 162. This is true even though the legacy is in trust. In re Mackay, 107 Cal. 303, 40 P. 558; Estate of McGirl, 125 Cal.App. 310, 13 P.2d 746; see In re Pearson's Estate, 251 Pa. 612, 97 A. 71.

[10] It is true, of course, that a trust for support and maintenance, created by a residuary devise including both real and personal property, is not technically a legacy for maintenance, since a legacy is ordinarily a bequest of money or personal property. Estate of Ross, 140 Cal. 282, 290, 73 P. 976; Thompson, Wills, 2d Ed., p. 19, sec. 11; 24 Words and Phrases, Perm. Ed., 517. Identical considerations are involved, however, in ascertaining the testator's intent whether the gift is a legacy for maintenance, a trust of personal property for that purpose (cf. In re Mackay, supra), or a similar trust consisting of both real and personal property. See Estate of Dare, supra. The nature of the property placed in trust should not require different conclusions where it appears that the testator's motives and desires were identical. We are compelled, therefore, in accord with our decision in Estate of Dare, supra, to hold that the testatrix is presumed to have intended that the payments for the beneficiary's support should accrue from the date of her death, under the circumstances here presented.

[11-13] It is true that during the administration of the estate, and prior to the distribution of the trust property to appellants, the beneficiary could not have brought action to compel payment against either the trustees or the executors of the estate. In re Mackay, supra; Estate of Dare, supra. The executors were under no duty to make payments and the trustees could not be compelled to make payment prior to the distribution of the trust property to them. The beneficiary's remedy during that period is confined to asking the probate court to distribute a portion of the trust funds to the trustees to be used for his support. See In re Mackay, supra, 107 Cal. page 307, 40 P. 558; Estate of McGirl, supra, 125 Cal.App. page 313, 13 P.2d 746. The rule preventing suit during this period relates to the time at which the trustees may be compelled to make actual payment, however, rather than to the date at which the right to support commenced. Thus, after the property was distributed to the trustees, payment should have been made for the respondent's support and maintenance commencing from the date of testatrix' death.

[14, 15] The amount to be paid for the beneficiary's support, however, was to be determined in the sole judgment of the trustees. The order of the superior court sought to specify the exact amount of the payments to be made to the beneficiary. It is well settled that the courts will not attempt to exercise discretion which has

been confided to a trustee unless it is clear that the trustee has abused his discretion in some manner. Hallinan v. Hearst, 133 Cal. 645, 648, 66 P. 17, 55 L.R.A. 216; Cromwell v. Converse, 108 Conn. 412, 143 A. 416, 61 A.L.R. 663; 4 Bogert, Trusts and Trustees, 1935, p. 2347, § 811; 2 Scott, Trusts, 1939, p. 986 et seq.; 26 R.C.L. p. 1373, sec. 234; Restatement, Trusts, sec. 187. In the present case the refusal of the trustees to make payment for the period between the death of the testatrix and the date of distribution of the trust estate to them was based upon the belief that any such payment would be improper. There was no attempt on the part of the trustees to fix the amount and, hence, there could be no abuse of discretion in this regard. The amounts to be paid should therefore be determined in the discretion of the trustees.

The order appealed from should be modified to direct that the trustees determine, in their discretion, the amounts necessary for respondent's maintenance during the period commencing with the death of the testatrix and until the entry of the decree of distribution. The trial court is directed to so modify the order, and when so modified, the order will stand affirmed, costs upon this appeal to be borne by appellants.

We concur: SHENK, J.; EDMONDS, J.; TRAYNOR, J.; CARTER, J.

18 Cal.2d 191

In re MARRE'S ESTATE.

PIUMA v. MINETTI et al.

L. A. 17440.

Supreme Court of California.

June 27, 1941.

Rehearing Denied July 24, 1941.

1. Costs 🔑172

Compensation for services of an attorney must ordinarily be paid by client employing attorney, in absence of exceptional circumstances, such as special agreement or special statutory provision, since there is no general rule which permits recovery of attorney's fees by a successful litigant. Code Civ.Proc. § 1021.

2. Costs 🔑172

Plaintiffs who have succeeded in protecting, preserving or increasing a fund for the benefit of themselves and others may be awarded compensation from the fund for the services of their attorneys.

3. Trusts 🔑377

Where testatrix directed testamentary trustees to pay out of net income of trust estate such part thereof as trustees deemed advisable for proper care, maintenance, support and education of testatrix' grandson, the grandson who was successful in proceeding brought to establish that right to payments accrued at date of testatrix' death was not entitled to order for an allowance from trust fund with which to pay fees of his attorney. Code Civ.Proc. § 1021.

4. Wills 🔑684(9)

Where testatrix directed testamentary trustees to pay out of net income of trust estate such part thereof as trustees deemed advisable for proper care, maintenance, support and education of testatrix' grandson, fees of attorney employed by grandson in successfully establishing that right to payments accrued at date of testatrix' death could not be ordered paid from the trust fund as necessary expense of the grandson where under the will the amounts payable to the grandson were to be determined in sole judgment of the trustees.

In Bank.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Proceeding in the matter of the estate of Angela L. Marre, deceased, wherein Stephen Milton Piuma filed a petition for an order against Henry L. Minetti and others, testamentary trustees, to require the trustees to make certain payments to the petitioner as beneficiary. From a portion of the court's order which denied petition for allowance from a trust fund with which to pay fees of his attorney, the petitioner appeals.

Affirmed.

Prior opinion, 108 P.2d 693.

Canepa & Castruccio, of Los Angeles (Horace W. Danforth, of Los Angeles, of counsel), for appellant.

Dockweiler & Dockweiler, of Los Angeles, for respondents.

Andrew F. Burke, of San Francisco, amicus curiæ for appellant.

GIBSON, Chief Justice.

This appeal from an order of the superior court of San Luis Obispo county sitting in probate involves the same parties who were before the court in Piuma v. Minetti, Cal.Sup., 114 P.2d 586, this day decided. This appeal, however, is brought by the beneficiary from that portion of the superior court's order which denied his petition for an allowance from the trust funds with which to pay the fees of his attorney. The facts surrounding the controversy are set forth in Piuma v. Minetti, supra, and need not be repeated here.

[1-3] There is no general rule which permits the recovery of attorney's fees by a successful litigant. Compensation for the services of an attorney must ordinarily be paid by the client employing him, in the absence of exceptional circumstances, such as a special agreement or special statutory provision. Miller v. Kehoe, 107 Cal. 340, 343, 40 P. 485; Los Angeles Trust & Sav. Bank v. Ward, 197 Cal. 103, 239 P. 847; Bank of America v. West End, etc., Co., 37 Cal.App.2d 685, 696, 100 P.2d 318; Code Civ.Proc., sec. 1021; 7 Cal.Jur. 286; 7 C.J.S., Attorney and Client § 176, p. 1043; 14 Am.Jur. 38. In addition to the exceptions provided by statute, there are certain actions in equity where the courts will award attorney's fees to a litigant. Salmina v. Juri, 96 Cal. 418, 31 P. 365; 7 Cal.Jur. 287; 14 Am.Jur. 44, sec. 70 et seq.; 1939, 34 Ill. L.Rev. 220. Thus, plaintiffs who have succeeded in protecting, preserving or increasing a fund for the benefit of themselves and others may be awarded compensation from the fund for the services of their attorneys. Miller v. Kehoe, supra; Tulare County v. Dinuba, 205 Cal. 111, 117, 270 P. 201; Farmers & Merch. Nat. Bank v. Peterson, 5 Cal.2d 601, 607, 55 P.2d 867; Bank of America v. West End, etc., Co., supra, 37 Cal.App.2d page 696, 100 P.2d 318; 7 Cal. Jur. 287; 25 Cal.Jur. 354; 7 C.J.S., Attorney and Client, § 193, pp. 1096-1100; 65 C.J. 722, sec. 585; Wallace v. Fiske, 8 Cir., 80 F.2d 897, 107 A.L.R. 749; Hempstead v. Meadville Theological School, 286 Pa. 493, 134 A. 103, 49 A.L.R. 1149; 1935, 35 Col.L.Rev. 740; 1940, 25 Iowa L.Rev. 836. In the present case the appellant beneficiary cannot bring himself within any of the recognized exceptions to the general rule that each party must pay his own attorney's fees since he has benefited no one but himself in prosecuting his action, and since the various beneficiaries were hostile litigants each employing separate counsel. See Salmina v. Juri, supra; Miller v. Kehoe, supra, 107 Cal. page 344, 40 P. 485; 7 C.J.S., Attorney and Client, § 193, p. 1100.

[4] It is suggested that under the facts of this case attorney's fees constitute a necessary expense of the beneficiary and should, therefore, be paid from the trust funds as a portion of the amount due for support and maintenance. The amounts payable, however, are to be determined in the sole judgment of the trustees, and under the facts here presented no ground is shown entitling appellant to an order of the court awarding him attorney's fees. The order of the trial court is affirmed.

We concur: SHENK, J.; EDMONDS, J.; TRAYNOR, J.; CARTER, J.

18 Cal.2d 200

STOCKTON SAVINGS & LOAN BANK v. MASSANET et al.

Sac. 5339.

Supreme Court of California.

June 30, 1941.

As Modified July 17, 1941.

1. Statutes 🔑220

The Act of 1935 concerning existence of an ambiguity and declaration of intent of the 1933 act providing that no deficiency judgment shall lie after a sale under a deed of trust or mortgage given to secure payment of balance of purchase price of realty, although not binding upon Supreme Court in its construction of the 1933 act, was a factor that could properly be considered in correctly determining meaning of 1933 act. Code Civ.Proc. §§ 580a–580c, 725a, and Civ. Code, §§ 2924, 2924b, 2924c, re-enacted by St.1935, p. 1802 et seq.

2. Constitutional law 🔑190

The Supreme Court, in applying the Act of 1935 concerning the existence of an ambiguity and declaration of intent of the 1933 Act providing that no deficiency judgment should lie after a sale under a deed of trust or mortgage given to secure the payment of the balance of the purchase price of realty, does not give a prohibited "retroactive" effect to the 1933 Act, since the meaning of the act to be interpreted is the same and the Act of 1935 does not change the meaning but merely supplies an indication of the legislative intent which may be considered together with other factors in arriving at the true intent existing. Code Civ.Proc. §§ 580a–580c, 725a, and Civ.Code, §§ 2924, 2924b, 2924c, re-enacted by St.1935, p. 1802 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Retroactive".

3. Mortgages 🔑375

Where section of Civil Code providing that no deficiency judgment shall lie after a sale under a deed of trust or mortgage given to secure payment of balance of purchase price of realty was part of a statute adding several new sections to, and amending various other sections of the Civil Code and the Code of Civil Procedure, the section was not limited as to time by reason of provision in independent section reciting that "this act and the provisions of this section shall be effective to and until September 1, 1936". Code Civ.Proc. § 580b, as added by St.1933, p. 1673, § 5; Civ.Code, § 2924½, as added by St.1933, p. 1674, § 8.

4. Mortgages 🔑375

Where trust deed was executed after 1933 Act providing that no deficiency judgment shall lie after a sale under a deed of trust or mortgage given to secure payment of balance of purchase price of realty and was due prior to September 1, 1936, such act became part of trust deed contract when executed, and grantee was bound by its provision that no deficiency judgment could be obtained, even if provision of act prohibiting deficiency judgments after a sale under a deed of trust or mortgage given to secure payment of balance of purchase price of realty was subject to provision in another section of same act limiting duration to September 1, 1936. Code Civ.Proc. § 580b, as added by St.1933, p. 1673, § 5; Civ.Code, § 2924½, as added by St.1933, p. 1674, § 8.

5. Statutes 🔑190

If there is no ambiguity, uncertainty, or doubt about meaning of a statute, and words unequivocally express a certain definite thought, there is no room for interpretation or construction by the courts.

6. Mortgages 🔑375

Evidence established that amount represented by note and trust deed was given by grantees to vendor as part of purchase price, so that note and trust deed were for "balance of purchase price", within purview of statute prohibiting deficiency judgments after a sale under a deed of trust or mortgage given to secure payment of balance of purchase price of realty. Code Civ.Proc. § 580b, as added by St.1933, p. 1673.

See Words and Phrases, Permanent Edition, for all other definitions of "Balance of Purcnase Price".

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Stockton Savings & Loan Bank against Chris Massanet and another, to recover a deficiency resulting after the sale of defendants' property under a trust deed. From a judgment for plaintiff, the defendants appeal.

Reversed with directions.

For prior opinion, see 104 P.2d 712.

Glensor & Schofield, of San Francisco, and J. Leroy Johnson, of Stockton, for appellants.

Nutter & Rutherford, Rutherford, Jacobs, Cavalero & Dietrich, D. R. Jacobs, Philip Cavalero, and Stephen Dietrich, all of Stockton, for respondent.

CARTER, Justice.

This is an appeal by defendants from a judgment by the court sitting without a jury for a deficiency after a sale under a trust deed covering defendants' real property.

The note and trust deed which were the basis of plaintiff's action for a deficiency were executed by defendants on August 20, 1935. The note was payable one year after date. Defendants having failed to pay the note, plaintiff recorded notice of default and election to sell on January 6, 1938. Thereafter, on May 4, 1938, the property was sold under the power of sale in the trust deed for a sum less than the amount of the note. Although defendants in their answer denied certain allegations in plaintiff's complaint, the truth thereof was stipulated at the trial. Defendants pleaded in defense to plaintiff's action that the trust deed was a purchase money trust deed and that therefore no action for a deficiency would lie by reason of section 580b of the Code of Civil Procedure. On motion of plaintiff made prior to trial the court struck that defense from defendants' answer. Nevertheless at the trial, over plaintiff's objection, the trial court permitted evidence to be adduced on the question of whether or not the instrument was a purchase money trust deed, remarking in so doing:

"I might say this: That in view of the fact that I anticipate you intend to appeal, it might be just as well to take this testimony so that if you are successful in the Appellate Court, the court there can enter judgment rather than send it back for trial." The court found that all of the allegations of the complaint were true and that all of the allegations in defendants' answer were untrue. Whether the court was referring to the answer with the stricken part omitted or as a part thereof does not appear. However, it is immaterial for the reason that if it be assumed that there was a finding that the trust deed was not a purchase money trust deed, that finding is not supported by the evidence as will be hereinafter seen.

The first issue presented by this appeal is, assuming the trust deed was a purchase money trust deed, was the plaintiff entitled to a deficiency judgment under section 580b of the Code of Civil Procedure, added in 1933, prior to the execution of the trust deed here involved, which read: "No deficiency judgment shall lie in any event after any sale under a deed of trust or mortgage given to secure payment of the balance of the purchase price of real property." New section added June 2, 1933; Stats. 1933, p. 1673. It is plaintiff's position that by reason of a clause in the statute of 1933, which added section 580b to the Code of Civil Procedure, that section was effective only until September 1, 1936, and that inasmuch as the sale under the trust deed was made in 1938, said section is not applicable. The statute of 1933 (Stats, 1933, p. 1669), besides adding section 580b, contained eight other sections which accomplished the following: Amended section 2924 of the Civil Code, relating to the recording of notices of default; added sections 2924b and 2924c to the Civil Code, relating to the recording of notices of default, and reinstating loans, respectively; added sections 580a, 580c, and 725a to the Code of Civil Procedure, relating respectively, to limits on the amount of deficiency judgments and time for commencing action, limits the amount of attorneys and trustees fees under trust deeds, and permitting an action to foreclose a trust deed; added 2924½ to the Civil Code, relating to mortgages and trust deeds. Each of those additions and amendments was made by a separate section in the 1933 Act, section 5 thereof adding section 580b; section 9 contains the customary declaration that if any part of the act is found unconstitutional the remainder is not to be affected; section 8 adds section 2924½ to the Civil Code and reads:

"Sec. 8. A new section to be numbered section 2924½ is hereby added to the Civil Code, to read as follows:

"2924½. No judgment shall be rendered for the balance due upon any obligation which was secured by a deed of trust or mortgage with power of sale upon real property following the exercise of such power of sale, if exercised at any time between the effective date of this act and September 1, 1935, unless it shall affirmatively appear that the notice of breach and election to sell provided for in section 2924 of the Civil Code, pursuant to which such sale was held, was recorded at least one year before the date of such sale. *This act and the provisions of this section shall be effective to and until September 1, 1936.*" It is the italicized portion of that section upon which respondent relies for its contention that all of the additions and amendments in the 1933 act were to be effective only until September 1, 1936. With that contention we cannot agree. Obviously, the intention of the legislature was to limit the period of operation of section 2924½ of the Civil Code only. It is the only provision in the entire series of added and amended sections which is definitely in the nature of a moratorium or temporary postponement of mortgage and trust deed foreclosures, and therefore logically and reasonably restricted as to the time during which it would operate. All the other sections deal with statements of procedure and substantive policy with reference to trust deeds and mortgages, which by their nature are more permanent in character and have no necessary relation to the purposes ordinarily sought to be accomplished in an endeavor to give temporary relief to debtors. It is to be noted that the sentence in question appears as a part of section 8 of the act and in the same paragraph as the balance of that section whereas the sections adding 580b and other sections are separate and independent sections. The legislature realizing that the use of the words "This act" in said sentence might create some confusion and ambiguity, reenacted sections 580a, 580b, 580c and 725a of the Code of Civil Procedure and sections 2924, 2924b and 2924c of the Civil Code in 1935 (Stats.1935, p. 1802, 1805) and Section 9 of that act provided:

[1-3] "It is the intent of this act to reenact sections 2924, 2924b and 2924c of the Civil Code and sections 580a, 580b, 580c and 725a of the Code of Civil Procedure in order to continue the same in effect subsequent to September 1, 1936, and *remove any ambiguity created by the language of section 2924 1/2 of the Civil Code as added by an act approved June 2, 1933, as to the time said sections shall be effective.* It is intended that sections 2924, 2924b, and 2924c of the Civil Code and sections 580a, 580b, 580c, and 725a of the Code of Civil Procedure shall be effective without any time limitation thereon." This expression by the legislature concerning the existence of an ambiguity and the declaration of the intent of the 1933 Act, although not binding upon this court in its construction of the 1933 act, is a factor that may properly be considered in correctly determining the meaning and effect of the sentence in question. Bates v. McHenry, 123 Cal.App. 81, 92, 93, 10 P.2d 1038; Rutledge v. Dominguez, 122 Cal.App. 680, 684, 10 P.2d 1027. That is not giving a retroactive effect to a statute, because the meaning of the statute to be interpreted has always been the same. The subsequent legislation interpreting the statute construed, does not change the meaning, it merely supplies an indication of the legislative intent which may be considered together with other factors in arriving at the true intent existing at the time the legislation was enacted. In the case of Kirkpatrick v. Stelling, 36 Cal.App.2d 658, 673, 98 P.2d 566, 574, (hearing denied by this court) the District Court of Appeal considered the identical question here involved with respect to section 580a of the Code of Civil Procedure which was added by section 4 of the 1933 Act. We are satisfied with the conclusion there reached, and quote with approval the language there used:

"In a supplemental brief filed by appellant, it is urged that when section 580a of the Code of Civil Procedure was enacted in 1933, it was made self-limiting for a period of a little over three years; that the note and deed of trust here involved were executed on July 7, 1934; that the 1933 statute, including its self-limiting provision, became part of the note and deed of trust; that the statute expired in September, 1936; that the sale took place in January, 1938; that at that time, but for its re-enactment in 1935, section 580a as enacted in 1933 would have been nonexistent and appellant would have had all the rights and remedies that existed prior to its adoption. Based on these premises, it is urged that the 1933 statute cannot be applied to this transaction because it had expired; and that the 1935 reenactment cannot be applied to notes and deeds of trust executed in 1934, because to do so would be to give the 1935 statute a retroactive effect, which, it has been held, in the many cases cited earlier in this opinion, cannot be done.

"To this argument there are at least two complete answers. In the first place, section 580a of the Code of Civil Procedure as enacted in 1933, in our opinion, was not limited as to time. That section was part of a statute adding several new sections to and amending various other sections of the Civil Code and Code of Civil Procedure. (Stats, 1933, p. 1669, chap. 642.) The statute has nine separate distinct and wholly self-sufficient sections. Each section of the act, with the exception of section 9, either amends some section of the codes, or adds a new section thereto. Section 9 is the severability section. Section 4 is the section that provides for the addition of section 580a to the Code of Civil Procedure. In that section nothing is said as to any limitation of time—as there added to the Code of Civil Procedure the section is not limited as to time. Section 8 adds section 2924½ to the Civil Code. At the end of that section, without a new paragraph, and with nothing to indicate that the sentence applies to any other section but section 8, appears this sentence: 'This act and the provisions of this section shall be effective to and until September 1, 1936.' In spite of the use of the word 'act' in this sentence, the only reasonable conclusion is that the time limitation was intended to apply only to section 2924½ of the Civil Code. This is the normal interpretation of section 8. If the legislature had intended the time limitation contained in the last sentence of that section to be applicable to all of the preceding seven sections, it would normally have added a separate section of the statute so declaring. At least it would have set the sentence forth in a separate paragraph.

"Apparently the legislature of 1935 had some doubts on the matter. Accordingly, they caused to be reenacted the seven sections that had been amended or added in 1933 (Stats.1935, p. 1802, chap. 650), but they did not reenact section 2924½ of the Civil Code that contained the time-limitation clause thus clearly indicating that in 1933 they had intended only section 2924½ of the Civil Code to be limited as to time, and that as to the other seven sections, including section 580a of the Code of Civil Procedure, no limitation was intended. Section 580a of the Code of Civil Procedure was expressly 'reenacted' in 1935. Sec. 4, Stats.1935, p. 1805, chap. 650. By section 9 of the 1935 act the legislature declared: 'It is the intent of this act to reenact sections 2924, 2924b, and 2924c of the Civil Code and sections 580a, 580b, 580c and 725a of the Code of Civil Procedure in order to continue the same in effect subsequent to September 1, 1936, and *remove any ambiguity created by the language of section 2924 1/2 of the Civil Code as added by an act approved June 2, 1933, as to the time said sections shall be effective.* It is intended that sections * * * 580a * * * of the Code of Civil Procedure shall be effective without any time limitation thereon.' (Italics ours.) From this review of the situation it seems clear that the legislature of 1935 'reenacted' section 580a simply out of an abundance of caution. Such reenactment, in our opinion, was unnecessary. The 1933 statute, in so far as it enacted section 580a, was not limited as to time."

[4] There is a further answer to plaintiff's contention even if it be assumed that the duration of section 580b was limited by the 1933 act. It is to be remembered that the trust deed was executed after the 1933 act and was due prior to September 1, 1936, the time limit expressed. That statute became a part of the trust deed contract when executed and therefore plaintiff was bound by its provision that no deficiency judgment could be obtained. Hales v. Snowden, 19 Cal.App.2d 366, 65 P.2d 847. The District Court of Appeal also considered that proposition in the case of Kirkpatrick v. Stelling, supra, and stated at page 674 of 36 Cal.App.2d, at page 575 of 98 P.2d: "There is another answer to appellant's contention even though it be admitted that section 580a as passed in 1933 was operative only until September 1, 1936. Although the provisions of section 580a appertain to the remedy, in the many cases holding the section not retroactive already cited in this opinion, it was held that its provisions affected the substantial rights of the contracting parties to such a degree that to apply the statute to mortgages and deeds of trust executed prior to its passage would impair the obligation of contracts. This holding is fatal to appellant's present contention. When this deed of trust and note were executed in 1934, the provisions of section 580a became an integral part of the contract the same as if written therein. By that section appellant's rights were limited. The fact the statute was to become inoperative in 1936 could in no way affect the contractual rights of respondent. If section 8 of the 1933 statute above quoted is given its broadest possible meaning, the legal effect would simply be that as to all mortgages and deeds of trust executed between the effective date of section 580a in 1933, and September 1, 1936, regardless of when the sale was held, the rights of the parties were to be measured by the statute as it existed at the time the mortgage or deed of trust and note were executed. There is no warrant for the interpretation that, if the sale were to be held after September 1, 1936, the old law should be applicable. Such an interpretation would make the substantial rights of the respondent dependent on the mere whim or caprice of appellant. Here the note was executed and fell due prior to 1936. The rights of the parties must, therefore, be governed by the 1933 statute."

[5] It is true as asserted by plaintiff that if there is no ambiguity, uncertainty or doubt about the meaning of a statute and the words unequivocally express a certain definite thought, there is no room for interpretation or construction by the courts. 23 Cal.Jur. 721. However, as we have seen there exists an uncertainty here because of the position in the act of the sentence in question, and the other reasons above-mentioned. Furthermore, it is reasonable to conclude that the words "this act" mean the part of the act adding section 2924½ of the Civil Code. The choice of the words "this act and the provisions of this section" may have been used out of an abundance of caution to avoid any confusion that might arise from any fancied or real distinction between the act itself as distinguished from the section which was added and made a part of the Civil Code by said act.

There is no substantial dispute as to the facts bearing upon the issue of whether or not the trust deed here in question is a purchase money trust deed within the meaning of section 580b of the Code of Civil Procedure. Mrs. Gleason acquired the property from Mr. Soler and at the time of the acquisition she discharged an encumbrance against the property by obtaining a loan from plaintiff secured by a trust deed on the property. After holding the property for some time, and being in default under the trust deed an arrangement was made whereby she conveyed the property to plaintiff in return for which plaintiff released her from liability under said trust deed and the note secured thereby. As a part of the same transaction plaintiff conveyed the property to defendants, and the latter gave plaintiff their note and trust deed on the property (the trust deed here involved) in the sum of about $12,200, the same being the amount due under the note and trust deed theretofore held by plaintiff against Gleason, and also defendants gave to Gleason a lease on the property and a note for $2,651.08 secured by a second trust deed on the property. It was agreed that the last-mentioned trust deed would be subordinated to the one here involved. In the lease from defendants to Gleason it is recited that defendants are the owners of the property and were giving the lease in return for a conveyance of the property by Gleason to defendants. That recital is of course squarely contrary to the indisputable facts inasmuch as Gleason did not convey the property to defendants, but instead conveyed it to plaintiff who conveyed it to defendants. The lease had been prepared under a prior arrangement, which was never consummated, by which Gleason was to convey to defendants who were to assume Gleason's indebtedness owed to plaintiff. Even if it be accepted that Gleason and not plaintiff was the vendor of the property, the fact remains that the trust deed and note were not merely a renewal or continuation of the note and trust deed owed by Gleason because the latter was released and eliminated when Gleason conveyed to plaintiff and the plaintiff released Gleason from liability thereunder. Plaintiff released one debtor (Gleason) and acquired another (defendants). Although no money was in fact advanced by plaintiff to defendants under the note and trust deed, plaintiff did accept defendants as their debtors and extended credit to them in return for which it was made possible for defendants to purchase the property. The sum represented by the note and trust deed was a necessary part of the purchase price. Gleason being in default under her trust deed, it was necessary for her to require defendants to make some arrangement by which the trust deed could be discharged. If a person purchases encumbered property and assumes the encumbrance, the amount of the indebtedness is certainly a part of the purchase price. Here there is more than a mere assumption of the encumbrance which would probably be a mere continuation of the loan.

[6] The plaintiff as record owner of the property, conveyed title thereof to defendants and received from defendants the note and trust deed here involved as the full purchase price of the property. These facts make it clear that the note and trust deed constituted the purchase price paid by defendants which brings the case clearly within the provisions of Section 580b of the Code of Civil Procedure. This is all we are called upon to decide in this case.

The record in the case at bar discloses that notwithstanding the order of the trial court striking from defendant's answer the defense that the note and trust deed here involved were executed to cover partial payment of the purchase price of real property and therefore no action for a deficiency judgment would lie by reason of the provisions of section 580b of the Code of Civil Procedure, the court nevertheless permitted the parties to introduce evidence disclosing the entire transaction between the parties, and there seems to be no dispute as to the facts in connection with said transaction. In view of the conclusion which we have reached in the foregoing opinion, it is obvious that the trial court should have made a finding to the effect that the trust deed constituted a purchase money trust deed, and determined as a conclusion of law that defendants were not liable for any deficiency arising as the result of the sale of the property covered by the trust deed.

From what we have heretofore said, it is clear that no useful purpose can be served by a retrial of this case, and it is therefore ordered that the judgment be and the same is hereby reversed with directions to the trial court to make findings and enter judgment in favor of the defendants in accordance with the views herein expressed.

We concur: GIBSON, C. J.; TRAYNOR, J.; EDMONDS, J.; SHENK, J.; SPENCE, Justice pro tem.

18 Cal.2d 227

SIEDLETZ v. GRIFFITH et al.

Sac. 5297.

Supreme Court of California.

July 2, 1941.

1. Appeal and error 🔑544(2)

On appeal on judgment roll alone, only question before reviewing court was whether judgment was supported by findings.

2. Mines and minerals 🔑101

Where trustee of common-law trust owning mining claims attempted to locate one of claims in name of plaintiff, the location in name of plaintiff had full legal effect in absence of any repudiation by the cestui que trust of act of trustee in locating for plaintiff.

3. Trusts 🔑237

A trustee's act injurious to or fraudulent as to a beneficiary is voidable only and may be either affirmed or repudiated by beneficiary.

4. Mines and minerals 🔑34

Where trustee of common-law trust owning mining claims attempted to locate one of claims in name of plaintiff, lessees of claim from plaintiff were strangers to any question of title as between plaintiff and the cestui que trust, and could not urge invalidity of trustee's act in suit to quiet title to claim.

5. Appeal and error 🔑548(1)

Where no bill of exceptions was presented or filed and no notice was given for filing of a transcript of evidence, exhibits which were not a part of the pleadings could not be considered on appeal on the judgment roll alone. Code Civ.Proc. § 953a.

In Bank.

Appeal from Superior Court, Sierra County; Raymond McIntosh, Judge.

Suit by Ray Siedletz against J. K. Griffith, Myrtle Griffith, and others to quiet title to a mining claim in Sierra county, wherein the defendants filed a cross-complaint. From a judgment quieting title in defendant Myrtle Griffith, the plaintiff appeals.

Judgment reversed.

Prior opinion, 106 P.2d 57.

Richard A. Haley and Olson & Ahlport, all of Los Angeles, and Walter M. Gleason and J. Joseph Sullivan, both of San Francisco, for appellant.

A. J. Just, of Downieville, for respondents.

CURTIS, J.

This is an appeal on the judgment roll from a decree quieting title in the defendant Myrtle Griffith to two placer mining claims in Sierra county.

Count 1 of the complaint alleges that plaintiff is the owner of the "Gold Blossom" quartz mining claim and that defendants claim some interest therein. In a second count it is alleged that the defendants, without plaintiff's consent, entered upon and took possession of the claim and extracted minerals of the value of $10,000. By a third count it is asserted that defendants leased the claim from plaintiff but breached the lease and thus forfeited certain improvements, tools and machinery. The prayer of the complaint asks for a decree quieting title in plaintiff to the "Gold Blossom" claim and machinery, and for damages in the sum of $10,000 as the value of the minerals extracted from the claim.

The defendants denied the allegations of the complaint and cross-complained. It is admitted that defendants entered into a lease of the mining claim, but it is alleged that the lease was made as a result of false and fraudulent representations made by the plaintiff that she was the owner of said claim, when, in fact, she was not, and that therefore the lease was void. It is further alleged that on July 1, 1925, the mining claim was sold and conveyed to the state of California for delinquent taxes, and that defendants never entered upon or extracted quartz from the mining property claimed by the plaintiff, but, upon the contrary, they allege that they are the owners of two placer mining claims in that vicinity known as "Lady Esther" and "Bonnie Brae". The answer and cross-complaint ask for a decree quieting title in defendants to said placer mining claims, and that plaintiff be determined to have no right, title or interest therein. The answer to the cross-complaint alleges that defendants' placer mining claims were wrongfully located and recorded over and upon the plaintiff's "Gold Blossom" quartz claim.

[1] This appeal being on the judgment roll alone, the only question before this court is whether the judgment is supported by the findings.

After oral and documentary evidence was introduced by all parties, the trial court made the following findings of fact:

"1. That on July 1st, 1931, William G. Dean, was, and had been since August 28th, 1925, the admitted trustee and agent of Sierra Syndicate, a common-law trust.

"2. That on said July 1st, 1931, and since August 28th, 1925, prior thereto the said Sierra Syndicate, a common-law trust, was the owner of Gold Blossom Gold and Silver Quartz Mining Claim.

"3. That on July 1st, 1931, the said Sierra Syndicate, a common-law trust, was the owner of a redemption right in said Gold Blossom Gold and Silver quartz mining claim.

"4. On July 1st, 1931, the said William G. Dean attempted to locate the said Gold Blossom gold and silver quartz mining claim, in the name of the plaintiff, acting as agent for the plaintiff, and that the plaintiff and William G. Dean both admitted such agency.

"5. That the said William G. Dean being then the trustee and agent of Sierra Syndicate, a common-law trust, attempted to act as agent for the plaintiff Ray Siedletz and transfer to the said plaintiff the entire interests in the Gold Blossom gold and silver quartz mining claim, vested in Sierra Syndicate, a common-law trust without consideration.

"6. That the said William G. Dean, on July 31st, 1931, by reason of the facts aforesaid placed himself in a position which subjected him to conflicting duties and exposed him to the temptation of acting, and did act contrary to the best interests of his original cestui que trust.

"7. That on 1st day of June, 1936, the defendant Myrtle N. Griffith located the Lady Esther Placer Mining Claim and the Bonnie Brae Placer Mining Claim being the subject matter of defendants' cross-complaint."

As conclusions of law from the above facts the trial court found: "That the attempted location by William G. Dean as agent for plaintiff of the Gold Blossom gold and silver quartz mining claim was void, and in violation of his obligation and duties as trustee of said Sierra Syndicate, a common-law trust, and that in so far as defendants were concerned, the said Gold Blossom gold and silver quartz mining claim became open public land eligible for location as mining claims from and after July 1st, 1931, that the said William G. Dean was prohibited by law on July 31st, 1931, from acting in a dual capacity.

"That the defendant's locations of Lady Esther and the Bonnie Brae Placer Mining Claims are good and valid, and that defendants are entitled to a decree quieting their title thereto in said defendants as against the plaintiff, and that defendants are entitled to a judgment for their costs herein."

A judgment was then rendered quieting title to the two placer mining claims in defendant Myrtle N. Griffith.

Appellant offers two propositions which, it is alleged, necessitate a reversal of the judgment. First, it is urged that the acts of a trustee contrary to the best interest of his beneficiary and in violation of his trust are not void, as the trial court concluded, but merely voidable at the option of the beneficiary; second, that a tenant may not deny his landlord's title in a proceeding against him to recover property leased to him by his landlord.

[2-4] Appellant's first proposition, viz., that the acts of a trustee contrary to the best interests of his beneficiary are not void absolutely but voidable at the option of the beneficiary, is correct and the trial court's conclusion of law to the contrary, based only on the finding that Dean was agent for the Sierra Syndicate at the time he attempted to locate the "Gold Blossom" claim for appellant, is not a sufficient finding to support the judgment. There is no question that under the findings the syndicate, as beneficiary, could have the attempted location in favor of plaintiff set aside or held in trust for it, but until such time as the act of the trustee or agent is questioned in a proper action instituted by the syndicate, the location in the name of appellant

will have its full legal effect. See Myrick v. O'Neill, 33 Cal.App.2d 644, 92 P.2d 651; Depner v. Joseph Zukin Blouses, 13 Cal. App.2d 124, 56 P.2d 574. An act injurious to or fraudulent as to a beneficiary is voidable only and may be either affirmed or repudiated by such beneficiary. Pacific Vinegar, etc., Works v. Smith, 145 Cal. 352, 78 P. 550, 104 Am.St.Rep. 42; Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 P. 749; Petray v. First Nat. Bank, 92 Cal.App. 86, 267 P. 711; Restatement, Trusts, § 218. The syndicate was not a party to this action nor do the findings disclose that it has at any time repudiated the act of its agent Dean in locating for appellant. It is true that there is a finding that the attempted transfer of the interest in the claim from the syndicate to appellant was without consideration. For that reason it might be argued that the syndicate would never ratify such an act and that it should be considered void from the beginning; however, no such speculation can be indulged in here. The invalidity of Dean's act cannot be urged by respondents, who must be considered as strangers to any question of title as between the appellant and the Sierra Syndicate.

[5] Respondents attempt to argue that the whole case was tried upon the issue of fraud; that by concluding that appellant had no title, the trial court inferentially found that there was fraud in the making of the lease; and that therefore the question of whether or not a trustee is entitled to act in a dual capacity and whether this act may be questioned by a stranger to the relation becomes wholly immaterial when the issue is fraud and deceit. It is further argued that the location by Dean in the name of plaintiff was a part of a scheme by the syndicate to defraud the United States government, the state of California and the county of Sierra; that it was a scheme to keep title to the claim without doing assessment work or paying taxes. It is also alleged that the trial court properly concluded that the claim became open public land eligible for location by respondents, for the reason that on June 1, 1936, when respondents located the placer claims, the title to the "Gold Blossom" claim was in the state of California because of a previous tax sale. If any of the above allegations had been included in the findings made by the trial court, then the judgment might be upheld, but no one of them is present in such findings. Certain exhibits introduced at the trial are referred to by respondents as supporting the allegations of fraud. Even if these exhibits were considered by this court, they would not be sufficient to make further findings, but they cannot be said to be properly before this court. No bill of exceptions was presented or settled. No notice for the preparation or filing of a transcript of evidence under the provisions of section 953a of the Code of Civil Procedure was given. The exhibits were not a part of the pleadings and therefore cannot be considered a part of the judgment roll.

The conclusion of law that the attempted location for appellant by Dean was void and the judgment quieting title in favor of respondent Myrtle Griffith are based solely on the finding of fact that Dean was acting in a dual capacity and contrary to the best interests of his original cestui que trust, the Sierra Syndicate. For the reasons previously discussed it cannot be said that the judgment is supported by the findings. This conclusion being sufficient to require a reversal of the judgment, there is no necessity for a consideration of appellant's second contention to the effect that a lessee is estopped from questioning his landlord's title.

The judgment is reversed.

We concur: GIBSON, C. J.; EDMONDS, J.; CARTER, J.; TRAYNOR, J.; SPENCE, J. pro tem.

45 Cal.App.2d 576

PEOPLE v. PIANEZZI et al.

Cr. 3414.

District Court of Appeal, Second District, Division 1, California.

June 26, 1941.

1. Jury 🔑29(2)

A defendant charged with robbery may waive his constitutional right to be tried by a jury. Const. art. 1, § 7, as amended in 1928.

2. Jury 🔑29(2)

Where the Constitution prior to amendment authorized waiver of jury trial only in misdemeanor cases, but after amendment provided a trial by jury may be waived in all criminal cases, it was assumed that the amendment was adopted for express purpose of extending that right to felony charges. Const. art. 1, § 7, as amended in 1928.

3. Robbery 🔑24(3)

In robbery prosecution, evidence identifying defendant as one of the participants was sufficient to sustain conviction.

4. Criminal law 🔑254

In robbery prosecution, claimed inconsistencies in testimony of witnesses were matters addressed to the trier of facts.

5. Robbery 🔑24(3)

In robbery prosecution, it is not necessary that the identification of a defendant be made positively by any number of witnesses.

6. Criminal law 🔑260(11)

In prosecution for bank robbery, whether defendant was one of the participants in the robbery was for the trial judge sitting without a jury to determine upon all the evidence in the case.

7. Criminal law 🔑260(11)

In prosecution for bank robbery, defendant's testimony wherein he denied any complicity in the robbery created but a conflict in evidence and it was within province of trial judge, sitting without jury, to resolve such conflict against defendant.

8. Criminal law 🔑170½(1)

In prosecution for bank robbery, action of prosecutor in asking question which assumed that the defendant was in the bank at the time of the robbery did not constitute prejudicial "misconduct" where one witness had previously testified that defendant was in bank and participated in the crime, and court reframed the question by asking "Did you see him at the bank that day?" thereby eradicating the claimed objectionable feature.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

9. Criminal law 🔑912½, 1037(1)

In prosecution for bank robbery, claimed prejudicial misconduct of prosecutor in asking question which assumed that the defendant was in bank at time of the robbery does not come within exception to the general rule that where no objection was made to the alleged misconduct by the defendant such misconduct will not furnish sufficient ground to justify the granting of a new trial or reversal of judgment.

10. Criminal law 🔑1186(4)

The constitutional provision that no judgment shall be set aside unless the court shall be of the opinion that the error complained of has resulted in miscarriage of justice is not intended to serve as authority for reversal of a judgment, but its saving grace is directed toward affirmance of judgment notwithstanding errors in law or procedure unless after examination the appellate tribunal is of the opinion that errors have resulted in a miscarriage of justice. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Peter Pianezzi, Leo W. Boster and others were indicted for the crime of robbery. Leo W. Boster was convicted of the crime of robbery of the first degree, and he appeals.

Affirmed.

Leo W. Boster, in pro. per.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

On May 4, 1939, the Yokohama Specie Bank in Los Angeles was held up and robbed of $7,565. In an amended indictment returned by the grand jury appellant and three other men were accused of the crime. Following a plea of not guilty, appellant waived trial by jury, which waiver was concurred in by his counsel and the district attorney. He was tried separately from his codefendants and by the court found guilty of the crime of robbery as charged in the amended indictment, which the court fixed as robbery of the first degree and further found that at the time of the commission of the offense appellant was armed with a deadly weapon. From the judgment of conviction this appeal is prosecuted.

[1, 2] By his brief, filed in propria persona, appellant concedes that he personally, as well as his counsel and the prosecutor, waived trial by jury, but he contends that a defendant, by reason of the guaranties of the Constitution of the United States, cannot waive his constitutional right to be tried by a jury. In the leading case of Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263, 279, note, the Supreme Court of the United States, in an elaborate opinion reviewing all earlier cases on that subject, some of which are conflicting with the views expressed in the cited case, held that a person charged with a crime may, consistently with the provisions of the federal Constitution, waive trial by a jury of twelve and consent to a trial by any lesser number or by the court without a jury. The United States Supreme Court concluded that the constitutional provision was meant to confer a right upon the accused which he might forego at his election. In California our Constitution as amended in 1928 (Const., art. I, sec. 7) reads in part: "A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel." This constitutional provision specifically authorizes a defendant to waive his right to trial by jury. Since the Constitution prior to the aforesaid amendment authorized the waiver of a jury trial only in misdemeanor cases, it must be assumed the amendment was adopted by the people of this state for the express purpose of extending that right to felony charges.

[3] Appellant next asserts that the evidence is insufficient to support the judgment of conviction, in that proof of his identity as one of the participants in the robbery does not measure up to the standards required by law. This claim is without merit. Appellant was identified positively by four employees of the bank. The robbers were in the bank between ten and fifteen minutes, were unmasked, and as to the opportunity for observation of the participants by the bank employees, the record discloses the following testimony on the part of one of the witnesses who identified appellant:

"* * * A. Yes, moved here, and then he told me to put my hands down. So I did. That is when I had really a good look at him.

"Q. (By Deputy District Attorney) Did you get a front view of him? A. Yes, a front view.

"Q. Did you get a side view of him? A. Yes, I had a side view later on, both sides, front and back, because I was facing—I was still facing this way, so that I could see him, that is all. I just watched him all the time he was there, and he was always moving.

"Q. How long did you stand in that position? A. Well, I really don't know. Perhaps eight minutes or ten minutes; it seemed a long time to me."

[4-7] Claimed inconsistencies in the testimony of the witnesses were matters addressed to the trier of facts. It is not necessary that the identification of a defendant be made positively by any number of witnesses. This issue is one for the jury, and in the instant case was for the trial judge sitting without a jury, to determine upon all the evidence in the case. 8 Cal.Jur. p. 169. The record discloses that the trial judge made no mistake here. What we have just said is equally applicable to the testimony given by defendant wherein he denied any complicity in the robbery. At most, it is at once apparent that defendant's entire testimony created but a conflict with the evidence produced by the prosecution, and it was within the province of the trial judge to resolve such conflict against the defendant.

[8, 9] It is next contended by appellant that the deputy district attorney was guilty of prejudicial misconduct during the trial. In this connection it appears that following the testimony of one witness who had identified appellant as being one of the robbers, a second witness was called and interrogated as follows:

"Q. (By Deputy District Attorney) Now, have you seen the defendant this morning? A. Yes, I have.

"Q. Do you recognize him? A. Yes, I do.

"Q. Which man was he? A. He is sitting there in the dark blue suit.

"Q. Where did you see him that day? A. I saw him this morning as he came in.

"Q. I mean on the day of the robbery of the bank what was his position?

"Mr. Warner (Defendant's Counsel): The question is leading and suggestive.

"The Court: Objection overruled. Did you see him at the bank that day? A. Oh, yes * * *."

Appellant claims prejudicial misconduct because one of the questions asked by the prosecutor assumed that the former was in the bank at the time of the robbery when there was no evidence of such fact. However, as heretofore pointed out, there was evidence of such fact because one witness already had identified appellant as being in the bank and participating in the crime. Further, the court reframed the question so as to eradicate therefrom the claimed objectionable feature allegedly therein contained. In the circumstances, no prejudice could have ensued to appellant's substantial rights. Neither does the claim of prejudicial misconduct come within the exception to the general rule that where, as in the instant case, no objection was made to the alleged misconduct by the defendant, such misconduct will not furnish sufficient grounds to justify the granting of a new trial or reversal of the judgment. People v. Berryman, 6 Cal.2d 331, 337, 57 P.2d 136.

[10] Finally, appellant urges that a reversal of the judgment should be had pursuant to the provisions of section 4½ of article VI of the state Constitution. This section is not intended to serve as authority for reversal of a judgment, but its saving grace is directed toward affirmance of a judgment notwithstanding errors in law or procedure unless after examination of the entire cause, including the evidence, the appellate tribunal shall be of the opinion that the errors complained of have resulted in a miscarriage of justice. Moreover, from a reading of the record in the case at bar we would not be warranted in saying that there was a miscarriage of justice.

For the foregoing reasons, the judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

45 Cal.App.2d 680

COCA COLA BOTTLING CO. v. FELICIANO et al.

Civ. 2756.

District Court of Appeal, Fourth District, California.

June 30, 1941.

1. Homestead 🔑**33**

Where building is actual bona fide residence of a party, he may legally select it and land on which it is situated as a "homestead", even though, incidentally, a part thereof is used for other purposes than those of family residence.

See Words and Phrases, Permanent Edition, for all other definitions of "Homestead".

2. Homestead 🔑**57(3)**

Evidence that building across front of lot was flush with sidewalk, that two of three front rooms were used as stores and for bottling wines, that third was used as a warehouse, that gasoline, beer, wines and soft drinks were sold by owner of building and that he and his family had no other home aside from their living quarters in the rear of the building supported finding that property was actual bona fide residence of owner and his wife which could be legally selected as a "homestead".

3. Appeal and error 🔑**1008(1)**

In action to have a declaration of homestead declared invalid on ground that property was used for business purposes rather than residential purposes, the primary and incidental uses of the premises were questions of fact for the trial court.

4. Appeal and error 🔑**996**

Where reasonable inferences have been drawn by trial judge from undisputed evidence in support of his judgment, like inferences must be drawn on appeal.

5. Appeal and error 🔑**1149**

In action to have a declaration of homestead declared invalid, reversal of judgment was not required because of conflict between trial court's finding that lien of judgment attached to property even though declaration of homestead thereon had been previously recorded and finding that homestead was valid, but findings would be modified by striking out statement that judgment became a lien on property. Code Civ.Proc. § 956a.

6. Homestead 🔑**103**

The lien of a judgment does not attach to a homestead.

7. Appeal and error 🔑**1149**
Jury 🔑**18**

In action to have declaration of homestead declared invalid, trial by jury was not a matter of right and reviewing court could properly modify trial court's findings. Code Civ.Proc. § 956a.

8. Appeal and error 🔑**110, 782**

Since an order denying a motion for new trial is not appealable, attempted appeal from such an order was dismissed. Code Civ.Proc. § 963.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by the Coca Cola Bottling Company againinst Frank D. Feliciano and others, to have set aside and declared invalid a declaration of homestead filed by Vernie Belle Feliciano, wife of Frank D. Feliciano. Judgment for the defendants and the plaintiff appeals from the judgment and an order denying a new trial.

Judgment affirmed and the appeal from the order dismissed.

C. Douglas Smith (of Smith & Smith), of Santa Maria, for appellant.

Fred A. Schaeffer, of Santa Maria, for respondents.

MARKS, Justice.

Plaintiff, a judgment creditor of Frank D. Feliciano, brought this action to have set aside and declared invalid, a declaration of homestead on property in San Luis Obispo filed by Vernie Belle Feliciano, wife of Frank D. Feliciano. Defendants had judgment and plaintiff has appealed.

The facts of the case are not in dispute. Mr. and Mrs. Feliciano and their children lived on the property in question. The legality of the declaration of homestead is not questioned, if the use to which this property had been put left it subject to the homestead law.

The property consisted of a lot which had a width of about fifty-four feet and a depth of about one hundred ten feet. There was a building across the front of the lot, flush with the sidewalk, which was used by Mr. and Mrs. Feliciano for business and residential purposes. The rear line of this building was irregular, the deepest part extending back about fifty-four feet. The front was divided into three rooms, two of which were used as stores and for bottling wines. The third was used as a warehouse. Back of the rooms which were used as stores were the rooms used by the Feliciano family for their living quarters. These living quarters, which were in the main building, consisted of a living room, kitchen, pantry, bedroom, bath and screen porch. They were furnished in the manner usually found in modest homes. On the rear of the lot was a building in which was a shed, a garage, and a bedroom.

Frank D. Feliciano bought the property in question in 1934, and, with his family, has since occupied it as his residence and place of business. The family had no other home.

Feliciano was the distributor of the products of plaintiff in San Luis Obispo and northern Santa Barbara counties. In addition to operating this business he sold gasoline from a pump in front of the building, sold beer and wines at both wholesale and retail in the storerooms, as well as soft drinks. He also bottled wines there. At times he employed as many as six persons using four delivery trucks and one automobile in his business. Mrs. Feliciano assisted in the business, part of the time, by waiting on trade and in helping with the books. The gross revenue from the business during the year 1937 was about $80,000. We are not informed as to the amount of the net profits.

Plaintiff seeks a reversal of the judgment on the ground that the primary use of the property was for business purposes, the residential occupancy being merely incidental thereto, and that, therefore, it was not subject to being homesteaded. In support of this argument the following cases are cited: Ackley v. Chamberlain, 16 Cal. 181, 76 Am.Dec. 516; Laughlin v. Wright, 63 Cal. 113; In re Estate of Noah, 73 Cal. 590, 15 P. 290, 2 Am.St.Rep. 834; McDowell v. His Creditors, 103 Cal. 264, 35 P. 1031, 37 P. 203, 42 Am.St.Rep. 114; Beronio v. Ventura County Lumber Co., 129 Cal. 232, 61 P. 958, 79 Am.St.Rep. 118; and In re Estate of Levy, 141 Cal. 646, 75 P. 301, 99 Am.St.Rep. 92.

[1] The arguments of plaintiff are all clearly answered in the case of McKay v. Gesford, 163 Cal. 243, 124 P. 1016, 1017, 41 L.R.A.,N.S., 303, Ann.Cas.1913E, 1253, in which the Supreme Court said:

"It was recognized at a very early day that questions of difficulty would arise under our homestead law touching the character of the property sought to be exempted under its provisions. Ackley v. Chamberlain, 16 Cal. 181, 76 Am.Dec. 516. It is there said 'that the question whether property devoted chiefly to business purposes can be subjected to a homestead claim is full of embarrassment.' But, when it is borne in mind that the homestead law is a beneficent law calling for liberal construction (Heathman v. Holmes, 94 Cal. 291, 29 P. 404), we think all difficulty will be removed and all doubt resolved by the following suggestion: If under these identical circumstances of ownership of the property, of the construction of the building thereon, and of the use of that building Mrs. Ferguson, instead of being a married woman with a husband, had been a widow with minor children to support, and an attack had been made upon a declaration of homestead which she had duly made and recorded upon the property, would any court say, or would anyone say, that, notwithstanding that it was the residence and sole and only home of herself and babies, it could not be impressed with the homestead characteristics because the principal purpose and use of the premises was its conduct by her as a hotel or boarding house in order that she might thus support herself and babies and give them a home? But the law is no different if you substitute a husband for the babies. The dominant and controlling fact still remains that this was the residence and home of the family, that it was suitable for the purpose, and was used for the purpose. We are not in this case embarrassed by difficulties which have arisen in other cases where the character of the business maintained is one entirely foreign to the conception of a home, if not repugnant to it—such a case, for example, as is instanced by Chief Justice Field in Ackley v. Chamberlain [16 Cal. 181, 76 Am.Dec. 516], supra, of an effort to impress a gas factory with homestead characteristics because the owner lived in it. Here the very business which was carried on was conducted for the purpose of maintaining the home, for, if this be not so, then it must follow that any widow seeking to support herself and perhaps her children by taking boarders or lodgers under circumstances where it can be truly said that the principal business conducted upon the premises is that of a lodging house or a boarding house cannot have a homestead, although she is conducting this very business so as to maintain herself and her offspring in a home. Each case of this character stands by itself and is to be governed by its own facts. Our own cases have passed recently under review in [Re] Estate of Levy, 141 Cal. 646, 75 P. [301] 317 [99 Am.St. Rep. 92]. Without again reviewing them, it is sufficient to refer to this case. Therein, after extended consideration of our decisions and amongst them Heathman v. Holmes, 94 Cal. 291, 29 P. 404, where it is said, 'Using a building partly or even chiefly for business purposes, or renting part of it, is not inconsistent with the right of homestead, provided it is and continues to be the bona fide residence of the family' this court said: 'These cases are all authority for the proposition that, if a building is the actual bona fide residence of a party, he may legally select it and the land on which it is situated as a homestead, even though, incidentally, a part thereof, no matter how large, may be used by him for other purposes than those of family residence. There is no decision of this court in conflict with this view.' "

The cases relied on by plaintiff are distinguished in some of the following, each of which supports the rule announced in the McKay case: Skinner v. Hall, 69 Cal. 195, 10 P. 406; Heathman v. Holmes, 94 Cal. 291, 29 P. 404; In re Estate of Ogburn, 105 Cal. 95, 38 P. 498; In re Estate of Levy, supra; Harlan v. Schulze, 7 Cal.App. 287, 94 P. 379; Schmidt v. Denning, 117 Cal.App. 36, 3 P.2d 322; Vincenzini v. Fiorentini, 2 Cal. App.2d 739, 38 P.2d 876.

[2] Under the rules announced in these cases the findings of the trial court that the property was the actual, bona fide dwelling and residence of defendants, and that the business conducted in and from the premises was incidental to its use as a dwelling, finds support in the evidence.

[3, 4] The primary and incidental uses of the premises were questions of fact addressed to the trial court in the first instance. It is elemental that where reasonable inferences have been drawn by the trial judge from undisputed evidence in support of his judgment, like inferences must be drawn on appeal. Witherow v. United American Ins. Co., 101 Cal.App. 334, 281 P. 668; Mah See v. North American, etc., Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123.

[5] Plaintiff maintains that the judgment must be reversed because of a conflict in the findings, relying on such cases as Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11; Hollywood, etc., Co. v. Hollywood Laundry Service, 217 Cal. 131, 17 P.2d 712; Vuich v. Smith, 140 Cal.App. 453, 35 P.2d 365; and Mohun v. Timm, 20 Cal.App.2d 136, 66 P.2d 701.

The trial court found, in effect, that the lien of plaintiff's judgment which was recovered on March 31, 1938, attached to the property even though the declaration of homestead was recorded on December 29, 1937, and at the same time held that the homestead was valid and rendered the property exempt from execution and forced sale.

[6, 7] The lien of a judgment does not attach to a homestead. Thatcher v. Van Bever, 139 Cal.App. 658, 34 P.2d 740; Graham v. Hunt, 119 Cal.App. 586, 7 P.2d 186. The finding that the lien of the judgment attached to the homesteaded property is more of a mistaken conclusion of law drawn from admitted facts than a true finding of fact. As a trial by jury in this case was not a matter of right we may modify the findings. § 956a, Code Civ.Proc.

An order denying a motion for new trial is not appealable. § 963, Code Cov. Proc.

It is ordered:

That the words, "and it is true that said judgment became a lien on the property owned by the defendant Frank D. Feliciano", appearing at the end of paragraph numbered II of the findings of fact and conclusions of law are stricken therefrom.

[8] That the attempted appeal from the order denying the motion for new trial is dismissed.

That the judgment is affirmed.

We concur:

BARNARD, P. J.; KELLY, J., pro tem.

45 Cal.App.2d 596

PEOPLE v. HUSTON.

Cr. 3450.

District Court of Appeal, Second District, Division 2, California.

June 27, 1941.

1. Criminal law ⟹369(1)

In prosecution for committing lewd and lascivious act, evidence that defendant had perpetrated similar acts with person or persons other than the prosecuting witness is inadmissible, and if received is prejudicial error. Pen.Code, § 288.

2. Criminal law ⟹369(1)

In prosecution for kissing the private parts of a female of almost 12 years of age, admitting testimony of a child other than the prosecuting witness that as a forfeit for game which defendant played with her, she was required to kiss defendant was error which was prejudicial. Pen.Code, § 288.

3. Criminal law ⟹369(1)

In prosecution for kissing the private parts of a female of almost 12 years of age, testimony of a child other than the prosecuting witness, that defendant asked her what she had on, and witness said "I just have my unionsuit and dress", and that defendant asked what her unionsuit was like and requested to see it was error which was prejudicial. Pen.Code, § 288.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Louis Arby Huston was convicted of committing lewd and lascivious acts, and he appeals.

Reversed and new trial ordered.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant was convicted after trial by jury of violating section 288 of the Penal Code. This appeal is from the judgment and order denying his motion for a new trial.

The evidence being viewed most favorably to the People (respondent), the essential facts are:

In the spring of 1940 defendant on two separate occasions committed an act prohibited by section 288 of the Penal Code, to-wit: He kissed the private parts of the prosecuting witness, a female of almost twelve years of age.

Defendant took the witness stand and specifically denied having committed any of the acts charged against him.

Defendant relies for reversal of the judgment, among others, on the following proposition:

The trial court committed prejudicial error in receiving the following evidence of defendant's conduct on occasions when the prosecuting witness was not present:

(a) Testimony of a child other than the prosecuting witness that as a forfeit for a game which he played with her she was required to kiss him;

(b) Testimony of a child other than the prosecuting witness as follows:

"A He said, 'Aren't you cold?' and I said, 'Yes.' And he said, 'Well, what have you got on?' I said, 'I just have my unionsuit and dress.' And he said, 'What is your unionsuit like?' And I said, 'It is like panties and a shirt, like.' And he said, 'Let me see them.' I said, 'No.' He told me to let him see them three times, and I said, 'No', and then I walked off.

"Q Where did this happen?

"A In the filling station."

[1] This proposition is tenable. The law is established in California that, in a prosecution for committing lewd and lascivious acts prohibited by section 288 of the Penal Code, evidence that defendant has perpetrated similar acts with a person or persons other than the prosecuting witness is inadmissible and, if received, is prejudicial error. (People v. Rogers, 26 Cal. App.2d 371, 372, 79 P.2d 404; People v. Asavis, 22 Cal.App.2d 492, 494, 71 P.2d 307; 16 Cor.Jur. [1918] 610, § 1194; 22 C.J.S., Criminal Law [1940] p. 1178, § 691.)

[2,3] Applying the rule of law above stated to the facts in the instant case, it is clear that the trial court committed prejudicial error in permitting the prosecution to introduce over objection evidence that on prior occasions defendant with minor female children other than the prosecuting witness had committed or attempted to commit offenses prohibited by section 288 of the Penal Code.

This court on previous occasions has directed the attention of the profession to the reasons for this rule, which are so aptly stated in the universally acknowledged pronouncement of Lord Chief Justice Hale on the subject of the crime of rape, which also applies to offenses interdicted by section 288 of the Penal Code. It is as follows:

"It must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused though never so innocent; [and we should] be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses." (1 Hale P.C. [1736] 635, 636.)

For the foregoing reasons the judgment and order appealed from are and each is reversed and a new trial is ordered.

We concur: MOORE, P. J.; WOOD, J.

PEOPLE v. VANDERPOOL et al. *

Cr. 2163.

District Court of Appeal, First District, Division 1, California.

June 25, 1941.

Hearing Granted July 24, 1941.

1. Conspiracy 🔑51

The penal paragraph of section of Penal Code relating to conspiracy, providing that persons conspiring to commit any felony shall be punishable as "in this code" provided for punishment of commission of such felony, applies only where felony is made punishable by Penal Code. Pen.Code, § 182.

See Words and Phrases, Permanent Edition, for all other definitions of "In This Code".

2. Criminal law 🔑86

The first penal paragraph of conspiracy section of Penal Code applies to any act which is injurious to public health, morals or tends to pervert or obstruct justice or due administration of laws, so that if act denounced by section of Penal Code is made a misdemeanor in such code, it is by such first penal paragraph made punishable as a misdemeanor; otherwise second paragraph prescribing punishment controls question of jurisdiction. Pen.Code, § 182.

3. Criminal law 🔑86

Whether violations of Small Loan Act were offenses against public morals and tended to pervert and obstruct justice and due administration of laws within first penal paragraph of section of Penal Code relating to conspiracy was immaterial, as respects jurisdiction of prosecution for conspiracy to violate such act, where Legislature laid down rule that unless offense forming object of conspiracy is punishable under Penal Code, jurisdiction is controlled by second penal paragraph of conspiracy section. St.1939, p. 2886; Pen.Code, § 182.

4. Statutes 🔑231

Where no specific punishment was prescribed by section of Penal Code making failure to procure license prescribed by law a misdemeanor, section must be read in conjunction with another section of same code providing for punishment of misdemeanors except in cases where different punishment is prescribed. Pen.Code, §§ 19, 435.

5. Criminal law 🔑86

As respects contention that superior court lacked jurisdiction of prosecution for conspiracy to violate Small Loan Act, on theory that violation of act was made a misdemeanor in Penal Code, so that jurisdiction was not controlled by second penal paragraph of conspiracy section of code, where Small Loan Act provided that violator should not only be subject to imprisonment and fine but should be prohibited from receiving any emoluments whatsoever from transaction, it was inconsistent with section of Penal Code making failure to procure license prescribed by law a misdemeanor. St.1939, pp. 2887, 2896, §§ 4, 20; Pen.Code, §§ 182, 435.

6. Statutes 🔑225½

When inconsistency exists between statute dealing generally and one dealing specifically with a phase of same subject matter, special statute is controlling.

7. Criminal law 🔑84(1)

As respects contention that superior court lacked jurisdiction of prosecution for conspiracy to violate Small Loan Act, on theory that violation of act was a misdemeanor punishable under Penal Code, so that jurisdiction was not controlled by second penal paragraph of conspiracy section of code, assuming inconsistent provisions of section of Penal Code making failure to procure license prescribed by law a misdemeanor and section of Small Loan Act prescribing punishment for violation of act to be valid, later enacted provision of Small Loan Act prevailed. St.1939, pp. 2887, 2896, §§ 4, 20; Pen.Code, §§ 182, 435.

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* Subsequent opinion 128 P.2d 513.

8. Criminal law 🔑86

The superior court was not without jurisdiction of prosecution for conspiracy to violate Small Loan Act on theory that violation of act was a misdemeanor punishable under Penal Code and jurisdiction was not controlled by second penal paragraph of conspiracy section, as against contention that if conspiracy was not made punishable by Penal Code, it was not punishable at all. St. 1939, p. 2886; Pen.Code, § 435.

9. Criminal law 🔑86

As respects contention that superior court lacked jurisdiction of prosecution for conspiracy to violate Small Loan Act, on theory that violation of act was a misdemeanor punishable under Penal Code and jurisdiction was not controlled by second penal paragraph of conspiracy section, failure to obtain license under Small Loan Act did not involve "perversion or obstruction of justice" within conspiracy section. St. 1939, p. 2886; Pen.Code, § 435.

See Words and Phrases, Permanent Edition, for all other definitions of "Perversion or Obstruction of Justice".

10. Conspiracy 🔑34

Subdivision 5 of section of Penal Code relating to conspiracy, in so far as it relates to "perversion or obstruction of justice", is aimed at conspiracies to commit acts designed and intended to obstruct its administration, but not to acts or conduct which, while repugnant to justice, are not so designed or intended. Pen.Code, § 182, subd. 5.

11. Pawnbrokers and money lenders 🔑1

The Small Loan Act is independent legislation enacted without reference to Penal Code, to control lenders and brokers engaged in business of making loans within specified amounts, and while penalty is prescribed for violation of its provisions, purpose of act is to regulate rather than prohibit legitimate business. St.1939, p. 2886.

12. Criminal law 🔑86

A conspiracy to violate Small Loan Act falls clearly within language of section of Penal Code relating to conspiracy, which provides that conspiracy to commit any crime other than felony or specific offenses enumerated in its fifth subdivision shall be punishable by imprisonment in county jail or state penitentiary not exceeding two years, and permits trial to be had in superior court of county in which any overt act tending to accomplish it shall have been committed. St.1939, p. 2886; Pen.Code, § 182.

13. Conspiracy 🔑47

The essential elements in conspiracy charge need not be proved by direct evidence, but may be deduced from evidentiary circumstances presented. Pen.Code, § 182.

14. Conspiracy 🔑47

Evidence sustained conviction of conspiracy to engage in making of small loans without obtaining license therefor, as against contention that there was no proof that two defendants who were employed by third defendant were aware of fact that third defendant had neglected to obtain required license. St.1939, p. 2886; Pen.Code, § 182.

15. Conspiracy 🔑47

Evidence sustained conviction under count of indictment charging conspiracy to make loans for $300 or less and to charge rates of interest in excess of maximum allowed by Small Loan Act. St.1939, p. 2886; Pen.Code, § 182.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

H. F. Vanderpool and others were convicted of conspiracy to violate provisions of the California Small Loan Act, St.1939, p. 2886, and they appeal.

Affirmed.

John B. Ehlen, of San Francisco, and Melvin V. Wood, of Oakland, for appellants.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

WARD, Justice.

Appellants were convicted by the court sitting without a jury on two counts of an indictment charging conspiracy to violate the provisions of the California Small Loan Act. Deering's General Laws, 1939 Supp., p. 1509; Stats. 1939, Ch. 1045, p.

2886. The first count charged that defendants conspired "* * * to charge, contract for and receive, by device, subterfuge and pretense, greater interest, consideration and charges than are authorized by the provisions of the said California Small Loan Act for the loan, use and forbearance of money, goods and things in action, and for the loan, use and sale of credit and to require borrowers * * * in connection with and incidental to the making of loans, to contract for, purchase and agree to purchase other things and merchandise in connection with such loans and to enter into collateral sales agreements and contracts, in connection with such loans." Eleven overt acts are alleged in the count. The second count charged that during a specified period of time defendants conspired "to engage in the business of making and negotiating * * * loans of money, credit, goods, and things in action in the amount and of the value of less than $300.00 without first obtaining from the Commissioner of Corporations of the State of California a license authorizing them so to do." The superior court, holding that the conspiracy charged in each count came within the purview of section 182 of the Penal Code, specifically subd. 1 and the second penal paragraph thereof, followed the provisions of that subdivision and paragraph in entertaining jurisdiction and passing judgment. We quote the section in full since its construction and application to this case present the main question on the appeal: "If two or more persons conspire: 1. To commit any crime; 2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime; 3. Falsely to move or maintain any suit, action or proceeding; 4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises; 5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws. They are punishable as follows: When they conspire to commit any felony, or to commit any act injurious to the public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws, they shall be punishable in the same manner and to the same extent as in this code provided for the punishment of the commission of the said felony or act, respectively. When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, and cases of such conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done."

Appellants' operations which led to their arrest and prosecution were as follows: For some years prior to the effective date of the Small Loan Act (September 19, 1939), Vanderpool had been engaged in the business of making unsecured loans. At times appellant Clancy was in his employ. Two months after the said act became effective Vanderpool, having obtained from the board of equalization a seller's permit under which he was authorized to sell tangible personal property; and from the city of Oakland, a merchandise agent's license, opened offices in the city of Oakland under the name of Bell Sales Company. These offices consisted of two adjoining rooms with an interconnecting door. There was a partition of wood and frosted glass between the rooms, but the interconnecting door was usually kept open. On the entrance door to one of the rooms were painted the words "H. F. Vanderpool, Public Accountant, Agent for Financial Service Company"; on the other, the words "Bell Sales Company". While operating the Bell Sales Company, Vanderpool became an agent for the sale of automobile signals. Appellants Clancy and Rouse, the latter having been previously employed in a similar business, subsequently entered the employ of Vanderpool, and thereafter most of the sales hereinafter mentioned were made by them. The stock of the business consisted of some twenty-six pieces of jewelry which Vanderpool purchased at the time of opening the offices at a cost of less than $90. When an individual applied for a loan, he was directed to the room where the jewelry was displayed and told that he might purchase a piece on credit which would be repurchased for cash immediately in the next room at the amount he wished to borrow. A sales tag, simply containing the description "merchandise", was made out for the purchase and was usually signed by the customer. In the next room,—occasionally in the same room,—the article was turned back and the desired small loan made. The amount named on the sales tag represented the sum of the loan, the state sales tax (notwithstanding there was no actual or intended sale), and interest on the loan calculated to the time the purported price of the article became payable, the rate of interest being higher than permitted by the Act and in some instances exceeding 30 per cent a month. The stock of jewelry was neither augmented by purchases nor diminished by sales. It figured in more than six hundred so-called sales without ever leaving the premises. The stock was never on display except in connection with contemplated loans; and at times the loan was consummated without the use of the jewelry. The sales operations were obviously merely used as a subterfuge to make the loan. One of appellants testified: "Q. Do you remember any cases in which you allowed the customer to make a selection of the merchandise that he wanted? A. No, I can't say I did; sometimes I laid two or three articles out there if they wanted to look at them, if some customer came in and wanted to look at the jewelry, I laid three or four articles out there."

Appellants contend (1) that the conspiracy charged is a misdemeanor conspiracy over which the superior court has no jurisdiction because (a) it falls within the purview of subd. 5 of said section 182 and (b) the Small Loan Act itself, expressly and by implication, makes a violation of its provisions a misdemeanor; (2) that the evidence is insufficient to establish the conspiracy, sought to be proved under the first count of the indictment, to make loans for $300 or less, and to charge rates of interest in excess of the maximum allowed by the Small Loan Act; and (3) that the evidence is insufficient to prove a conspiracy, under the second count of the indictment, to engage in the making of such loans without first obtaining a license therefor, since there was no proof that defendants Clancy and Rouse were even aware of the fact that Vanderpool had neglected to obtain the required license from the Commissioner of Corporations.

Specifically, appellants contend that violations of the Small Loan Act are offenses against public morals; that they tend to pervert and obstruct justice and the due administration of the laws within the meaning of the first penal paragraph of said section, with the result that since the act provides that any person who violates it is guilty of a misdemeanor, conspiracy to violate it is likewise a misdemeanor. Respondent challenges the contention that conspiracies to violate the act are referable to subd. 5 thereof, maintaining that subd. 1 is the one applicable; and further contends that in any event it is only where the offense charged is a felony, or act referable to subd. 5, and made punishable by some provision of the Penal Code, that the punishment prescribed for the felony or act is, by the first penal clause of section 182, made applicable to such felony or act.

[1, 2] The first penal paragraph provides: "When they conspire to commit any felony * * * they shall be punishable * * * as in this code provided for the punishment of the commission of the said felony * * *". By virtue of the designation and inclusion of the phrase "in this code", it should be concluded that only where the felony is made punishable by the Penal Code does the first penal paragraph apply. Doble v. Superior Court, 197 Cal. 556, 241 P. 852; People v. Campbell, 1 Cal. App.2d 109, 36 P.2d 198. If this conclusion is correct under the opinion in the Doble case, it applies equally to "any act" which is injurious to public health, morals or tends to pervert or obstruct justice or the due administration of laws, so that if "the act" denounced by the section of the Penal Code is made a misdeameanor "in this code"; it is by said first penal paragraph made punishable as a misdemeanor. Otherwise the second paragraph prescribing the punishment controls the question of jurisdiction.

[3] It is advisable at this point to consider whether the substantive offense, the commission of which forms the object of the conspiracy, is in fact an act against public morals, etc. Appellants cite Lesser v. Collins, 1 Cal.App.2d 161, 36 P.2d 411 and People v. Van, 30 Cal.App.2d 663, 87 P.2d 57. In the Lesser case, the registrar of voters of the City and County of San Francisco appealed from an order for a peremptory writ of mandate directing that Lesser be permitted to qualify as a voter. It appeared that Lesser had been convicted of conspiracy to violate section 176 of the Penal Code. The offense (omission of duty by a public officer) was specifically denounced by the Penal Code as a misdemeanor, and no other punishment than that specified in the Penal Code provided. It involved the perversion of justice referred to in subdivision 5 and the first penal clause of section 182. The Van case involved a conspiracy to maintain a lottery

which is specifically denounced and the punishment therefor prescribed by Penal Code section 320.

The perpetration of any offense denounced by the Penal Code or otherwise is perhaps in a broad sense a perversion or obstruction of justice and interferes with the due administration of laws. The same thing may be said of acts against public morals, and perhaps in a more limited sense acts injurious to public health. We need not be concerned in the present case with the niceties of distinction between various offenses relating to public morals, etc., as the legislature wisely or unwisely has laid down the rule that unless the offense forming the object of the conspiracy is punishable under the provisions of the Penal Code, the jurisdiction is controlled by the second penal paragraph of section 182, and the courts are bound by this rule.

[4, 5] The consideration so far naturally leads to the question: Where is the punishment for a violation of the provisions of the Small Loan Act prescribed? Section 435 of the Penal Code reads: "Every person who commences or carries on any business, trade, profession, or calling, for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license prescribed by such law, is guilty of a misdemeanor." No specific punishment is prescribed by the section so it is necessary that it be read in conjunction with section 19 of the same code, which provides: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, or by both." An examination of the Small Loan Act discloses that a "different punishment is prescribed". Section 4 of the California Small Loan Act provides: "No person shall engage in the business of making or negotiating, for himself, or another, loans of money, credit, goods, or things in action, in the amount or of the value of three hundred dollars or less, without first obtaining a license from the Commissioner of Corporations." Deering's General Laws, 1939 Supp., pp. 1510, 1511. Section 20, page 1517 provides: "Any person and the several members, officers, directors, agents, and employees thereof, who shall violate or participate in the violation of any of the provisions of this act, or any of the rules, orders and regulations of the commissioner, shall be guilty of a misdeameanor. Any contract of loan in the making or collection of which any violation of this act shall have been committed, shall be void as to interest and charges, and neither the lender nor the broker shall have any right to collect or receive any interest or charges whatsoever." Stats.1939, ch. 1045, pp. 2886, 2887, 2896. Evidently the legislature intended that a violator of the provisions of the Small Loan Act should not only be subject to imprisonment and a fine but that any violator (person, officer or employee) should be prohibited from receiving any emoluments whatsoever from the transaction. To that extent it is inconsistent with section 435 of the Penal Code.

[6, 7] When an inconsistency exists between a statute dealing generally and one dealing specifically with a phase of the same subject matter, the special statute is controlling. Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 82 P.2d 29. In Pierce v. Riley, 21 Cal.App.2d 513, 519, 70 P.2d 206, 209, the court said: "It is not conclusive of this problem, but it is recognized as a rule of construction in determining which act is controlling under such circumstances, that the statute last approved, particularly if it be a special act applicable to a particular subject, will be controlling over one which was previously approved, on the theory that it is the latest utterance of the Legislature." See, also, Coca Cola Bottling Co. v. Feliciano, 32 Cal.App.2d 351, 89 P.2d 686. In Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L.R.A.,N.S., 813, 113 Am.St.Rep. 236, 7 Ann.Cas. 475, the court had before it two legislative enactments dealing with the licensing, the right to make loans on personal property, the amount of interest to be charged and providing a penalty for the violation thereof. Both enactments were declared unconstitutional, but the court held that the act later in time of adoption would otherwise have prevailed. Assuming the inconsistent provisions of code section 435 and section 20 of the Small Loan Act to be valid, the later enacted provision prevails.

[8] Appellants contend that if the conspiracy is not made punishable by the Penal Code it is not punishable at all. In Doble v. Superior Court, supra, 197 Cal. page 567, 241 P. page 856, the court said: "Nor do we find any merit in the contention that by section 183 there are no conspiracies punishable criminally other than those 'enu-

merated' in the preceding section (182), for the words 'any crime,' appearing in subdivision 1 of section 182, having been shown to include felonies and misdemeanors punishable under the law of the state, a conspiracy to violate the Corporate Securities Act, being a crime, would be 'enumerated' within the meaning of the terms of section 183." The violation of the Small Loan Act "being a crime", should come within the purview of subdivision 1 of section 182. It is possible that an alleged conspiracy may be designated under two or more of the subdivisions of section 182. It is possible that a conspiracy might exist falsely to maintain a suit, action or proceeding (subd. 3), to cheat and defraud by means which are in themselves criminal (subd. 4), which technically would be an act tending to pervert justice (subd. 5).

[9, 10] The failure to obtain a license as in the present case does not involve the perversion or obstruction of justice. One may conduct a business, such as is referred to in the second count of the indictment, without a license, and thereby, without being aware that a license is required, violate the law. One might, without wrongful intent, charge greater interest for a loan than is permitted by the Small Loan Act, and still be amenable to the provisions thereof. Subdivision 5 of section 182 in so far as it relates to the perversion or obstruction of justice is aimed at conspiracies to commit acts designed and intended to obstruct its administration, but not to acts or conduct which, while repugnant to justice, are not so designed or intended.

[11] The Small Loan Act is independent legislation enacted without reference to the Penal Code, to control lenders and brokers engaged in the business of making loans within specified amounts, and while a penalty is prescribed for the violation of its provisions, the purpose of the act is to regulate rather than prohibit legitimate business.

[12] The act itself makes no mention of a conspiracy to violate it, but such a conspiracy falls clearly within the language of the section of the Penal Code which we have discussed and which provides that a conspiracy to commit any crime other than a felony or the specific offenses enumerated in its fifth subdivision shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, and permits the trial thereof to be had in the superior court of the county in which any overt act tending to accomplish it shall have been committed.

[13-15] Appellants contend that the evidence as a matter of law is insufficient to sustain the judgments on each count, and on the second count an additional question is raised, namely, that appellants Rouse and Clancy did not know that it was necessary for Vanderpool to possess a license to operate. Appellant Rouse had previously worked for another concern in the same general line of business and knew that a license was necessary. Appellant Clancy testified that he knew the new law limited the rate on unsecured loans, but did not know whether Vanderpool had applied for a license. Certain evidence was introduced tending to impeach the witness in this respect. However, the essential elements in a conspiracy charge need not be proved by direct evidence but may be deduced from the evidentiary circumstances presented. People v. Ratliff, 131 Cal.App. 763, 22 P.2d 245; People v. Sisson, 31 Cal.App.2d 92, 87 P.2d 420. The mere recital of the facts in this case amply controverts the claim of insufficiency of the evidence to sustain the judgment on the second count and demonstrates that the two defendants who were formerly connected with other loan companies, but here claim lack of knowledge of the issuance or non-issuance of a license, must have been aware from the very manner in which the business was carried on, that it was operated without a license.

Under the facts as disclosed by the record, the essential elements necessary to each count in the indictment to establish the conspiracy charged were proved to a moral certainty and beyond a reasonable doubt against each defendant.

The judgments and orders are, and each of them is, affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

45 Cal.App.2d 580

PEOPLE v. STOWELL et al.

Cr. 3463.

District Court of Appeal, Second District, Division 1, California.

June 26, 1941.

1. Criminal law ⚷1081

Where order denying defendant's motion for new trial was entered February 24, 1941, and the written and only notice of appeal therefrom was filed March 14, defendant's appeal from order denying motion was ineffective and would be dismissed, since notice of appeal was not filed within statutory time. Pen.Code, § 1239.

2. Criminal law ⚷1144(13)

On defendant's appeal after a verdict finding defendant guilty, District Court of Appeal was bound to view evidence in light most favorable to prosecution.

3. Licenses ⚷40

That defendant, who was charged with violation of Corporate Securities Act by selling securities issued by codefendant, did not know that codefendant was without a permit from Commissioner of Corporations authorizing issuance of securities was not a good defense to prosecution for violation of the act, since defendant had burden of ascertaining at his peril whether defendant's acts were in violation of statute. Gen.Laws 1937, Act 3814, § 18.

4. Licenses ⚷40

One selling securities issued by another has the burden to investigate whether issuer of securities has a permit from Commissioner of Corporations authorizing issuance of securities, and failure to ascertain whether securities can be legally sold is no excuse for violation of Corporate Securities Act. Gen. Laws 1937, Act 3814, § 18.

5. Criminal law ⚷313

One who sells securities issued by another is presumed to know that a permit must be obtained from Commissioner of Corporations before certain securities may be sold. Gen.Laws 1937, Act 3814, § 18.

6. Licenses ⚷42(4)

Evidence sustained conviction for violation of Corporate Securities Act as against contention that conviction was unauthorized because of absence of proof that defendant had knowledge that codefendant, who was actual seller of securities, did not possess a permit from Commissioner of Corporations authorizing issuance and sale of securities. Gen.Laws 1937, Act 3814, § 18.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Leonard McWhorter was convicted of a violation of the Corporate Securities Act, Gen.Laws 1937, Act 3814, and he appeals. Attempted appeal from order denying motion for new trial dismissed.

Judgment affirmed.

Robert E. Ford, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

WHITE, Justice.

[1] In an information filed by the district attorney of Los Angeles county Clifford R. Stowell and Leonard McWhorter were accused in four counts of the crime of grand theft and in three counts of violation of the Corporate Securities Act. Stats.1917, p. 673, and amendments thereto; Deering's Gen.Laws, 1937, Act 3814. Defendant Stowell pleaded guilty to two counts of the information, and upon a plea of not guilty to all counts by defendant McWhorter the latter was tried before the court following valid waiver of a jury. After such trial defendant McWhorter stood convicted of the offenses of violation of the Corporate Securities Act as charged in counts 2 and 4 and acquitted on the remaining counts. After denial of his motion for a new trial and pronouncement of sentence, such last-named defendant appealed from the judgment and the order denying him a new trial. It appears that the order denying the motion for a new trial was entered February 24, 1941, while the written, and only, notice of appeal therefrom was filed March 14, 1941. Not having been filed within the statutory time (Pen.Code, sec. 1239), the appeal from the order denying the motion for a new trial was ineffective, and the review by us must be confined therefore to the appeal from the judgment.

[2] Stating the evidence in the light most favorable to the prosecution, as we are required to do following a guilty

verdict, it appears from the record that about December, 1937, appellant met the complainant, Miss Vesta A. Olmstead, a retired schoolteacher 78 years of age. Appellant came to see her about an oil proposition, but she rejected the same. Shortly thereafter appellant called at Miss Olmstead's home to see her about an oil lease near Crow's Landing in Stanislaus county. He told her he had an oil lease there, and the complainant invested $250. From time to time thereafter she gave appellant checks for various sums of money for the purpose of buying oil leases or interests therein. It further appears that appellant never delivered to Miss Olmstead any of the leases, oil well interests or assignments of leases at any time, nor, so far as the evidence discloses, were any of such leases or assignments made of record. Various sums were also given to appellant by the complainant for an expense account and in some instances as loans. In the aggregate, the complainant delivered to appellant some $10,671, and in return therefor received only the sum of $116.67 as a dividend on the invested money.

Appellant and his codefendant Stowell were old friends, having been associated as far back as 1925, and as late as August, 1940, they were mutually interested in some deals in San Bernardino county. About August 10, 1939, appellant introduced the complainant to his codefendant Stowell. Prior to this introduction appellant had told her Mr. Stowell had offered him a proposition to go to work as a salesman, and appellant advised Miss Olmstead to put the leases she and appellant had into Stowell's project, known as Nevada Mineral Sales Company, which was owned exclusively by Stowell and operated under the aforesaid fictitious firm name, in connection with which Stowell had filed a certificate with the county clerk of Los Angeles county. Appellant was a licensed real estate salesman from October 21, 1939. The record further indicates that appellant told Miss Olmstead that he had investigated the Nevada Mineral Sales Company and found that the real estate commissioner had given the company a permit to sell quarter acres of land and give away some stones with it for $2.97 each, the stones being turquoise gems. Appellant advised Miss Olmstead that Stowell needed more money for radio advertising, and asked her to put up $1,500. This occurred prior to the time of her meeting with Stowell. It was in connection with this deal that she went to the bank, where she met Mr. Stowell and gave him a check for the last-mentioned amount, appellant being with her at that time. At the time of the delivery of the check in question the complainant received a memorandum agreement signed "Nevada Mineral Sales Company by C. R. Stowell", said agreement being for a one-third interest in the Nevada Mineral Sales Company. It was also agreed that appellant would deliver to Mr. Stowell all of the leases belonging to complainant at an appraised value of $4,500. Upon payment of the $1,500, a bank account was opened in the name of the Nevada Mineral Sales Company and checks authorized to be drawn by codefendant Stowell and appellant McWhorter or either of them. This occurred about August 10, 1939. Subsequently, in September, after frequent conversations between appellant and Miss Olmstead, the latter paid appellant $1,200, which was to be used for radio advertising in connection with the company's business. This time appellant gave Miss Olmstead another memorandum agreement in the aforementioned company entitling her to a 5 per cent interest in the Nevada Mineral Sales Company in consideration of the payment of the $1,200. On the 25th of September appellant brought the complainant a check for $116.67 as her first dividend in the Nevada Mineral Sales Company. Shortly after the beginning of the year 1940 the Nevada Mineral Sales Company ceased to exist.

Appellant admitted having the transactions in question with Miss Olmstead, but denied any wrongdoing, and contended that he acquired for her the interests in the Nevada Mineral Sales Company on the same basis as he had acquired the oil leases and assignments; that he acted in good faith and that he was to receive a portion of whatever profits were derived from such investments. Appellant also testified directly and positively that he did not at any time know whether there had been any permit issued to Nevada Mineral Sales Company or to Mr. Stowell authorizing the sale and issuance of certificates of interest in that concern. Appellant concedes that the certificates issued were "securities" within the meaning of the Corporate Securities Act and that no permit authorizing the securities to be sold or issued was obtained by either appellant, his codefendant Stowell, or any other person.

Appellant urges a reversal of the judgment on the single ground that the evidence is insufficient to support the conviction because of the absence of proof that he had knowledge that his codefendant, the actual seller of the securities, did not possess a permit from the commissioner of corporations authorizing such issuance and sale.

So far as here applicable, section 18 of the Corporate Securities Act, upon which the conviction on both counts was predicated, reads as follows: "Every officer, agent, or employee of any company and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security * * * contrary to the provisions of this act * * * is guilty of a public offense * * *."

[3, 4] No doubt appears that appellant aided his codefendant in the sale of the securities. The former admitted he investigated the business of his codefendant and introduced the latter to the complainant. That appellant was acting in concert with his codefendant, and not as the agent or representative of the complaining witness, is further evidenced by the fact that the cash proceeds of the sale were deposited in an account to which he had access and upon which he could draw. True, the only direct and positive evidence as to actual knowledge on the part of appellant concerning the absence of a permit from the commissioner of corporations was that of appellant himself, who testified that he did not know that his codefendant was without such permit. But this does not excuse him for committing the acts charged against him, which in plain and positive language are denounced and forbidden by the statute. In the light of appellant's long experience as a real estate and securities salesman, the court was not bound to believe that he proceeded with the sales of the securities here in question without informing himself whether the law regulating such sales had been complied with; and the burden rested upon appellant to ascertain at his peril whether his acts were in violation of the statute. Such a rule is necessary for the effective protection of the public. People v. McCalla, 63 Cal.App. 783, 220 P. 436. Strikingly appropriate to the situation with which we are here confronted is the following language taken from People v. Dean, 131 Cal.App. 228, 21 P.2d 126, 128: "The law, however, puts the burden of such investigation on the party selling, and it is no excuse if he fails to ascertain if such security cannot in fact be legally sold. He is bound to make such investigation, if the security is not issued by him, before attempting to make a sale thereof, and we may well presume that he did so, as it would not seem reasonable to presume that, knowing the law as he must, he would go ahead with the sale without an independent investigation. * * * Otherwise, by going blindly ahead when trouble arises, he forces the state to prove a negative which it is his duty to affirmatively ascertain before he can lawfully sell the security. The state in its prosecutions under the act is not putting the wronged victim back in the position he was before the unlawful sale was made. That wrong is still not righted, even after a successful prosecution, and we are not willing to hold that the party whose duty it was to save all that loss and damage can, by closing his eyes to facts it was his duty to ascertain before damaging some innocent third person, force the prosecuting officer to do something he should himself have done and to prove something he is bound to know under the law, if he acts legally."

[5] And in People v. Stewart, 115 Cal. App. 681, 2 P.2d 195, it is declared that the very object and purpose of the statute would be frustrated unless it be presumed that a defendant knows that a permit must be obtained from the commissioner of corporations before certain securities may be sold.

[6] The case of People v. Flumerfelt, 35 Cal.App.2d 495, 96 P.2d 190, relied upon by appellant, is easily distinguishable from the case at bar. In the cited case it was held that the defendant was entitled to show, as she offered at the trial to prove, that in selling the stock there in question she acted upon information imparted to her by her attorney that a permit had in fact been issued. On appeal the court stated that if she acted in good faith upon such misrepresentation of the facts, she was entitled to present such testimony to the jury in support of her claim that she did not knowingly sell the stock in violation of the act. In the case with which we are here concerned there is nothing to show that appellant relied upon any information that a permit had been issued to anybody authorizing the sale of the securities in question or that, relying upon any such misinformation, he acted in good faith in making the sales with which he was charged. On the contrary, the evidence

clearly shows that without seeking information as to the existence of a permit from the commissioner of corporations, appellant, knowing the law as he must, nevertheless went ahead with the sales without making, as he was required to do, any independent inquiry or investigation.

The attempted appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

We concur: YORK, P. J.; DORAN, J.

45 Cal.App.2d 685

REYNOLDS v. VIDOR et al.

Civ. 12491.

District Court of Appeal, Second District, Division 1, California.

July 1, 1941.

Rehearing Denied July 30, 1941.

Hearing Denied Aug. 28, 1941.

1. Dismissal and nonsuit ⟹7(1)

The words "before the trial", as used in statute authorizing plaintiff to dismiss an action at any time before trial provided that a counterclaim has not been set up or affirmative relief sought by cross-complaint or answer of defendant, mean before submission of the case, and therefore the plaintiff may dismiss his case at any time before its final submission, but not afterwards, unless the order of submission is set aside. Code Civ. Proc. § 581.

See Words and Phrases, Permanent Edition, for all other definitions of "Before the Trial".

2. Dismissal and nonsuit ⟹7(1)

Where order of submission was vacated and an order was entered setting cause down for argument, and, prior to date set for further argument, plaintiff substituted attorneys, and substituted attorneys then filed a formal dismissal of the cause without prejudice, plaintiff's dismissal was filed "before the trial" within statute giving plaintiff right to dismiss before trial, in absence of clear showing of bad faith of plaintiff or her counsel. Code Civ.Proc. § 581.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Ruth A. Hubbard Reynolds against King Vidor and others for damage to real property. From an adverse judgment, the plaintiff appeals.

Reversed, with directions to enter dismissal without prejudice.

Davis & Thorne, of Los Angeles (Hallam Mathews, of Los Angeles, of counsel), for appellant.

John S. Chapman and Ward Chapman, both of Los Angeles, for respondents.

YORK, Presiding Justice.

The instant action is one for damage to real property occasioned by the alleged failure of a bulkhead and the consequent deposit upon plaintiff's land of silt and debris which was carried thereupon from the property of defendant Vidor by the heavy rains of March, 1938.

It appears from the record herein that upon the completion of the trial and oral argument on March 1, 1939, the cause was submitted and briefs were filed by both parties, and on June 5th, the court ordered judgment for defendants. On June 9th, pursuant to notice of motion duly filed and served by plaintiff upon opposing counsel, the trial court made an order vacating and setting aside the submission of March 1st, and set the cause down for argument on June 28, 1939, upon the question of "Act of God". On June 12th, counsel for defendants served and filed their affidavit in opposition to such motion. On June 26th, two days prior to the day set for such further argument, plaintiff substituted attorneys Davis and Thorne in the place and stead of counsel, who represented her during the trial, and served notice thereof on defendants. On the same day, i. e., June 26th, the newly substituted counsel filed with the clerk of the court a formal dismissal of the cause without prejudice, and telephoned defendants' counsel of such action. On the day set for the argument on the question of "Act of God", neither plaintiff nor her counsel appeared, whereupon the court made its order setting aside the order of June 9th (vacating the order of submission and reopening the cause for argument) and "re-entered judgment for defendants in accordance with the order of June 5th".

Thereafter, on July 6, 1939, upon motion of defendants, the court vacated and struck from the files the dismissal filed by plaintiff on June 26th, and again entered judgment in favor of defendants.

Plaintiff prosecutes this appeal from the judgment of July 6, 1939, contending:

"1. A party may dismiss his actions without prejudice at any time before final submission for judgment of the trial court, there being no cross-demand of defendant, and such trial court thereby loses jurisdiction.

"2. A trial court setting aside a dismissal entered by plaintiff before final submission acts beyond its jurisdiction.

"3. Act of God to be a defense must be without human intervention.

"4. A judgment is not supported by the findings of fact where such purported findings are in reality conclusions of law, or where no findings appear on material issues."

It is respondents' position that "in view of the unqualified representations that the case was sought to be reopened for the single limited purpose of arguing the question of 'act of God', the order must be construed as setting aside the submission for that limited purpose, and certainly not as a means of depriving defendants of the fruits of their victory after a completed trial". Respondents also accuse appellant of having connived with her counsel to circumvent formal entry of judgment by persuading the court to set aside the submission for the purpose of further argument, whereas the true purpose was to enable her to file with the clerk a dismissal of the action. In this regard, it should not be overlooked that there was of record the order of the trial court that "the order of submission of this cause heretofore entered is hereby vacated and set aside and said cause now set down for argument upon the question of 'Act of God' for June 28, 1939", on the day that attorneys Davis and Thorne were substituted into the case and filed the dismissal. Moreover, the affidavit of Lester C. Thorne filed herein avers that he first met appellant on the morning of June 26, 1939, a conference having been arranged between them by appellant's husband, and that prior to said conference, said attorney had not "talked to either of the attorneys representing the Plaintiff and in fact, has never met or ever talked to Mr. Harry Sutton, one of the attorneys for the Plaintiff, and though well acquainted with his associate, Mr. J. J. Craig, has not met him or conversed with him for a period of at least ten years prior to June 26, 1939. * * * That said dismissal was made and filed on behalf of Plaintiff in good faith, believing that said procedure was for her best interest under the facts and law of said case and considering the legal status of her position at the time said dismissal was filed. That neither the affiant nor anyone in the office of affiant had any knowledge that the above case even existed as a matter of fact until the morning of June 26, 1939 when he met the Plaintiff for the first time."

In connection with appellant's first point, it is provided by subdivision 1 of section 581 of the Code of Civil Procedure that "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: 1. By the plaintiff, by written request to the clerk, filed with the papers in the case * * * *at any time before the trial,* upon payment of the costs * * * provided that a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant." (Emphasis added.)

[1] The words "before the trial" have been construed as "meaning 'before submission' of the case. A plaintiff, therefore, may dismiss his case at any time before its final submission, but not afterwards, unless the order of submission is set aside". 9 Cal.Jur. 510, citing numerous authorities, including Westbay v. Gray, 116 Cal. 660, 48 P. 800.

In Westbay v. Gray, supra, the action had been tried and submitted, but the order of submission had been set aside and leave given to amend the pleadings. It was there held at page 667 of 116 Cal., at page 802 of 48 P.: "It stood, therefore, as though no submission had ever been had. Under these circumstances, the plaintiff had a right to apply for, and the court had a right to grant, the dismissal."

In King v. Superior Court, 12 Cal.App.2d 501, 56 P.2d 268, 271, the trial was concluded and the case submitted on November 18, 1935. At that time the trial judge announced his decision for defendant and directed his counsel to prepare findings of fact and conclusions of law. Before these were served or filed, plaintiffs' counsel filed a notice of motion to reopen the case for the purpose of receiving further evidence, and hearing further argument, to the granting of which defendant filed objections. Upon hearing said motion was granted and the case set for further hearing on December 17, 1935. The trial court was otherwise engaged on December 17th, and the case was heard on December 24, 1935, at which time a witness produced by plaintiffs testified in accordance with a summary of evidence set forth in one of the affidavits attached to the notice of motion. At the conclusion of his direct examination counsel for plaintiffs filed a dismissal of the action without prejudice which was dated December 24, 1935. Thereafter, on December 30, 1935, counsel for defendant filed notice of motion to vacate and set aside the purported dismissal and to enter judgment in favor of defendant on the merits. This latter motion was granted and counsel for defendant instructed to prepare findings of fact and conclusions of law preparatory to the entry of judgment in his favor. Plaintiffs sought by a petition in certiorari a review of the order vacating the order of submission and by a petition in prohibition to restrain the court from proceeding further with a trial of the action. Said writs were granted, the court holding as follows:

"The order of submission having been vacated generally and not specifically, it having been understood that any new evidence available to either party might be offered, and that the case might be reargued should counsel so desire, it is clear that the dismissal was filed 'before the trial' as required by section 581 of the Code of Civil Procedure. As no other order of submission was made prior to the filing of the written order of dismissal with the clerk, that document was filed before the trial, and the filing was a matter of right under the provisions of section 581 of the Code of Civil Procedure and the cases already cited. The following cases support this conclusion: Westbay v. Gray, 116 Cal. 660, 48 P. 800; Jones v. Currier, 65 Iowa 533, 22 N.W. 663; National Bank of Commerce v. Butler, 163 Mo.App. 380, 143 S.W. 1117; Knight v. Illinois Central R. R. [6 Cir.], 180 F. 368; Van Sant v. Wentworth, 60 Ind.App. 591, 108 N.E. 975.

"A dismissal of an action has the effect of terminating it, and the rights of the parties as affected by that particular action are concluded as though the case had been determined on its merits, though it is not a bar to a new action. Section 581, Code Civ. Proc.; 9 Cal.Jur. 524, and cases cited."

[2] In the absence of a clear showing of bad faith on the part of appellant or her counsel, upon whose motion the submission was vacated and the cause reopened for further argument, and it appearing from the record herein that the order granting such motion was duly and regularly made upon notice and hearing, the filing of the dismissal by appellant was a matter of right under section 581, supra, and the trial court had no further jurisdiction of the cause.

For the foregoing reasons, the judgment is reversed and the trial court is directed to enter a dismissal of said cause without prejudice.

We concur: DORAN, J.; WHITE, J.

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45 Cal.App.2d 554

PEOPLE v. CARSON.

Cr. 2187.

District Court of Appeal, First District, Division 1, California.

June 25, 1941.

1. Criminal law 🔑1202(6)

Denial of motion to vacate judgment in so far as it adjudged accused to be an habitual criminal, which motion was based on ground that pleas of guilty to two charges of receiving stolen goods were obtained by promises by police officer that if accused would plead guilty no charges based on prior convictions would be filed, was not an abuse of discretion where evidence regarding alleged promises was conflicting, and implied finding that no such promises were made was supported by substantial evidence. Pen. Code, § 644.

2. Criminal law 🔑252(1)

The statute providing for circumstances under which an indictment or information may be amended to charge prior convictions does not permit the amendment in that respect of a complaint as distinguished from an indictment or information. Pen.Code, § 969a.

3. Indictment and information 🔑162

Where after accused pleaded guilty to two complaints charging receipt of stolen goods, Municipal Court certified cases to Superior Court for purpose of imposing sentence, Superior Court properly amended complaints on motion of district attorney to charge accused with prior convictions in view of statute expressly authorizing Superior Court to amend a complaint by adding charges of prior convictions. Pen.Code, §§ 644, 859a, 969½.

4. Indictment and information ⚿162

Where after accused pleaded guilty to two complaints charging receipt of stolen goods Municipal Court certified cases to Superior Court and such court on motion of district attorney amended complaints to charge accused with prior convictions, the prior convictions were not improperly charged because amendments by which they were added to complaints were unsigned, since statute authorizing Superior Court to amend complaint by adding charges of prior convictions does not require such amendments to be signed, but amendments are given vitality by order of court. Pen.Code, §§ 644, 859a, 969½.

◆

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

William Carson was convicted of receiving stolen goods and of two prior convictions and from an order denying his motion to vacate the judgment in so far as it adjudged him to be an habitual criminal, he appeals.

Affirmed.

William Carson, in pro. per.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Judge.

Defendant, upon pleas of guilty, was convicted of two offenses of receiving stolen goods, and also of two prior convictions for which he had served terms in the state prison, both felonies enumerated in section 644 of the Penal Code. By the judgment he was adjudged to be an habitual criminal and sentenced to twelve years to life at Folsom, the sentences on the two offenses to run concurrently. About a year later, the defendant moved to vacate and set aside the judgment in so far as it adjudged him to be an habitual criminal. The present appeal is from the order of the trial court denying this motion.

Assuming it was within the power of the trial court to entertain the motion to vacate at the time and on the grounds now urged, we are of the opinion that such motion was properly denied.

[1] The appellant, who appears in propria persona, first contends that his pleas of guilty to the two charges were obtained as a result of promises made to him by the police officer who filed the complaints, that, if the defendant would plead guilty to the charges of receiving stolen goods, no charges based on the prior convictions would be filed. So far as this contention is concerned, there is a direct conflict in the evidence. The defendant testified that such a promise had been made to him. The police officer in question when asked: "Now, did you make any such promise?" answered, "I did not." He was also asked: "Did you promise him that if he pleaded guilty to those two charges of Receiving Stolen Property, you would forget about the priors, or words to that effect?" He replied: "No, I did not." In view of this direct conflict in the evidence it must be held that the trial court did not abuse its discretion in denying the motion on this ground. The implied finding that no such promises were made is amply supported by substantial evidence.

Appellant points out that the record shows that the charges involving the two prior convictions were added to the complaints by the Superior Court after the case had been certified to that court by the Municipal Court, and urges that there is no statutory provision authorizing the Superior Court to amend complaints by adding charges involving prior convictions, after the case has been certified to the Superior Court by the Municipal Court.

In this regard the record shows the following: On January 18, 1940, two complaints were properly filed in the Municipal Court, each charging appellant with the offense of receiving stolen goods. In the presence of his counsel, the public defender, who was present at all stages of the proceedings, the defendant pleaded guilty to both complaints, and the cases were certified to the Superior Court for the purpose of imposing sentence. On January 24, 1940, in the Superior Court, the two complaints were amended on their face, on motion of the district attorney, to charge the defendant, in the language required by section 644 of the Penal Code, with five prior convictions. The record shows that a court order was made permitting the complaints to be so amended. On February 5, 1940, the Superior Court, on motion of the district attorney, dismissed three of the charges involving three of the prior convictions for the reason that these priors were not of offenses enumerated in section 644 of the Penal Code. The remaining two priors—one in 1914 for robbery, and one in 1917 for burglary, on each of which it was alleged terms were served by the defendant at Folsom—admittedly properly charged prior convictions of offenses enumerated in the habitual criminal section. On the same day the trial court denied the motion of the defendant to withdraw his pleas of guilty to the two charges that he had received stolen goods. The defendant, after being fully advised, then pleaded guilty to the two prior convictions. Judgment was thereupon made and entered on the same day finding defendant guilty of each of the two charges of receiving stolen property, of the two priors, adjudging him to be an habitual criminal, sentencing him to Folsom for life, with a provision that he should not be eligible for parole until he serves twelve years. The same judgment was entered on each conviction, with the further provision that the two sentences should run concurrently. These judgments have long since become final.

The motion to vacate and modify the judgment, in so far as it adjudicates defendant to be an habitual criminal, was filed in January, 1941, and denied by the trial court on February 11, 1941.

[2, 3] It is appellant's theory that the Superior Court had no power to amend the complaints by adding the charges involving the prior convictions, and for this reason had no jurisdiction to adjudge him to be an habitual criminal. Section 859a of the Penal Code provides that the magistrate, in all but those felonies punishable by death, where the prosecution is instituted by the filing of a complaint, may take the plea of the accused, and thereafter he shall certify the case to the Superior Court. Section 969a of the Penal Code provides for the circumstances under which an indictment or information may be amended to charge prior convictions. Appellant argues that section 969a, supra, does not permit the amendment, in this respect, of a complaint as distinguished from an indictment or information. That is undoubtedly correct. But there is another section of the code which expressly authorizes the Superior Court to amend a complaint by adding charges of prior convictions. Section 969½ of the Penal Code, dealing with proceedings in the Superior Court, provides: "Whenever it shall be discovered that a pending complaint to which a plea of guilty has been made under section 859a of this code does not charge all prior felonies of which the defendant has been convicted either in this state or elsewhere, said complaint may be forthwith amended to charge such prior conviction or convictions and such amendments may and shall be made upon order of the court. The defendant shall thereupon be arraigned before the court to which the complaint has been certified and must be asked whether he has suffered such previous conviction. If he answers that he has, his answer must be entered by the clerk in the minutes of the court, and must, unless withdrawn by consent of the court, be conclusive of the fact of his having suffered such previous conviction in all subsequent proceedings. If he answers that he has not, his answer must be entered by the clerk in the minutes of the court, and the question whether or not he has suffered such previous conviction must be tried by a jury impanelled for that purpose, unless a jury is waived, in which case it may be tried by the court. The refusal of the defendant to answer is equivalent to a denial that he has suffered such previous conviction."

In the present case the record shows that the procedure outlined in this section was followed. Upon discovery that the defendant had suffered the prior convictions, and after the case had been certified to the Superior Court, that court made its order amending the complaint by adding the charges involving the prior convictions. The defendant had already, in the Municipal Court, been arraigned and had pleaded guilty to the main charges. He was thereupon arraigned in the Superior Court on the charges of having suffered two prior felony convictions. The record shows that he was fully advised as to his rights and then pleaded guilty.

[4] Appellant contends that the priors were not properly charged because the amendments by which they were added to the complaint, so far as the record shows, were unsigned. Section 969½ of the Penal Code does not require such amendments to be signed. The amendments are given vitality by the order of the court, which

was duly and properly made. The complaints were amended upon their face. When this order was made the amendments became an integral part of the original complaints. It is true that this court in People v. Murray, 42 Cal.App.2d 209, 108 P.2d 748, commented on the fact that in that case the amendments to the information there involved were unsigned. The statement made in that case is as follows (42 Cal.App.2d at page 218, 108 P.2d at page 753): "The prior convictions are merely set forth in the transcript under the heading 'Prior Convictions'; and they are unsigned and without any introductory or concluding language making them part of the informations." In this portion of the opinion the court was describing the procedure that was followed by the court in that case. The fact that the amendments were unsigned was not made the basis of this court's decision in that case modifying the judgment. The basis of the decision was that the accused did not admit, and the People did not charge or prove, that the accused had served prison sentences on the prior convictions. In the present case, the prior convictions are properly charged and the accused by his pleas of guilty thereto admitted the prior convictions and that he had served prison terms on each of them.

The order appealed from is affirmed.

We concur: KNIGHT, J.; WARD, J.

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45 Cal.App.2d 702

BROWN v. OXTOBY et al.

Civ. 6595.

District Court of Appeal, Third District, California.

July 2, 1941.

Hearing Denied Aug. 28, 1941.

1. Appeal and error 🔑1008(1)

An appellate court cannot assume to exercise functions of a jury, but its province is to decide questions of law, to review action of trial court, and correct trial court's errors.

2. Appeal and error 🔑994(3), 1012(1)

Although an appellate court may consider question of sufficiency of evidence as a matter of law to support verdict, it may not weigh evidence, pass upon credibility of witnesses, nor substitute its judgment for that of trial court, but its duty stops when it has determined that there is some substantial evidence to support verdict.

3. Fraud 🔑58(1)

In action for damages based upon false representations inducing making of loan, plaintiff's uncorroborated testimony that false representations were made was sufficient to support finding that they were made, notwithstanding defendants' denial. Code Civ.Proc. § 1844.

4. Fraud 🔑22(1)

Where defendants, to induce plaintiff to make loan, falsely represented that defendants' title was clear except for one deed of trust, fact that a second deed of trust on property was then on record, and that plaintiff had failed to consult the record, did not preclude plaintiff from recovering for the false representations.

5. Fraud 🔑22(1)

Where no duty is imposed by law to make inquiry concerning matter disclosed by public records, and where a prudent man would not be upon inquiry, fact that plaintiff has failed to avail himself of means of knowledge open to him does not bar him from relief when thereafter he shall make actual discovery.

6. Evidence 🔑96(1)

"Laches" is a defense, and burden of proving facts from which it may be inferred rests upon party invoking doctrine.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

7. Fraud 🔑38

Where loan induced by false representations was made April 30, 1931, but fraud was not discovered by plaintiff until about May 31, 1933, action for damages based upon the false representations commenced April 24, 1934, was not barred by "laches".

8. Set-off and counterclaim 🔑60

In action for false representations which concerned incumbrances on property and which allegedly induced plaintiff to make a loan, there was no error in failing to credit defendant with rental for period when plaintiff occupied the premises in question, in absence of any plea of right to a set-off.

9. Husband and wife ⚷138(2)

Where husband and wife were joint owners of realty upon which apartment house was built and both solicited from plaintiff a loan which was expended upon property in liquidating existing incumbrances and paying labor bills, it could be inferred that husband was wife's agent so as to render her liable with him for his fraudulent representations regarding incumbrances on property by which plaintiff was induced to make loan.

10. Principal and agent ⚷158

Although principal may not have actually authorized particular fraudulent act, principal is responsible for agent's fraud if he has entrusted to agent a matter putting agent in a position to perpetuate fraud while executing agency transaction within scope of his employment.

11. Husband and wife ⚷138(2)

Although authority of husband to represent wife in control of her separate property is not to be presumed merely from existence of marriage relation, such authority may be established by circumstantial evidence, and, as between the parties, much less evidence is needed to establish agency of one for the other than is ordinarily required.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action for damages based upon false representations in obtaining a loan by Elizabeth Brown against John R. Oxtoby and another. Judgment for the plaintiff, and the defendants appeal.

Judgment affirmed.

Paul C. Hill, of Los Angeles, for appellants.

Elmer P. Bromley and H. E. Lindersmith, both of Los Angeles, for respondent.

TUTTLE, Justice.

This is an action for damages, based upon false representations. Findings were entered in favor of plaintiff, and judgment was entered against defendants in the sum of $14,258.33.

As grounds for reversal, appellants and defendants, urge the following points: That the evidence is insufficient to support the findings, and that the court erred in failing to find upon a set-off in favor of appellants, which it is claimed was proven. The court found:

"That it is true that to induce plaintiff to enter into said agreement and to lend and pay defendants said sum of ten thousand dollars ($10,000.00), said defendants, on the said 30th day of April, 1931, at the time of the making of said agreement hereinbefore mentioned and at the time of the paying of said ten thousand dollars ($10,000.00) by plaintiff to defendants as hereinafter alleged, did falsely and fraudulently represent to plaintiff that said real property hereinbefore described was on the 30th day of April, 1931, and at the time of the payment of the said ten thousand dollars ($10,000.00) by plaintiff to defendants as hereinafter alleged, free and clear of all incumbrances save and except the said deed of trust hereinbefore mentioned and described as recorded in Book 10307, page 261, official records of the office of the county recorder, county of Los Angeles, State of California, given to secure the repayment of the said twenty-five thousand dollars ($25,000.00); that it is true that in truth and in fact the said representations made by the said defendants were false and fraudulent as the defendants well knew, and the said defendants made said representations for the purpose of defrauding and deceiving the plaintiff and inducing plantiff to enter into said agreement of April 30th, 1931, and to pay to defendants pursuant thereto the said ten thousand dollars ($10,000.00); that it is true that in truth and in fact the said real property hereinbefore described was, on the said 30th day of April, 1931, and at all times herein mentioned, encumbered by said first deed of trust executed by said defendants for the benefit of said Thomas Mortgage Company and recorded in Book 10307, page 261, official records of Los Angeles County, California, as hereinbefore mentioned and was on the 30th day of April, 1931, and at all times mentioned, also encumbered by a second deed of trust on the said real property in addition to the foregoing mentioned first deed of trust, which second deed of trust was executed by defendants in favor of B. H. Horkin and M. E. Downey as beneficiaries to secure the repayment to said beneficiaries of the sum of seventeen thousand six hundred eighty-six and 28/100 dollars ($17,686.28), which second deed of trust just mentioned was recorded on the 11th day of April, 1931, in Book 10703 at page 365, official records in the office of the county recorder of Los Angeles County, California; that it is true that at the time said representations were made, said defendants knew them to be false and knew that at the said time the representations were made that the said real property hereinbefore described was encumbered by said first deed of trust recorded in Book 10307, page 261 of said official records, and was also encumbered by said second book of trust recorded in Book 10703, page 365, of said official records, but fraudulently and knowingly made said representations to the plaintiff for the purpose of inducing plaintiff to enter into said agreement of April 30, 1931, and inducing plaintiff to pay and loan to defendants said sum of ten thousand dollars ($10,000.00)."

[1, 2] Appellant states that there was no evidence to establish fraud, and that there was no preponderance of the evidence to establish fraud. The scope of our inquiry upon appeal where questions of fact are involved, is thus stated in 2 Cal.Jur. p. 912, § 539: "It is the province of an appellate court to decide questions of law, to review the action of the court below and correct its errors. An appellate court possesses none of the functions of a jury, and cannot assume to exercise them. While the question of the sufficiency of the evidence, as a matter of law, to support a verdict or finding may be presented to the appellate court for review, its duty stops when it has determined that there is some substantial evidence to support it. It will not weigh the evidence, pass upon the credibility of witnesses, nor substitute its judgment thereon for that of the trial court, but will uphold the verdict or finding, even though it would have decided otherwise if it had occupied the place of the trial judge or jury."

[3, 4] We are therefore not permitted to say on which side the evidence preponderates. That, in effect, is weighing the evidence—a function committed solely by law to the trial court. Our inquiry therefore ends if it appears that there is any substantial evidence to support the findings under attack. An examination of the record discloses that there is a sharp conflict in the evidence relating to fraud. Plaintiff testified to the representations made. Defendants denied that they made them. Conceding as appellants contend, that plaintiff's testimony was uncorroborated, it was sufficient to support the finding. Code of Civil Procedure, sec. 1844. The chief attack made upon the proof of fraud is the fact that the false representation made by appellants was to the effect that the title of appellants was free and clear of all incumbrances save and except the first deed of trust. They point out that when such representation was made, the second deed of trust was recorded in the office of the county recorder of Los Angeles county. This, they argue, was at least constructive notice of the existence of the incumbrance, and consequently there can be no actionable fraud based upon the representation that no other incumbrance except the first trust deed was in existence. We do not believe that the failure of plaintiff to consult the public records is fatal to her claim. In the case of Cameron v. Evans Securities Co., 119 Cal.App. 164, 170, 171, 6 P.2d 272, 275, the court held, in referring to a finding that certain representations in respect to title were false, "The evidence is sufficient to support the finding, therefore respondent was under no duty to investigate public records for the purpose of ascertaining whether or not the representation that the premises were not further incumbered was true". The complaint alleged that defendant falsely represented that the property was free from any incumbrance other than a specified deed of trust. The rule relating to such a situation is further there laid down as follows:

[5] "Appellants urge, however, that, since the evidence establishes that the mortgage was recorded, the means of knowledge were open to respondent, and, that, having failed to avail himself of sources of information that were known to him, he may not take advantage of his own lack of diligence. The rule in this connection is stated in Tarke v. Bingham, 123 Cal. 163, 55 P. 759, 760, in the following language: 'Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, "a prudent man" would not be upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that inquiry becomes a duty, and the failure to make it a negligent omission.' Later decisions

have approved this rule. Spreckels v. Gorrill, supra [152 Cal. 383, 92 P. 1011]; Teague v. Hall, 171 Cal. 668, 154 P. 851; French v. Freeman, 191 Cal. 579, 217 P. 515; Lillis v. Silver Creek, etc. Water Co., 21 Cal.App. 234, 131 P. 344."

In the case of Head Bros. v. Thompson, 77 Iowa 263, 42 N.W. 188, 190, a similar state of facts is thus disposed of: "Though it is true that Head had constructive notice, yet, if Thompson knew that Head was relying upon his statements, then it was fraud for him not to have disclosed the existence of the Meath mortgage, and such a fraud as should make void the agreement if one were made." 33 A.L.R. 1030.

[6] As to the insufficiency of the evidence to support a finding that plaintiff was not guilty of laches, the same general rule applies. To this may be added the rule that laches is a defense, and the burden of proving the facts from which it may be inferred rests upon the party who invokes the doctrine. It is a question of fact. In 10 Cal.Juris. pp. 526, 527, § 64, it is stated: "There is no artificial or hard-and-fast rule either as to the lapse of time or the circumstances which will justify the application of the doctrine of laches. The question must be determined by a consideration of all the facts and circumstances of the particular case. Laches is a question of fact, on the evidence, and each case becomes largely a law unto itself. In other words, the matter is one which reposes in the sound discretion of the chancellor."

[7] The loan which is the basis of the dispute was made April 30, 1931. The court found that plaintiff first discovered the fraud about May 31, 1933. The action was commenced April 24, 1934. Considering the lapse of time, it clearly must be considered as commencing when plaintiff first discovered the fraud. The time which elapsed between that date and the filing of the complaint was less than one year. We cannot say, as a matter of law, that plaintiff was barred by laches. There was sufficient evidence to support the finding.

[8] It is contended by appellant that the court erred in failing to credit appellant with the rental at the rate of $50 per month, covering the period when plaintiff occupied the premises in question. No evidence is pointed to which might constitute the basis of this contention, nor are any authorities cited which make it mandatory for the court to find upon the issue of set-off where, as here, there was a failure to plead it. The rule is the other way. 23 Cal.Jur. p. 272, § 43.

[9] Finally, appellants insist that the judgment should, at least, be reversed as against Jessie R. Oxtoby, the wife of the other appellant. It is pointed out that all the fraudulent representations were made by the husband alone. That the record bears this out is not questioned by respondent. We are of the opinion, however, that the trial court could reasonably infer from the entire case that the husband at all times was the agent of the wife.

[10] Facts and inferences deducible therefrom show that appellant John Oxtoby was a contractor; that appellants were joint owners of the real property upon which the apartment house was built; that both appellants went to plaintiff and solicited the loan for $10,000; that the proceeds from said loan were expended upon said property in liquidating existing incumbrances and paying labor bills in connection therewith; and that the prior incumbrances involved in the fraudulent representations were executed by the wife as well as by the husband. Although the principal may not have actually authorized the particular fraudulent act, yet the principal is responsible for the fraud of the agent if he has entrusted to the agent a matter which puts the agent in a position to perpetuate the fraud complained of, while the agent is executing the agency transaction within the scope of his employment. 2 Am.Jur. p. 283, § 363; Re-statement, Agency, § 261; Newcomb v. Title Guar. & Trust Co., 131 Cal.App. 329, 21 P.2d 456, 22 P.2d 552. As stated in Rauer's Law, etc. v. Berthiaume, 21 Cal.App. 670, 674, 132 P. 596, 598, 833:

[11] "While the authority of a husband to represent his wife in the management and control of her separate property is never to be presumed merely from the existence of the marriage relation, nevertheless such authority may be established by circumstantial evidence; and, as between husband and wife, much less evidence is needed to establish the fact of agency of one for the other than is ordinarily required."

A similar holding appears in Hulsman v. Ireland, 205 Cal. 345, 270 P. 948. We have examined the cases cited by appellant. It is true that, standing alone, the relationship of husband and wife cannot sustain a finding that one is the agent of the other. Likewise, one joint tenant cannot, by his own contract, bind the other in respect to their common property. Here, we have entirely different facts with which to deal. Admittedly the record shows that the wife did not make the false representations, nor did she have any knowledge of them. She did, however, personally solicit the loan upon the joint property, and she signed the two incumbrances which are the basis of the fraud. She authorized her husband to build the apartment house, and put him in a position which enabled him to commit the fraud, and they both retained the benefits flowing from the transaction.

The judgment is affirmed.

We concur: PULLEN, P. J.; THOMPSON, J.

In re ROBINSON'S ESTATE.

ROBINSON v. HILL et al.

Civ. 13130.

District Court of Appeal, Second District, Division 2, California.

June 24, 1941.

Hearing Granted Aug. 22, 1941.

1. Executors and administrators 🔑32(2)

The probate court is without jurisdiction to determine issues presented by administrator that intestate's heirs have embezzled a portion of estate and invested it in realty.

2. Executors and administrators 🔑12

To give probate court of county jurisdiction to appoint administrator, it was not necessary to show that nonresident decedent had property in such county at time of his death, it being sufficient if it was shown that there was property in county requiring care and administration when petition for letters of administration was filed. Code Civ.Proc. § 4; Civ.Code § 3528; Probate Code, §§ 301, 360.

3. Executors and administrators 🔑12

The statute providing that letters of administration must be granted in the superior court of any county in which the decedent leaves an estate, decedent not being a resident of state at time of his death and having died out of the state, must be liberally construed in order to prevent a failure of justice. Probate Code, § 301.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

In the matter of the estate of William Robinson, deceased, wherein Glen M. Robinson was appointed administrator. From an order and judgment by which Probate Court granted motion of Minnie Lee Hill and others to terminate all probate proceedings and to discharge the administrator, the administrator appeals.

Reversed.

Otto A. Gerth, of Los Angeles, for appellant.

Laurence B. Martin, of Los Angeles (Samuel Reisman, of Los Angeles, of counsel), for respondents.

WOOD, Justice.

An appeal is being prosecuted from an order by which the probate court granted a motion of respondents to terminate all probate proceedings and to discharge and dismiss appellant as administrator of the estate of William Robinson, deceased. There is also an appeal from a formal judgment entered after the granting of the motion.

William Robinson died on March 7, 1936, at Hendricks county, Indiana, while a resident of Indiana. At the request of D. E. Robinson, a son of decedent, Glen M. Robinson, the appellant, filed a petition for letters of administration of the estate of decedent in Los Angeles county. This petition was regularly granted by the probate court on June 22, 1937, appellant was duly qualified and letters of administration were issued to him. Minnie Lee Robinson, a daughter of decedent, was duly notified of the pendency of the proceedings but she filed no objection thereto and no appeal was taken from the order appointing the administrator, which became final. Thereafter the administrator filed his first account, which was approved by the court, and gave notice to creditors.

The respondents on this appeal are Minnie Lee Robinson, her daughter, Mrs.

Pauline Mann, and Mrs. Mann's husband, Carl L. Mann. On January 4, 1939, appellant in his capacity as administrator filed an action in the superior court of Los Angeles county in which he alleged that shortly after decedent's death respondents wrongfully obtained possession of and converted to their own use property of decedent consisting of cash and United States bonds of a value in excess of $35,000 and used a part of the cash and of the bonds to purchase real estate in Los Angeles county. By this action he sought among other things to impress a trust upon this real estate. Respondents filed their answer to this action.

On March 11, 1939, respondents filed a motion in the probate court asking for the termination of the probate proceedings and for the discharge of the administrator. In support of their motion they filed affidavits showing that decedent at the time of his death had no property in the state of California. This motion was resisted by appellant, who filed affidavits showing that at the time of the petition for letters of administration property belonging to decedent's estate was located in Los Angeles county. Respondents' motion was denied on April 5, 1939, but no appeal was taken from the order of denial. On January 31, 1940, respondents filed a second motion to terminate the probate proceedings and to discharge the administrator, this motion being based upon their affidavits in which they set forth the same matters which had been set forth upon the filing of the previous motion, with the additional statements that probate proceedings were and had been pending in the state of Indiana at the time of the filing of the petition for the appointment of an administrator in California. This second motion was granted on March 6, 1940, and the administrator filed his notice of appeal from the order and from a formal judgment subsequently entered.

Two principal contentions are presented in appellant's brief: First, that in order to give the probate court jurisdiction to appoint an administrator it was not necessary to show that decedent had property in Los Angeles county at the time of his death, it being sufficient if it was shown that there was property in the county requiring care and administration when the petition for letters of administration was filed; and second, that the jurisdictional facts were established when the order appointing the administrator was made, that the order of appointment was regular on its face and became final, and that it cannot be collaterally attacked. Our disposition of the first contention makes it unnecessary to pass upon the second contention.

It is provided in section 301 of the Probate Code that letters of administration are to be granted in the superior court "of any county in which he leaves estate, the decedent not being a resident of the state at the time of his death, and having died out of the state * * *". Respondents argue that, even if it be assumed that decedent's bonds were surreptitiously removed from Indiana and brought to California after the death of decedent, the language of the section above quoted requires a ruling that the probate court of Los Angeles was without jurisdiction to appoint an administrator because decedent did not "leave" property in Los Angeles county. Appellant refers to the rule that the probate court is without jurisdiction to determine title to property which is claimed by the estate on one hand and by third parties on the other, and argues that the code section should be given a liberal interpretation so that the administrator can present the issues concerning his allegation of the embezzlement of a portion of the estate to the proper tribunal. He refers to section 4 of the Code of Civil Procedure, in which it is provided that all proceedings under the code "are to be liberally construed, with a view to effect its objects and to promote justice"; and to section 3528 of the Civil Code: "The law respects form less than substance."

A statement which appears to be determinative of the matter is to be found in Re Estate of Daughaday, 168 Cal. 63, 72, 141 P. 929, 933: "Still further it should be pointed out that section 1322 of the Code of Civil Procedure, touching the probate of foreign wills, and providing that administration may be had in any county in which the testator shall have left any estate, means any county in which there shall be estate of the testator at the time administration is sought." Section 1322 of the Code of Civil Procedure, referred to in the above quotation is now section 360 of the Probate Code, which provides: "A will admitted to probate in any other state or country may be offered for probate in the superior court having jurisdiction as determined by section 301 of this code." It will be seen that section 360 of the Probate Code makes the jurisdictional facts set forth in section 301 of the Probate Code the basis for issuing letters by the probate court. Reading these two sections together, it is apparent that the court in the Daughaday case determined that jurisdiction rests in the probate court of the county where property of the decedent be found at the time that the application for letters of administration is filed. It must be conceded, however, that the statement quoted from the Daughaday case was not necessary to a decision of the issues then before the court. For this reason we have examined the authorities of other states and find that, although there is some conflict, the more numerous and the better reasoned cases hold that the court of the state where the property of a deceased person is found at the time of the application for letters of administration has jurisdiction to grant the letters.

In Appeal of Ela, 68 N.H. 35, 38 A. 501, 502, it is said: "Assume that the probate court had no power to make the appointment, for the reason that the deceased left no estate in this county; the subsequent bringing of the property here by the administrator would confer jurisdiction of the subject-matter upon that court, and authorize it to charge him with the property, in the exercise of its common-law jurisdiction over the estates of deceased persons." In Manning v. Leighton, 65 Vt. 84, 26 A. 258, 262, 24 L.R.A. 684, 692, the court stated: "But it is not necessary that the assets upon which administration is granted should have been within the jurisdiction at the time of the decease. The rule, as usually stated by text-writers, would seem to require this; but it is evident that an adherence to the rule as thus stated would sometimes exclude assets from administration. Certainly, a debtor would not be permitted to defeat the collection of his debt by moving from one jurisdiction to another after the death of the creditor. The subsequent creation of an obligation to be collected by the representative of the deceased presents the same necessity. The jurisdiction must exist in favor of the estate wherever legal proceedings are necessary to establish its right to property, and none but a local administrator can secure the recognition of the courts." In Pinney v. McGregory, 102 Mass. 186, 192, 193, these statements were made by the court: "Indeed the St. of 1817, c. 190, § 16 (which included the estate of intestates already deceased, as well as of those who might die in the future), would seem to point to the time of a petition for administration, rather than the time of the death, as the time at which there must be estate within the county, in order to give jurisdiction; for the words are, 'when any person who has died or shall die intestate without the Commonwealth shall leave estate of any description within the same to be administered,' letters of administration may be applied for as if he had died within the Commonwealth, and the judge of probate of any county 'wherein such estate shall be found' shall have power to grant them. * * * To limit the power of granting administration to cases in which the goods are or the debtor resides in the Commonwealth at the time of the death of the intestate would be to deny to the creditors and representatives of the deceased, whether citizens of this or of another state, all remedy whenever goods are brought into this state, or a debtor takes up his residence here, after the death of the intestate. The more liberal construction of the statute is necessary to prevent a failure of justice."

Respondents rely upon In re Estate of Estrem, 16 Cal.App. 563, 107 P.2d 36, 41, but we find nothing therein which is not in agreement with the above quoted statement taken from the Daughaday case. In the Estrem case an attempt was made to set aside an order of the Alameda probate court admitting a will to probate on the ground, among others, that the executor had after the admission of the will to probate filed an inventory and appraisement showing an absence of property in Alameda county. The court ruled that the order, which had become final, was regular on its face and did not appear to be void; that the proceedings failed to show that at the time of decedent's death none of his property was situated in Alameda county, since the inventory merely stated that "certain property which the court might have deemed situate in Alameda county was without value, in the opinion of the appraiser". The issue now before the court was not passed upon or discussed in the Estrem case.

[1-3] Appellant filed his petition for letters of administration for the purpose of giving him legal status to commence an action against respondents. He seeks to present to the proper tribunal the issues presented by his allegations that respondents embezzled a portion of decedent's estate

and invested it in real estate situated in Los Angeles county, issues which the probate court is without jurisdiction to determine. Bauer v. Bauer, 201 Cal. 267, 256 P. 820. This he should be permitted to do. A liberal construction should be given section 301 of the Probate Code in order to prevent a failure of justice.

The order and the judgment are reversed. Appellant to recover costs from respondents.

We concur: MOORE, P. J.; McCOMB, J.

45 Cal.App.2d 690

PAPINEAU v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 6596.

District Court of Appeal, Third District, California.

July 1, 1941.

Rehearing Denied July 31, 1941.
Hearing Denied Aug. 28, 1941.

1. Trusts 🔑140(1)

The term "beneficial interest" is commonly used to designate the entire interest of a beneficiary in a trust.

See Words and Phrases, Permanent Edition, for all other definitions of "Beneficial Interest".

2. Judgment 🔑683

A judgment, in action by second assignee of beneficiary's interest in trust against trustee and buyer at trustee's sale pursuant to first assignment that second assignee was not entitled to any relief because neither trustee nor its agents had made any fraudulent representations and trustee had informed second assignee of first assignment at time of second assignment, was "res judicata" in subsequent action against trustee by a holder of a beneficial interest assigned by second assignee.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Judgment 🔑720

Where, in former action, principal object was to obtain a decree that plaintiff had an interest in trust estate, and court found that plaintiff had no such interest in trust, such issue could not again be litigated even if form of action, or nature of action, might differ.

4. Judgment 🔑585(2)

A transferee of second assignee's beneficial interest in trust could not maintain action for termination of trust on ground that prior action, wherein second assignee was precluded from recovering against trustee and buyer at trustee's sale, was an action at law for tort, where facts alleged in prior action attempted to establish an equitable estoppel which would preclude defendants therein from successfully relying upon first assignment, and sought damages only in event such relief was denied to second assignee.

5. Action 🔑25(2)

The prayer of a complaint may be consulted in determining whether case is one in law or equity.

6. Judgment 🔑720

An adjudication of an issue in prior action is conclusive of rights of parties in subsequent action involving the same issue.

7. Action 🔑53(1)

An issue cannot be split, since an issue may not be litigated piecemeal.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Laura L. Papineau against the Security-First National Bank of Los Angeles to declare a trust terminated, to obtain an accounting, and to have distributed to plaintiff an undivided interest in a trust. From an adverse judgment, plaintiff appeals.

Affirmed.

LeRoy B. Lorenz, of Los Angeles, for appellant.

Frank P. Doherty and William R. Gallagher, both of Los Angeles, for respondent.

PULLEN, Presiding Justice.

By this action plaintiff and appellant sought to have the court define the interest of plaintiff in a certain trust, to declare the trust terminated, for an accounting, and to have distributed to plaintiff an undivided one-tenth interest therein.

Upon the death of Francis Ganahl in 1916 a trust was created by his widow and children by conveying the property to the predecessor of the defendant bank, as trustee. The trust was primarily to secure the repayment of $10,000 to the trustees by the beneficiaries, this sum having been advanced by the bank to close the estate, and also to provide a convenient method of handling the property, particularly during the life of the widow who was entitled to the income for her life. The trust agreement provided for termination of the estate after repayment of the bank loan upon the request of the beneficiaries, under certain specified conditions, and also provided that the respective interests were assignable by the several beneficiaries.

In 1925, Vincent P. Ganahl, one of the beneficiaries, borrowed $5,000 from respondent bank, and as security therefor assigned, with power of sale, his beneficial interest in the trust.

In 1929 Vincent P. Ganahl borrowed from O. L. Papineau the sum of $40,000, and as security transferred and assigned to him his beneficial and reversionary interest in the trust.

In 1930 the trustee bank notified Papineau of the default of Vincent P. Ganahl under the prior assignment, and of the intended sale of the interest of Vincent P. Ganahl to satisfy said loan, and in due time such interest was sold to Ernest Ganahl, a brother of the pledgor, for approximately $5,000.

Thereafter an action was brought by Papineau against the trustee and Vincent P. Ganahl and Ernest Ganahl on the theory that the defendants had conspired to conceal from him the existence of the prior assignment. Upon the trial of the issues thus presented the trial court found that neither the defendant bank nor any of its officers had made any fraudulent representations, nor have been guilty of any concealment, and further found that at the time of the second assignment the bank had informed plaintiff of such prior assignment, and entered judgment in favor of the defendant. This judgment was affirmed in Papineau v. Security-First National Bank et al., 6 Cal.2d 668, 59 P.2d 131.

A few months later the present action was commenced, wherein plaintiff claimed to be the owner of a one-tenth beneficial interest in the trust by reason of an assignment from Vincent P. Ganahl, and set up the fact that the beneficial interest so sold had terminated and the trust had been completed by the fulfillment of its purposes, and asked that plaintiff's interests be declared and the corpus of the trust distributed to the persona legally entitled thereto.

In answer to the complaint the bank set up the former assignment, the default of Vincent P. Ganahl, and the sale of his one-tenth beneficial interest in the trust. For a separate defense the defendant bank also set up the former decision in the prior action as a bar and estoppel to the issues raised in the present action.

The trial court granted the motion for a trial upon the issues of res judicata and estoppel raised by the separate defense, and held the plea of res judicata was well taken and that the issues raised in the complaint were finally and completely adjudicated in the prior action. It is from that judgment this appeal is taken.

It is the contention here that Vincent P. Ganahl, as beneficiary under the trust, had two interests in the trust, one a beneficial interest and the other a reversionary interest, and that only the beneficial interest was litigated in the prior action.

[1] The term, however, "beneficial interest" is commonly used to designate the entire interest of a beneficiary in a trust, and it is apparent such term was here so used.

[2] In the original complaint in the first action plaintiff so used the term, alleging in paragraph III "that by the terms of said declaration of trust the said Vincent P. Ganahl is made the owner of an undivided one-tenth beneficial and reversionary interest * * *;" and also "that Vincent P. Ganahl offered * * * to convey to plaintiff as security for the payment of the * * * purchase price, the said one-tenth beneficial and reversionary interest * * *," and when plaintiff inquired of the trustee if Ganahl could assign said beneficial interest he was informed that he "could assign said beneficial interest in said trust to plaintiff as security, and that defendant trustee would recognize such assignment;" also it is alleged the bank notified plaintiff of its intention of foreclosing the said one-tenth beneficiary and reversionary interest of Vincent P. Ganahl. In fact it clearly appears that

when the beneficial interest of the grantee is referred to it relates to the entire interest of the assignee. Inasmuch, therefore, as the issue here presented was whether plaintiff had any interest in the trust, which was the same issue as was presented and adjudicated in the prior action, the decision there rendered forecloses any further inquiry on that issue.

[3] In the former action the principal object was to obtain a decree that plaintiff had an interest in the estate. The court having found that plaintiff had no such interest in the trust, that issue cannot now again be litigated, even if the form of the action or the nature of the action may differ. In Detwiler v. Clune, 77 Cal.App. 562, 247 P. 264, plaintiff attempted to rescind a contract on two grounds, fraud and failure of consideration. Having failed in that action he then sought to recover the money paid by him under the contract on the ground of failure of consideration. The court held the two actions were the same, notwithstanding the fact the prior action was for rescission of the contract and the subsequent action to recover upon a consideration that had failed.

[4, 5] Appellant contends the prior action was an action in law for a tort, but the facts alleged attempted to establish an equitable estoppel, which would preclude defendants therein from successfully relying upon the prior assignment, and sought damages only in the event this relief was denied him. Such is evident from the allegations of the complaint, and is apparent from the prayer which may be consulted in determining the character of the case. McPheeters v. McMahon, 131 Cal.App. 418, 21 P.2d 606; Bank of America National Trust & Savings Association et al. v. Joseph Feig et al., 21 Cal.App.2d 247, 68 P.2d 985.

[6] We need not discuss the well established rule that an adjudication of an issue in a prior action is conclusive of the rights of the parties in a subsequent action involving the same issue. English v. English, 9 Cal.2d 358, 70 P.2d 625, 128 A.L.R. 467; Guaranty Liquidating Corp. v. Board of Supervisors, 22 Cal.App.2d 684, 71 P.2d 931.

As said in Freeman on Judgments, Fifth Edition, section 672, page 1418: "If the existence, validity or construction of a contract, lease, conveyance or other obligation has been adjudicated in one action it is res judicata when it comes again in issue in another action between the same parties, though the immediate subject matter of the two actions be different. * * *"

Plaintiff, in both actions, is relying upon the same assignment, and must of necessity rely upon the same evidence to establish his ownership of an interest in the trust.

[7] Also the attempt to differentiate between the reversionary interest and a beneficial interest as shown by the language of the complaints is an attempt to split an issue which cannot be done, for an issue may not be litigated piecemeal. Price v. Sixth Agricultural Association, 201 Cal. 502, 258 P. 387; Andrews v. Reidy, 7 Cal.2d 366, 60 P.2d 832.

What has been said is sufficient to sustain the action of the trial court, and it is unnecessary to consider other points urged for reversal. The judgment is affirmed.

We concur: TUTTLE, J.; THOMPSON, J.

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45 Cal.App.2d 566

JONES et al. v. BENSON et al.

Civ. 6554.

District Court of Appeal, Third District, California.

June 25, 1941.

Rehearing Denied July 25, 1941.

Hearing Denied Aug. 22, 1941.

1. Insurance 🔑56

In action against directors of mutual fire insurer to recover damages for failure to levy an assessment to pay amount of fire loss ascertained by the rendering of judgment in an action on fire policies in May, 1936, evidence supported finding that insurer ceased to do business in 1934, and that there was no policy in force after January 1, 1935. St. 1935, pp. 626, 627, §§ 7010, 7011, 7018.

2. Insurance 🔑56

Directors of a mutual fire insurer were not liable for damages for wilfully failing to levy an assessment after amount of fire loss was ascertained by the rendering of a judgment for plaintiffs in an action on fire policies on May 10, 1936, where no policies upon which a levy of assessment could lawfully be made were thereafter in force. St.1935, pp. 626, 627, §§ 7010, 7011, 7018.

3. **Insurance** ⟹56

Where mutual fire insurer rejected liability for plaintiffs' fire loss, and amount of loss sustained was not ascertained until after trial of action on fire policies, which resulted in judgment on May 10, 1936, liability of insurer's directors to pay a penalty for failure to levy an assessment to pay loss did not "accrue" until amount of loss was ascertained by the rendering of the judgment. St. 1935, pp. 626, 627, §§ 7010, 7011, 7018.

See Words and Phrases, Permanent Edition, for all other definitions of "Accrue".

Appeal from Superior Court, Lake County; Ben R. Ragain, Judge.

Action by Jesse W. Jones and others against C. A. Benson and others, directors of the Lake County Farmers Mutual Fire Insurance Company, to recover damages as a penalty for failure to levy an assessment to pay a loss sustained by fire. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Taft & Spurr, of Ukiah, for appellants.

Lovett K. Fraser, of Lakeport, for respondents.

THOMPSON, Justice.

The plaintiffs have appealed from a judgment which was rendered against them in a suit for damages against the directors of Lake County Farmers Mutual Fire Insurance Company as a penalty for failure to levy an assessment to pay the loss sustained on account of a fire, pursuant to section 7018 of the Insurance Code of California, St.1935, p. 627.

The complaint alleges and the court found that the Lake County Farmers Mutual Fire Insurance Company was organized pursuant to law (Stats.1897, p. 439) and was engaged in business in Lake county prior to May, 1936; that the defendants were directors of the company; that on November 25, 1932, plaintiffs were members of the company which carried upon the property of plaintiffs insurance against fire in the aggregate sum of $4,676, upon which they paid a premium of $50.35 for three years; that on the last-mentioned date the company had outstanding policies in full force in favor of various other members in the aggregate sum of $714,906, but that all of these policies had expired prior to January 1, 1936, after which time no policies were issued, and the company conducted no further business; that the board of directors never thereafter held a meeting for any purpose whatever; that on November 29, 1932, plaintiffs' insured property was entirely destroyed by fire and they promptly made a claim to the company for compensation on that account, which was denied; that suit was thereupon filed against the company for compensation under their policies, which suit was regularly tried and judgment was rendered for plaintiffs May 10, 1936, for the full sum of $4,676. From that judgment no appeal was taken, and it became final; that execution was thereafter issued and returned by the sheriff unsatisfied.

This suit was filed against the directors of the insurance company, under section 7018 of the Insurance Code of California, April 24, 1939, for damages, in the nature of a penalty, for wilful failure to levy an assessment "upon all of the property insured" by the company as provided by sections 7010 and 7011 of the Insurance Code. After a demurrer to the complaint had been overruled, the defendants answered, denying the material allegations of the complaint. The cause was tried by the court which adopted findings as above stated, including a determination that: "The Lake County Farmers Mutual Fire Insurance Company ceased to do business in 1934, and there was no policy in force after the 1st day of January, 1935."

The preceding finding is supported by the evidence. Mr. Victor Eickhoff, who was secretary of the insurance company from 1933 until it ceased to do business, testified: "They [the company] discontinued writing any new policies in, I think, January or February, 1933, or maybe it was later in the year, and all policies had expired in 1935."

Judgment was rendered in this case against the plaintiffs to the effect that they take nothing by this action. From that judgment this appeal was perfected.

[1, 2] We are of the opinion the findings and judgment are amply supported by the evidence. The directors are not liable for damages for wilfully failing to levy an assessment after the amount of loss was ascertained by the rendering of judgment for $4,676, on May 10, 1936, for the reason that there were thereafter no policies of insurance in force against any properties owned by members of the company, upon which a

levy of assessment could lawfully be made. Since there were no properties against which a levy could be lawfully assessed, after the amount of the loss had been ascertained, it follows that the directors could not possibly be guilty of failure to perform their duty in that regard. This is not a suit against individual members of the mutual fire insurance company for contribution for payment of losses sustained. It is merely a suit against the directors for damages in the nature of a penalty, for wilful failure to perform a duty as such officers. The liability for contribution of individual members is not involved.

The original County Fire Insurance Act (Stats.1897, p. 439), upon which the appellants rely, was repealed in 1935, by the enactment of the California Insurance Code. Stats.1935, p. 496. Substantially the same provisions of the original act are retained in the Insurance Code, in so far as they apply to this suit. Section 7010 of the last-mentioned act provides that: "When any loss exceeds in amount the cash funds of the insurer and also exceeds one-eighth of one per cent of the total amount of the insurer's insurance in force, its president shall convene its directors to make an assessment."

The following section provides that: "Upon being convened for the purpose, the directors shall make an assessment upon all of the property insured in the insurer. Such assessment shall be in proportion to the amount for which each piece of property is insured, taken in connection with the rate of premium under which it is classified."

Section 7018 of that code then provides: "A director of any such insurer who wilfully refuses or neglects to perform the duties imposed upon him by law or by the insurer's by-laws shall be liable in his individual capacity to the person sustaining a loss."

Section 13 of the "Constitution and Articles" of the Lake County Farmers Mutual Fire Insurance Company, to which each member subscribes, and which is the measure of liability of the directors for failure to levy an assessment, provides for calling a meeting of the board for that purpose, when there is a lack of funds to meet obligations for fire losses, after "the amount of any loss shall have been ascertained". It reads: "When the amount of any loss shall have been ascertained, which exceeds in amount the cash funds of the company, the president shall convene the Board of Directors of the company, who shall make an assessment upon all the property to the amount for which each several piece of property is insured, taken in connection with the rate of premium under which it may be classified."

[3] In the present case the company's liability for the plaintiffs' loss was rejected. The amount of loss sustained by them was not ascertained until after trial of the case based on their policies had been reduced to judgment on May 10, 1936. The liability of the directors to pay a penalty for failure to levy an assessment could not have accrued prior to that date. The supreme court of Kansas, in construing a similar statute, in which the facts were practically the same as they are in this case (Decker v. Righter, 9 Kan.App. 431, 58 P. 1009, 1010), held that the liability of directors of a mutual fire insurance company for failure to call a meeting of the board and levy an assessment to pay a loss sustained by an insured member, did not accrue until the amount of loss was ascertained by the rendering of judgment. We are in accord with that decision. The court there said: "The plaintiff's claim was not adjusted, but was contested, and did not become an adjudicated demand against the company until January 6, 1897 [when the judgment was rendered], and until that time the company was not required to take any special steps looking to its payment. This being true, no assessment could have been properly made in September, 1896, to pay this claim, then disputed."

In the present case, since the amount of loss was not ascertained until May 10, 1936, at which time there were no insurance policies in force upon property against which assessments could be lawfully levied, it follows that the directors did not fail to perform any duty imposed upon them by law. The court therefore properly held that plaintiffs were not entitled to recover judgment against the directors of the company.

In view of our foregoing conclusions it is unnecessary to pass upon other contentions of the respondents in support of the judgment.

The judgment is affirmed.

We concur: PULLEN, P.J.; TUTTLE, J.

45 Cal.App.2d 666

LEWIS v. CIVIL SERVICE BOARD OF CITY OF LONG BEACH et al.

Civ. 13198.

District Court of Appeal, Second District, Division 1, California.

June 30, 1941.

Mandamus ⚷143(1)

A mandamus petition which revealed that city charter empowered Civil Service Board to create classifications of employees in classified civil service, subject to confirmation by city council, and which in effect argued that board threatened to abuse its power would be denied because prematurely brought in absence of showing without conflict that any action had yet been taken by board, and in absence of showing of enough of the rules of the board to enable court to determine which were applicable.

WHITE, J., dissenting.

◆

Mandamus proceeding by Robert H. Lewis against the Civil Service Board of the City of Long Beach and others.

Petition denied.

D. A. Boone and James T. Satchell, both of Long Beach, for petitioner.

No appearance for respondents.

PER CURIAM.

The petition for writ of mandate is denied, for the reason that the petition shows upon its face that it is premature, and that the Civil Service Board is merely holding in abeyance the action which petitioner seems to think it may possibly take.

According to the petition herein, the charter of the City contains the provision that, "The power of creating classifications of employees in the classified civil service shall be with the Civil Service Board, subject to confirmation by the city council." In effect, petitioner argues that the Civil Service Board threatens to abuse its power. From the terms of the charter itself, petitioner's remedy is an appeal to the city council, if and when such threat matures into action.

In other words, any action that might be taken by the Civil Service Board with reference to the matter discussed in the petition for an alternative writ of mandate would be "subject to confirmation by the city council", as provided by said charter. The petition on its face shows a conflict as to whether any action has as yet been taken by the Civil Service Board, and further, the petition is deficient in that it does not show enough of the rules of the Civil Service Board to enable us to determine which are applicable herein. However, section 10 of Rule VIII of said Board, as shown at the bottom of page 3 of Exhibit B attached to the petition herein, reads, "The provisions of this rule do not apply to promotion in the Police and/or Fire Department, as the same are provided for in Rules X and XII, respectively." Rules X and XII are not set out in said petition either in substance or effect. We believe this court is without power to grant said petition at this stage of the proceedings.

WHITE, Justice.

I dissent. In my opinion section 100 of the Long Beach City Charter unequivocally declares that members of the fire department are in the "competitive" class of classified civil service employees, and at least inferentially provides that the promotional examinations mentioned in section 104 of the charter shall be competitive. In other words, that the determination of "merit, efficiency, character, conduct", shall be by competitive examination. The Civil Service Board is not authorized to exercise any power not conferred upon it by the charter which creates it or not necessarily implied from the powers so conferred.

In the instant case, it appears from the verified petition that petitioner successfully passed a promotional examination for engineer in the fire department and was certified by the civil service board to the appointing power in the fire department, the latter of whom declared his intention to appoint petitioner to the vacant departmental position, but is restrained from so doing by action of the civil service board taken at its meeting on May 19, 1941, when it was voted that "promotional examinations and certifications be held in abeyance, and that the chief examiner be instructed to work out a method of holding promotional tests which would conform to the above court decision". The court decision referred to in the minutes of the civil service board is Haub v. Tuttle, 80 Cal.App. 561, 251 P. 925. In my opinion, this case is not applicable nor helpful in determining the powers of the board of the city of Long Beach, for the reason that the charter under consideration in the cited case did not contain the "competitive class" provisions found in the Long Beach charter.

I feel that petitioner is entitled to an alternative writ of mandate requiring the Civil Service Board of Long Beach to reinstate and put into effect the eligible list for promotions to the position of engineer in the fire department as such list was established by competitive examination conducted pursuant to the requirements of the city charter, and to certify the name of petitioner as being eligible for promotion to the existing vacancy in the position of fire department engineer, or to show cause before this court why such action is not taken.

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45 Cal.App.2d 632

GRADY et al. v. EASLEY et al.

Civ. 12477.

District Court of Appeal, Second District, Division 1, California.

June 30, 1941.

Hearing Denied Aug. 28, 1941.

1. Appeal and error 🔑863

Ordinarily, upon an appeal from a summary judgment entered under statute, providing for such judgment where it appears that there is no defense to the action, the only question presented is whether trial court abused its discretion, but the validity of such judgment is to be determined by the sufficiency of the affidavits considered upon the hearing of the motion for summary judgment. Code Civ.Proc. § 437c.

2. Judgment 🔑181

To warrant a summary judgment, there must be a failure on the part of defendant to satisfy the court that there is any basis for his denial or any truth in his defense, and unless the defendant fails so to do, the case should proceed to trial. Code Civ.Proc. § 437c.

3. Judgment 🔑185

Upon a motion for summary judgment, the allegations of fact made by defendants in their affidavits in opposition to such motion must be accepted as true, and the primary question for court to decide is whether the affidavits, when so viewed, raise an issue of fact. Code Civ.Proc. § 437c.

4. Judgment 🔑185

A motion for summary judgment must be denied and the case must proceed to trial, where an issue of fact is raised by defendant's affidavits filed in opposition to such motion, the allegations of fact contained in such affidavits being accepted as true. Code Civ.Proc. § 437c.

5. Judgment 🔑185

Where allegations of fact contained in affidavits filed by defendants in opposition to motion for summary judgment, accepting such allegations as true, raise only an issue of law, under statute providing for entry of summary judgment on motion where it appears that there is no defense to the action, court is required to render a summary judgment. Code Civ.Proc. § 437c.

6. Judgment 🔑185

Since entry of summary judgment deprives a defendant of a trial on the merits, plaintiff's affidavit in support of such motion must be strictly construed, whereas an affidavit of defense is to be liberally construed, and if the terms thereof reasonably warrant the inference that the defendant has a substantial defense to plaintiff's claim, summary judgment should not be entered. Code Civ. Proc. § 437c.

7. Judgment 🔑183

In action to recover upon a note, plaintiffs, by moving for summary judgment provided for by statute, admitted every material averment in the affidavit of defense filed by makers of note. Code Civ.Proc. § 437c.

8. Fraud 🔑31

A party who has been induced to enter into a contract by false and fraudulent representations may rescind the contract, or he may affirm it, keeping what he has received under the contract, and maintain an action to recover damages sustained by reason of the fraud, or he may set up such damages as a complete or partial defense to suit on the contract.

9. Judgment 🔑181

In action upon a note, given as part of consideration in a transaction involving an exchange of lands, the materiality of false representations with respect to her land allegedly made by payee and her agent in inducing the exchange presented a fact issue to be determined by a trial on the merits and precluded entry of summary judgment on motion by holders of note. Code Civ.Proc. § 437c.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Hanson, Judge.

Action by Denis H. Grady and others against James I. Easley and others, to recover upon a promissory note, wherein defendants counterclaimed for money allegedly had and received by deceased payee named in note, her successors and assigns for the use of defendants. From a summary judgment in favor of plaintiffs, defendants appeal.

Judgment reversed and cause remanded.

Jensen & Jenson and William C. Jensen, all of Los Angeles, for appellants.

Grady & Hotchkiss and Harold K. Hotchkiss, all of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an appeal from a summary judgment made August 2, 1939, against appellants Easley under section 437c of the Code of Civil Procedure for the sum of $2,416.33 and costs, it being contended (1) that the affidavits of respondents filed in connection with their motion for summary judgment are insufficient to support such judgment; (2) that appellants' affidavit filed in opposition to said motion is sufficient to entitle them to defend or present a triable issue of fact, and that the entry of the summary judgment improperly deprived them of their constitutional right to a jury trial.

Section 437c of the Code of Civil Procedure, at the time the judgment herein was entered, provided as follows: "* * * when an answer is filed * * * if it is claimed that there is no defense to the action, on motion of the plaintiff * * * supported by affidavit of any person or persons having knowledge of the facts, the answer may be stricken out and judgment may be entered, in the discretion of the court, unless the defendant, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to defend. * * * *The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant * * * can testify competently thereto.* The affidavit or affidavits in opposition to said motion shall be made by the defendant, or by any other person having knowledge of the facts, and together shall set forth facts showing that the defendant has a good and substantial defense to the plaintiff's action * * * upon the merits. The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant * * * can testify competently thereto. *When the party resisting the motion appears in a representative capacity,* such as a trustee, guardian, executor, administrator, or receiver, *then the affidavit in opposition by such representative may be made upon his information and belief.*" (Emphasis added.)

Respondents, as trustees under the will of Emily B. Garner, deceased, brought the instant action to recover on a promissory note executed by appellants in favor of decedent for the sum of $2,500, payable on October 15, 1936. The amended answer to the complaint sets up separate defenses as follows: (1) want of jurisdiction in the superior court over the subject of the action; (2) lack of consideration for the execution of the note; and (3) that the note was obtained from appellants through the fraud, deception and misrepresentations of decedent Garner and her agents, servants and employees in connection with a transaction whereby decedent obtained from appellants their ranch in New Mexico for her citrus grove located at La Habra, California. In addition, said amended answer sets up a counterclaim for the sum of $950, money had and received by decedent, her successors and assigns, for the use of appellants.

According to the allegations of the answer, the fraud complained of consisted of false representations to the effect that the California ranch was situated in a locality that was frostless; that the cost of watering the orchard thereon was between $300 and $400 per year; that the indebtedness on the well which supplied the water was $5,000; that the operation of the ranch property would produce a gross revenue of $8,000 to $10,000 per year; that the fruit trees on the property were all in first-class condition. Further, that decedent, her agents, servants and employees concealed from appellants the fact that the water level in the well supplying the water to the orchard had fallen over 100 feet in the ten years preceding the exchange of properties, and she falsely represented to appellants that the cost of operation of said property including all expenses was $3,500 per year. Appellants then alleged that instead of a $5,000 loan on the well, there was a $16,000 loan against it; that the cost of water necessary to operate the ranch was in excess of $1,000 per year; that over six acres of orange trees had been improperly planted, that the trees were stunted and had to be removed; that it was impossible to operate the property for less than $4,700 per year; that the first year after the exchange was made more than one-half of the crop was destroyed by frost and all the avocado trees on the property were permanently damaged.

The motion for summary judgment was made upon the ground that the answer is spurious in that "(a) Where both parties to an exchange have an opportunity to investigate, neither can rely on alleged misstatements to avoid the contract; (b) Where water stock is sold with property any representation in connection with water supply is an expression of opinion and not a representation of fact; (c) The conduct of defendants in paying interest and principal for three years and obtaining extension of time constitute a waiver of any alleged fraud; (d) Similarly defendants' failure to file a claim against the Estate of Emily B. Garner is indicative of waiver"; and also on the further ground that the first and third affirmative defenses do not state sufficient facts to constitute a defense.

The affidavit of respondent Grady avers that from January, 1931, to the date of her death on February 4, 1936, he was retained as counsel, financial and business adviser by Mrs. Emily B. Garner; that he was executor of her will and that he and his coplaintiff Hollembeak are trustees of her estate, and as such are owners and holders of the note here sued upon. That in August of 1934, Mrs. Garner, who owned a 23-acre orange grove at La Habra, California, discovered through an advertisement that appellants had a ranch in New Mexico for sale or trade; that she contacted them and they came to La Habra where they remained for several days inspecting the orange grove and investigating the operation, income and water conditions prevailing thereupon. That they indicated their willingness to make "the deal", whereupon Mrs. Garner went to New Mexico to inspect the Easley property. That on August 28, 1934, at Albuquerque, Mrs. Garner and the Easleys executed a contract of exchange, herein referred to as exhibit "A". A short time thereafter, appellant James I. Easley visited the office of affiant and it was agreed that exhibit "A" should be amended, and on September 28, 1934, another agreement, herein referred to as exhibit "B", was executed which incorporated the said amendments, it having first been examined by appellants' attorney. At their first conference affiant and appellants discussed the provisions of exhibit "A" which required a $5,000 payment to be made by Mrs. Garner on a mortgage against the La Habra property, and the repayment of same to her by appellants, it being indicated that the Easleys were pressed for cash. Said appellants agreed that they would repay the $5,000, as provided in exhibit "A", by a cash payment of $2,500 into escrow and by executing a note for $2,500 in favor of Mrs. Garner, due in two years with interest at 6 per cent, said cash and note to be delivered to Mrs. Garner at the close of the escrow. This $2,500 note is the note here sued upon and is referred to in the record as exhibit "C". Before the escrow was completed on November 15, 1934, both parties had taken possession of the respective properties under the exchange agreement, and 54 shares of stock in the Grandview Mutual Water Company were transferred to appellants.

According to his affidavit, when appellants first came to the office of respondent Grady in September of 1934, which was prior to the time the properties were placed in escrow, he discussed with them "the trade generally, but not specifically with reference to any items such as the indebtedness of the Grandview Mutual Water Company", and explained to appellants that "the president of the water company would be able to give them any information they desired pertaining to the water supply or condition of the wells"; affiant also explained to them that the La Habra Citrus Association had a contract for the purchase of all citrus fruit from said ranch and that inquiry could be made to said association for information regarding production, etc., of the La Habra ranch; that neither affiant nor Mrs. Garner was well-versed with respect to the management of the ranch for the reason that during the time Mrs. Garner owned it she had had someone else manage it for her. That for a period of over ninety days before the transfer or exchange of properties was completed, the Easleys communicated with him upon several occasions, during most of which time they were in possession of the said orange grove, and neither then nor since did the Easleys make any complaint about any misrepresentations having been made to them by this affiant, by Mrs. Garner or by anyone purporting to represent her.

Affiant avers that during the years 1935, 1936 and 1937 he corresponded with the Easleys regarding the note and at all times the Easleys indicated their willingness to pay the same and thanked him for his "kind patience". That on October 15, 1937, he received a letter enclosing a check for $650 to be applied, $500 to the principal and $150 to the interest then due on the note, said letter reciting: "We want to thank you sincerely for your lieniency and consideration in this matter and to assure you that we will further reduce the note at the earliest possible moment."

Quoting from the affidavit: "Affiant states that never at any time since the transfer of said properties has the said James I. Easley, or his wife, Marguerite B. Easley, indicated by any word or action that they were dissatisfied with the real estate deal or that any misrepresentation had ever been made to them, because had they done so at a time when it would have been possible this affiant would have made every effort to have re-traded the properties back, as affiant felt in the beginning and feels now that said Emily B. Garner was not benefited at all by the trade of said properties * * * that this is indicated by the fact that said Easleys have been and now are asking $75,000 for the La Habra property, which has about $22,000 against it, while affiant did for years endeavor to sell the said (New Mexico) property for $21,000 with a land purchase contract against it of approximately $1600.00 * * * (which) was finally traded for some property in La Jolla, California."

Respondent Grady then states upon information and belief that at no time since the fall of 1934 had the appellants complained to the Beckwiths or to Mrs. Garner "about anything connected with the trade of said properties, nor have they complained in any way about the orange ranch at La Habra."

The affidavit then goes on to state that the "Easleys had better sources of information than from this affiant and that affiant would have shown them the water bills, tax bills, etc., which had been paid on the La Habra ranch during the period that the said Emily B. Garner was the owner thereof had he been asked to do so and affiant states that the said Easleys did not inquire of affiant concerning such matters but did of their own accord go to the president of the Grandview Mutual Water Company and to the La Habra Citrus Association for their information."

Many other facts are averred in said affidavit based on information and belief to the effect that appellants were on friendly terms with Mrs. Garner and her relatives, including her brother, Mr. Beckwith, as well as with affiant, and therefore had ample means at their disposal to have ascertained those facts which they now claim were either concealed from them or were misrepresented to them.

The affidavit of James I. Easley in opposition to the motion for summary judgment is to the following effect: That all negotiations culminating in the execution of the agreement of August 28, 1934 (exhibit "A"), were had between him and one Captain Beckwith and a real estate agent with whom said Beckwith had listed the La Habra property; that Beckwith is the surviving brother of Mrs. Emily B. Garner and held himself out as the owner of said property and affiant did not know that Mrs. Garner was the owner thereof until just prior to the execution of said agreement, when Beckwith informed affiant in the presence of Mrs. Garner that said "property was not carried in his name for reasons which he would thereafter explain, but that he had had full and complete charge of it and the final say-so".

That "prior to the execution of said agreement, the said Captain Beckwith and said real estate agent told affiant that the cost of watering the alleged orchard upon said property was between $300 and $400 per year; that the indebtedness on the well which supplied the water to said property was $5,000.00; that the operation of the property would produce a gross revenue of $8,000 to $10,000 a year; that the fruit trees upon said property were all in first-class condition and said Emily B. Garner, her agents, servants and employees, concealed from defendants the fact that the water level in said well had fallen over one hundred feet in the ten years preceding said exchange, and represented to defendants that the cost to operate said property, including all expenses, was $3500.00 a year. Affiant alleges that each and all of said statements were false and untrue;

that affiant believed said statements and relied upon same and would not otherwise have made said exchange, and was wholly unfamiliar with conditions in California or with raising citrus, all of which was at said time fully known to said Beckwith and to said Emily B. Garner." Affiant then avers as his best recollection of the matter that some of these conversations took place in the presence of Mrs. Garner, and "that all of said matters, including the representations made by said Beckwith and said real estate agent, and defendants' entire unfamiliarity with conditions in California or the citrus industry were heard by Mrs. Emily B. Garner during the period of said negotiations and prior to the execution of said agreement, and said Emily B. Garner at no time objected thereto or indicated to this affiant in any way that said representations were not made with her approval". That affiant never met respondent Grady until after the execution of the agreement of August 28, 1934; that about a month after that date he "received information that said Grady, as attorney for Mrs. Garner and said Beckwith, threatened to file a suit to cancel the whole deal, unless said agreement should be amended. It is affiant's best recollection that at this time possession had actually changed hands and affiant had gone to a lot of expense, and rather than be faced with a lawsuit, he did, by reason of the said threats, execute the agreement of September 28, 1934. * * * Affiants had no discussion whatsoever with said Denis Grady, or did they even know him or of him until after the execution of said agreement of August 28, 1934. At no time prior to the completion of the escrow which was some time after the agreement of September 28, 1934, did affiants have any conversation with said Grady with reference to any matter pertaining to said transaction except the one matter hereinbefore referred to, to-wit: That said Grady did advise his clients to cancel the whole deal unless defendants would consent to the cancellation of paragraph VIII of said agreement of August 28, 1934. Subsequently thereto, however, affiant has many times informed Grady of each and all of the representations made to them by said Beckwith and said real estate agent, as shown in defendants' answer, and of the fact that all of said representations were untrue, to which said Grady has replied, 'Well, I tried to keep the deal from going through.' The said Beckwith took over the operation of said New Mexico ranch and at said time it was in excellent condition, well stocked and complete in every detail. Said Beckwith soon tired of the property, however, and allowed it to deteriorate * * * (and) later traded said property for property in La Jolla, and they advertised that said property at La Jolla had cost them $75,000 but that they would take $40,000 in cash. For several years after the completion of said transaction affiant and said Beckwith freely conversed with reference to the same, and the said Beckwith boasted to affiant and also to many friends of affiant, that the defendants 'Wanted a lemon ranch and they sure got one.' To another friend of affiants' he stated, 'Well, I guess I am going to have that California place back on my hands. I have a $45,000 mortgage on it which is more than it is worth.' Defendants became destitute of funds and had no money to even pay the taxes on the property or all of the interest upon the first and second trust deeds thereon, and communicated many times their troubles to said Beckwith and also informed him of the fact that they would never be able to pay said note. Said Beckwith later appeared to defendants to become remorseful because of the plight of defendants and of his part therein. He told defendants that everything he had was tied up in the trust and that said Grady was the trustee * * * that said Grady was dishonest and was dealing with said property for his own purposes and was robbing the estate, and that he was going to have Grady removed as trustee after which, if defendants could hang on a little longer, he would make things right with defendants and help them out of their financial plight * * * to try to placate Grady until he could get matters again in his own hands and he (Beckwith) specifically advised affiant to make the payments on said note, which affiant made, if there was any possible way that affiant could raise the money. It was by reason of these matters that affiant made the payments on said note as shown in the pleadings. It was also for these reasons that affiant never took any action seeking affirmative relief. Affiant at all times fully believed that it was within the power and ability of said Beckwith to assist him in his difficulties and to obtain the surrender and cancellation of said note."

[1, 2] While "Ordinarily, the only question presented upon an appeal from a sum-

mary judgment under section 437c is whether or not the trial court abused its discretion" (Kelly v. Liddicoat, 35 Cal. App.2d 559, 560, 96 P.2d 186, 187, citing Bank of America, etc., Ass'n v. Oil Well Supply Co., 12 Cal.App.2d 265, 55 P.2d 885); nevertheless, "The validity of the judgment is to be determined by the sufficiency of the affidavits considered upon the hearing of the motion." McComsey v. Leaf, 36 Cal.App.2d 132, 133, 97 P.2d 242, 243. After an exhaustive review of the subject, the opinion in the last-named case of McComsey v. Leaf, announces the following rule at page 140 of 36 Cal.App.2d, at page 247 of 97 P.2d thereof: "to warrant a summary judgment there 'must be a failure on the part of the defendant to satisfy the court * * * that there is any basis for his denial or any truth in his defense' (Cardozo in Curry v. MacKenzie, 239 N.Y. 267, 146 N.E. 375), and that unless the defendant does so fail, the case shall proceed to a deliberate trial in the usual course. Krieger v. Dennie, 123 Cal. App.Supp. 777, 10 P.2d 820."

[3-5] "It may be conceded at the outset that on a motion for summary judgment the allegations of fact made by defendants in their affidavits must be accepted as true, and that the primary question for the court to decide is whether the affidavits, when so viewed, raise an issue of fact. If an issue of fact is raised, then a summary judgment is improper, and the case must proceed to trial. Krieger v. Dennie, 123 Cal.App.Supp. 777, 780, 10 P.2d 820. If, however, the facts as averred are accepted and create only an issue of law, the court is bound, under the provisions of section 437c, to render a judgment on motion." Bank of America, etc., Ass'n v. Casady, 15 Cal.App.2d 163, 168, 59 P.2d 444, 446.

[6] In the case of Wyatt v. Madden, 59 App.D.C. 38, 32 F.2d 838, cited and relied upon in McComsey v. Leaf, supra, suit was brought by plaintiff to recover on two promissory notes. The defendant in her answering affidavit to the motion for summary judgment averred that she was induced to execute and deliver to plaintiff said notes in reliance upon certain material representations made by plaintiff's agent; that the said representations were false; that they were made with intent to deceive, and that by reason thereof she was damaged in a sum considerably in excess of the amount of her notes to the plaintiff.

In said case it was held at page 839 of 32 F.2d in the opinion: "The enforcement of Rule 73 [relating to summary judgment] deprives a defendant of a trial on the merits. Therefore, we have ruled that plaintiff's affidavit must be strictly construed. St. Clair v. Conlon, 12 App.D.C. 161, 163; Riley v. Mattingly, 42 App.D.C. 290, 294. An affidavit of defense, on the contrary, is to be liberally construed, and, if its terms reasonably warrant the inference that the defendant has a substantial defense to plaintiff's claim, summary judgment ought not to be entered. Codington v. Standard Bank, 40 App.D.C. 409; Lawman v. Johnston, 42 App.D.C. 202. In the light of these decisions, we are of the opinion that the court erred in entering summary judgment in this case.

[7] "Plaintiff's suit is based upon defendant's default in payment of notes. Defendant alleges, in effect, that she was induced to execute these notes through material misrepresentations, known to be false, and made for the purpose of inducing action on her part. By moving for judgment, plaintiff admits every material averment in the affidavit of defense.

[8] "One who has been induced to enter into a contract by false and fraudulent representations may rescind the contract; or he may affirm it, keeping what he has received under it, and maintain an action to recover damages he has sustained by reason of the fraud; or he may set up such damages as a complete or partial defense if sued on the contract by the other party. 13 C.J. 395; 12 R.C.L. p. 408, § 154; Passaic National Bank v. Commerical National Bank, 49 App.D.C. 146, 262 F. 234.

"The materiality of the alleged false statements can best be determined by a trial on the merits. In Shappirio v. Goldberg, 192 U.S. 232, 241, 24 S.Ct. 259, 261, 48 L.Ed. 419, the court observed that: 'There are cases where misrepresentations are made which deceive the purchaser, in which it is no defence to say that had the plaintiff declined to believe the representations and investigated for himself he would not have been deceived.' Whether this statement applies to the present case will depend upon the facts disclosed by the evidence."

[9] In the light of the foregoing authorities, taking into consideration the circumstances presented by the record herein, it is the opinion of this court that the

materiality of the alleged fraudulent statements should be determined by a trial on the merits of the case.

The judgment is reversed, and the cause remanded for trial.

We concur: DORAN, J; WHITE, J.

45 Cal.App.2d 592

In re SAGER'S ESTATE.

BOWERS v. STUBBLEFIELD.

Civ. 13133.

District Court of Appeal, Second District,
Division 2, California.
June 27, 1941.

Rehearing Denied July 17, 1941.

Hearing Denied Aug. 25, 1941.

1. Wills 🔑439

In construing a will, the intention of the testator should prevail.

2. Wills 🔑825

Where will nominating guardian for estate of testator's incompetent sister directed executors and trustees to pay to the guardian for her services such sum as the court might declare reasonable, but court in guardianship proceeding had awarded guardian $150 per month for her services payable from the estate of the incompetent sister, denial of the guardian's petition for payment of $150 per month from the testator's estate for services of guardian was not an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Proceeding in the matter of the estate of Homer Sager, deceased, wherein Maude Bowers filed a petition seeking payment of $150 per month from the estate of the deceased to the petitioner as guardian of the person and estate of Clara Sager, an incompetent person, opposed by Nellie Ruth Stubblefield, etc. From an order denying the petition, the petitioner appeals.

Affirmed.

Denio, Hart, Taubman & Simpson, by Geo. P. Taubman, Jr., all of Long Beach, for appellant.

F. A. Knight and Henry D. Lawrence, both of Long Beach, for respondent.

WOOD, Justice.

This is an appeal from an order of the probate court denying appellant's petition in which she asks the court to direct the payment of $150 per month from the estate of Homer Sager, deceased, to petitioner as the guardian of the person and estate of Clara Sager, an incompetent person.

Homer Sager died on January 4, 1940, leaving a will by which he left all of his estate in trust, the income, and if necessary the corpus of the estate, to be used for the support of his incompetent sister, Clara Sager, and upon her death to vest in certain named persons. In the third paragraph of the will it is provided that $250 per month be paid to Clara Sager for her support during the administration of the estate, the payments to begin on the date of the testator's death and to continue until the final distribution of the estate to the trustees. The fifth paragraph of the will is as follows: "I further declare that my sister is now of the age of seventy years and is in constant need of the care and attention of some suitable person, and in order that my said sister may have the proper care and attention of such person I hereby nominate and appoint Maude Bowers as Guardian of the person and estate of my said sister, Clara Sager, and request that she at all times care for and maintain my sister in the homeplace at 930 Pacific Avenue, Long Beach, California, and that during her guardianshp my sister be permitted either to have Maude Bowers look after her personally or to select some other person to care for her, it being my desire that my sister's wishes be respected at all times as to the person who shall look after her personal affairs. It is my request and I hereby direct that my said Executors and Trustees shall pay to the said Maude Bowers for her services as such Guardian such sum as the Court may declare reasonable, said Maude Bowers to reside at all times with my sister at 930 Pacific Avenue, Long Beach, California, after my death, and if she is unable to do so, her guardianship shall cease and my Trustees hereinafter mentioned shall appoint a new Guardian for my said sister."

All of the affairs of the estate have been settled, the final account and petition for distribution showing a net estate of $73,-

803.12. The sum of $250 per month has been paid to Clara Sager as directed in the third paragraph of the will. Clara Sager and Maude Bowers, the appellant, have since the death of Homer Sager been residing at his residence at 930 Pacific avenue in Long Beach. On February 13, 1940, appellant was regularly appointed guardian of the person and estate of Clara Sager and by order of the court made in the guardianship proceeding has received the sum of $150 per month for her services as guardian beginning with the date of her appointment. In her petition appellant asks the court that "the executor and executrix be ordered to pay to your petitioner as the said guardian of the person and estate of Clara Sager aforesaid, the sum of one hundred fifty dollars ($150.00) per month beginning January 4, 1940". Nellie Ruth Stubblefield, named as executrix in the will with George A. Hart, filed an answer in opposition to the petition, in which she alleged that appellant, as guardian, has received from the estate of Clara Sager the sum of $150 per month from the time of her appointment and that appellant has also received from the estate of Homer Sager a residence at 930 Pacific avenue, Long Beach. No testimony or evidence of any kind was offered or introduced at the hearing.

[1] An examination of the will in the light of the rule that the intention of the testator should prevail discloses that the principal desire of decedent was to provide for his aged incompetent sister. He provided a home for her and directed the payment of $250 per month for her during the administration of the estate. He nominated appellant as guardian of her person and estate with the request that appellant maintain Clara Sager and reside with her at the family residence, the additional provision being made that the sister's wishes concerning her personal care be respected and that if appellant should be unable to reside with the sister at the family residence her guardianship should cease. Further provision was made that "my said Executors and Trustees shall pay to the said Maude Bowers for her services as such Guardian such sum as the Court may declare reasonable * * *".

The provisions of the will have been carried out. The probate court has jurisdiction of both the proceeding to settle the affairs of the estate of Homer Sager and of the guardianship proceeding in the matter of the person and estate of Clara Sager. The same court which was called upon to approve the payment of the maintenance sum during the pendency of the administration has awarded the sum of $150 per month as compensation for the services of appellant as guardian. Both appellant and respondent appear to agree that the sum fixed as such compensation is reasonable.

[2] Respondent contends that appellant has regularly received compensation as guardian at the rate of $150 per month and that when the Homer Sager estate came to the point of being closed appellant saw "in the provisions of paragraph fifth of the will of Homer Sager, what appears to her to be a golden opportunity to obtain an additional and even a double allowance for her services as guardian of Clara Sager". Appellant contends that if an order be made granting her petition the allowance "would be paid to Maude Bowers as guardian of the person and estate of the incompetent sister, and obviously would then go into the independent funds of said surviving, incompetent sister, and thus reimburse her estate for the compensation paid as directed by the earlier order of the court in the incompetency proceedings to the guardian". If respondent's contention is correct it is evident that appellant is attempting to secure double payment for her services and that her petition should be summarily denied. On the other hand if appellant's position is correct and the court should grant her petition, no substantial change would be brought about in so far as the parties to this appeal are concerned, but additional bookkeeping would become necessary. It is possible that appellant would be able to carry on the books of the estate of the incompetent an additional amount which might serve as a basis for a petition for a larger allowance for her services. The testator did not mention any sum to be paid as compensation to the guardian but the matter was left to the discretion of the court. In passing upon the motion the court doubtless took into consideration the fact that appellant was receiving a residence free of charge and the additional fact that compensation had been awarded to her in the guardianship proceeding. We see no abuse of discretion. The possibility that at some distant date the heirs and legatees of Clara Sager or the remaindermen named in the will of Homer Sager might receive a somewhat

smaller or greater amount does not warrant interference with the order from which the appeal has been taken.

The order is affirmed, respondent to recover costs from appellant.

We concur: MOORE, P. J.; McCOMB, J.

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45 Cal.App.2d 559

In re GARDINER'S ESTATE.

KANDJOUNZEFF v. GARDINER et al.

Civ. 13132.

District Court of Appeal, Second District, Division 2, California.

June 25, 1941.

As Corrected July 24, 1941.

1. Judgment 🔑7, 16

Where a statute specifically inhibits an act, it is error for the court to do the thing prohibited, but if the Constitution has conferred on a court the power to deal with the subject matter, and its jurisdiction over the parties has been acquired pursuant to the exercise of due process, its judgment is valid and it is conclusive, however erroneous, unless reversed on appeal, in which event it is invalid only.

2. Judgment 🔑16

A decree is void if the court rendering it is destitute of jurisdiction, but otherwise it is valid and final unless by reason of material error in the application of substantive law it is reversed.

3. Courts 🔑1

"Jurisdiction" is the power to hear and determine and is not in the least dependent upon the ability of the judge to reason correctly or to act incorruptibly.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

4. Judgment 🔑7

Where a court in the exercise of its jurisdiction enters a decree affecting property rights contrary to statute, the court is guilty of error of judgment, but such error does not render the decree void, nor does the fact that the error may appear on the face of the decree itself indicate its nullity.

5. Judgment 🔑660

An erroneous decree which is not void on its face is forever binding and conclusive on the parties named, on the status defined, or on the property described unless on motion seasonably made it is vacated, or on appeal it is reversed.

6. Judgment 🔑7, 200

Even though findings of fact are utterly contrary to the evidence, the decree rendered is not for that reason void, and similarly the court's defiance or ignorance of an express statute or of the decisions of courts of last resort does not render its judgment a nullity.

7. Judgment 🔑217

The composition of a "judgment" is derived from an attempt to apply the law to the facts in question, and if the court decides the law and facts both wrong, or the facts right and the law wrong, or the law right and the facts wholly wrong, the judgment is still a "final judgment" if the time for appeal lapses.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment" and "Judgment".

8. Courts 🔑1

The duty of the court in every controversy or proceeding is to decide right, and that duty implies that the court may decide wrong, but its jurisdiction is not defeated or limited by a wrong decision.

9. Courts 🔑201

The superior court sitting in probate has the power conclusively to determine all questions of law and of fact which are ancillary to a proper judgment in the case, subject only to the orders of an appellate court.

10. Executors and administrators 🔑315(6)

A will cannot be invoked in support of the theory that a decree of distribution is void, since even though the will is part of the evidence upon which the decree is based, it becomes merged in the decree, and the decree itself becomes the measure of the rights of the beneficiaries and the law of the estate.

11. Executors and administrators 🔑315(6)

A decree of distribution is conclusive against collateral attack even though it is in contravention of the terms of the will involved, and the will cannot be used to impeach the decree.

12. Executors and administrators ⚷315(6)

Though a provision in a will may have been invalid, a decree distributing the estate in accordance therewith is conclusive when final.

13. Wills ⚷473

Where testator's principal intention was to maintain estate intact during the lives of his three children and to divide its income among them, provision in will creating a trust during the lives of the three children was the primary trust and was an independent scheme separate from a provision directing trustees to transfer all of the balance of the trust estate to the surviving issue of the three children upon the death of the last survivor of the three children.

14. Wills ⚷448

The construction of a will must be favorable to testacy if it reasonably admits of such construction.

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Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Proceeding in the matter of the estate of W. P. Gardiner, deceased, wherein Minnie Gardiner Kandjounzeff filed a motion to set aside and vacate a decree of distribution entered in 1902, and Ira O. Gardiner and others filed objections to the motion. From an order denying her motion, petitioner appeals.

Affirmed.

Kenyon F. Lee, of Los Angeles, for appellant.

Lewis T. Gardiner, of Los Angeles, and Heller, Ehrman, White & McAuliffe, of San Francisco, for respondents Paul Gardiner, Lewis T. Gardiner and Lorraine Gardiner.

Elliott H. Pentz, of Los Angeles, for respondents Ira O. Gardiner, as Trustee, Ira O. Gardiner, Individually, and Paul Kandjounzeff, a minor, by his Guardian ad Litem Elliott H. Pentz.

MOORE, Presiding Justice.

W. P. Gardiner being deceased, his will was admitted to probate in the superior court of Los Angeles county on May 12, 1900. Having bequeathed his property to a trustee to hold in trust for the use and benefit of his three children, to-wit, the petitioner and respondents herein, the decree of distribution was entered January 3, 1902. Following the terms of the will, the decree distributed the residue of the estate in trust with directions that the trustee divide between the three children and the survivors of them the income of the trust estate during the lifetime of the children, share and share alike; upon the death of any one or two of the children without issue, the survivors shall receive the income during their lives provided that the issue of any one of the three who might have deceased before the expiration of the trust, shall receive such income as would have been payable to his parent so long as any one of the three children shall remain alive; but the multiple issue of such deceased child shall receive share and share alike such income as would otherwise have been payable to their parent.

But it is provided, notwithstanding, that said property shall remain in trust vested in said trustee and his successors subject only to the payments herein provided for so long as one of the said three children shall remain alive. During each year each child shall receive annually his or her proportional share of the income for that year only. It further provided: "Fifth: Upon the death of the last surviving one of the said three children of said deceased said trustee or his successors in said trust shall forthwith transfer all of the property then remaining in trust to the then surviving issue of the said three children in manner following, that is to say, the same shall be divided in families, the issue of each child taking the same amount as the issue of any other child."

Pursuant to the decree of distribution the trustee named in the decree and his successors have continued to manage and administer the estate. On the 23d day of February, 1940, the petitioner filed her motion to set aside and vacate the order for distribution, filed just 38 years before, upon the grounds: (1) that it created a trust to convey real property after the death of the testator's children and is invalid by virtue of the provisions of sections 847 and 857 of the Civil Code, as declared by the Supreme Court in the Estate of Fair, 132 Cal. 523, 60 P. 442, 64 P. 1000, 84 Am.St.Rep. 70. It was there decided that the language of the will invalidated the trust sought to be created because none of the purposes for which express trusts might have been created under section 857 of the Civil Code included a trust to convey real property; (2) that the decree of distribution was and is in excess of the jurisdiction of the superior court "and is void on its face in that this court had no jurisdiction to create by its decree a trust to convey real property on or about January 3, 1902".

In her appeal from the order denying the motion, petitioner presents the same two propositions by her appeal. In view of our conclusion as to the finality of the decree of distribution, it will be unnecessary to discuss the merits of the trust created. We confine our comments to the asserted nullity of the decree, as stated in the second ground of attack.

Appellant is beset by an inordinate array of sound legal principles indistinguishably applied. She has confused the duty of the court with the power of the court. She has permitted her aversion for a judgment entered contrary to substantive law to obscure the ubiquitously accepted concept of the power of a court to enter a conclusive decree even though it mocks a provision of express law.

[1-5] Where a statute specifically inhibits an act, it is error for the court to do the thing prohibited. But, if the Constitution has conferred upon a court the power to deal with the subject matter and if jurisdiction over the parties has been acquired pursuant to the exercise of due process, its judgment is valid and it is conclusive, however erroneous, unless reversed on appeal. In such event it is invalid only. A decree is void if the court be destitute of jurisdiction, otherwise it is valid and final unless by reason of material error in the application of substantive law it be reversed. Jurisdiction is the power to hear and determine and is not in the least dependent upon the ability of the judge to reason correctly or to act incorruptibly. If the court, in the exercise of its jurisdiction enters a decree affecting property rights contrary to statute, the court is guilty of error of judgment. Neither does such error render void the decree nor does the fact that the error may appear upon the face of the judgment itself indicate its nullity. An erroneous decree which is not void on its face is forever binding and conclusive upon the parties named, upon the status defined, or upon the property described, unless upon motion seasonably made it be vacated or upon appeal it be reversed.

[6-9] At times the primary function of the trial court is to determine questions of fact. Even though such findings be utterly contrary to the evidence, the decree is not for that reason void. Similarly the court's defiance or ignorance of an express statute or of the decisions of the courts of last resort does not render its judgment a nullity. The composition of a judgment is derived from an attempt to apply the law to the facts in question. If the court decides the law and the facts both wrong, or the facts right and the law wrong, or the law right and the facts wholly wrong, it is still a final judgment if the time for appeal elapses. The fact that a court shall decide wrong does not affect the validity or the finality of a judgment any more than to decide right. The duty of the court in every controversy or proceeding is to decide right. Such duty implies that the court may decide wrong. Its jurisdiction is not defeated or limited by a wrong decision. To say that its judgment is final when right and interlocutory when wrong would open to attack the myriad of erroneous decrees that have confirmed the fallability of man since Coke struck the royal shackles from the hands of a cringing judiciary. It would provide an orgy for the prurient army of the litigious to the detriment of the peace, security and contentment of society. Therefore, in view of the nature of the superior court, of its constitutional founding and of its traditional authority to render conclusive judgments, no doubt remains of its power, sitting in probate, conclusively to determine all questions of law and of fact which are ancillary to a proper judgment in the case, subject only to the orders of an appellate court. See Gray v. Hall, 203 Cal. 306, 265 P. 246; Fauntleroy v. Lum, 210 U.S. 230, 234, 28 S.Ct. 641, 52 L.Ed. 1039; Estate of Ingram, 104 Cal. App. 1, 9, 10, 285 P. 365; Warren v. Ellis, 39 Cal.App. 542, 179 P. 544; Keating v. Smith, 154 Cal. 186, 97 P. 300; Crew v. Pratt, 119 Cal. 139, 51 P. 38; In the Matter of Trescony, 119 Cal. 568, 51 P. 951.

The principle is exemplified in the reversal of an order vacating the appointment of a guardian made more than six months after the appointment for the reason that the original order was not void on its face because it was contrary to the allegations of the petition or because the court erroneously deprived a mother of her maternal rights. In re Morehouse, 176 Cal. 634, 169 P. 365. Where a decree of distribution awarded community property as the separate property of the decedent wife and was an appropriate order of the probate court, in the absence of an appeal the decree became final and could be corrected only by motion for a new trial or on appeal. O'Brien v. Nelson, 164 Cal. 573, 574, 129 P. 985. Where a decree of distribution, in compliance with the terms of the will of deceased, awarded the property of decedent contrary to the prohibition of section 1313 of the Civil Code, which forbade a charitable bequest less than thirty days prior to the decease of the testator, a suit instituted for the purpose of declaring void that provision of the decree failed because the decree of distribution was valid although vulnerable. McGavin v. San Francisco, etc., Society, 34 Cal.App. 168, 167 P. 182.

[10-12] The will of the trustor cannot be invoked in support of the theory that the judgment is void. While the will is a part of the evidence upon which the decree is based, it becomes merged in the decree which itself becomes the measure of the rights of the beneficiaries and the law of the estate. In the Matter of Trescony, supra. The decree, therefore, is conclusive against collateral attack even though it is in contravention of the terms of the will. It follows that the will cannot be used to impeach the decree. Although a provision in a will may have been invalid, a decree distributing the estate in accordance therewith is conclusive when final. 11-B Cal.Jur. 796.

[13, 14] In view of the foregoing, it will be unnecessary to discuss the arguments of appellant on behalf of the nullity of the decree under consideration by the application of the rule set forth in the Estate of Fair, supra. Even though the decree of distribution was not final, the termination of the administration of the trust estate during the lifetime of the three named beneficiaries would be of doubtful legality. The fact that decedent's will provided that the trustees, upon the death of the last survivor of the three beneficiaries, should forthwith transfer all of the balance of the trust estate to the surviving issue of the three children, does not impair the will itself in so far as it creates a trust during the lives of the three named beneficiaries. The trust vested the estate in the trustee under orders to pay its income to the testator's children. It is an independent scheme separate from the provision requiring the trustee to transfer the residuary corpus to the issue of the children. To divide the income of the trust estate among the three children is the primary trust. The provision for the trustee to transfer the residue to the testator's unborn grandchildren is incidental. Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138; Nellis v. Rickard, 133 Cal. 617, 66 P. 32, 85 Am.St.Rep. 227. It is separable from the primary trust whose purpose was to secure the trustor's own children from economic want during their lives. To maintain the estate intact during the lives of the children and to divide its income among them were the principal and plain intentions of the testator and should not be defeated by separable provisions. Sacramento Bank v. Montgomery, supra. If it should be determined at the proper time that the provision for the trustee to transfer the corpus of the trust estate to the issue of the three beneficiaries is void, it would then be time enough for the court to terminate the trust and permit the legal heirs to come into their own. The construction of a will must be favorable to testacy if it reasonably admits of such construction. Estate of Spreckels, 162 Cal. 559, 561, 123 P. 371; Estate of Dunphy, 147 Cal. 95, 81 P. 315.

The order is affirmed.

We concur: WOOD, J.; McCOMB, J.

45 Cal.App.2d 541

DALLAPI et al. v. CAMPBELL et al.

Civ. 6576.

District Court of Appeal, Third District, California.

June 24, 1941.

1. Perpetuities 🔑1

The "rule against perpetuities" as it existed under the common law is an established rule of property law of California.

See Words and Phrases, Permanent Edition, for all other definitions of "Rule Against Perpetuities".

2. Perpetuities 🔑4(2)

Under the "rule against perpetuities" as applied to interest in land, any limitation or provision the purpose or possible effect of which is to cause an estate to commence in the future is invalid if as a result thereof, an estate may commence more than 21 years after a life or lives in being.

3. Perpetuities 🔑4(1), 6(1)

The rule against perpetuities relates only to future interest in property, the vesting of which is to be postponed beyond the allotted time, whereas the rule relating to restraint on alienation is statutory in origin and has reference to an undue prevention of the transfers of estates already vested. Civ. Code, § 715.

4. Mines and minerals 🔑55(4)

Provision of deed reserving exclusive right in grantor as against grantee, to lease and contract for drilling for and to market and sell all oil, gas and other hydro-carbon substances which might be recovered and saved from the tract, did not reserve any estate in the property conveyed, but only reserved a right or power to choose a lessee, and was in the nature of a contractual right and did not carry with it any interest in the real property conveyed.

5. Perpetuities 🔑4(4)

The reservation in grantor, as against grantee, of power or right to lease grantee's property, for oil and gas purposes, unlimited as to the time of execution of such lease, was a violation of the rule against "perpetuities" and was therefore void.

6. Mines and minerals 🔑73

The right of a lessee under usual oil and gas lease to drill for and produce oil and other substances is a "profit a prendre" which, whether unlimited as to duration or limited to a term of years is an "estate in real property" but if it is for a term of years, it is a "chattel real" whereas if it is unlimited in duration it is a "freehold interest", an "estate in fee" and "real property" or "real estate".

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Real", "Estate in Fee", "Estate in Real Property", "Freehold Interest", "Profit A Prendre", "Real Estate" and "Real Property".

7. Perpetuities 🔑1

The rule against perpetuities only applies to future interests in property and is not concerned with such interests which are vested.

8. Mines and minerals 🔑55(1)

Contractual limitations inserted in a grant deed restricting right of grantee to deal in oil and gas underlying the surface of property conveyed, if otherwise valid and enforceable, may not prevail where they conflict with well settled rules of property law.

9. Perpetuities 🔑4(4)

Where deed reserved exclusive right to grantor, as against grantee, to lease and contract for drilling and to market and sell all oil, gas and other hydro-carbon substances which might be recovered and saved from the land conveyed, and the reservation was unlimited as to the time of execution of such lease, the rule against "perpetuities" was violated at time of execution of the deed, since the possibility that a future interest might vest beyond the required period as conformity to the rule did not permit speculation regarding vesting of such future interest within the period of lives of persons in being plus 21 years.

10. Perpetuities 🔑4(2)

The mere possibility of property interest vesting beyond the period of lives of persons in being plus 21 years constitutes violation of rule against perpetuities.

11. Perpetuities 🔑4(20)

A general power of appointment in a donee of the power does not come within the prohibitions of the rule against perpetuities.

12. Powers 🔑19

Provision of deed reserving in grantor, as against grantee, exclusive right to lease and contract for drilling for, and to market and sell all oil, gas and other hydro-carbon substances which might be recovered and saved from the land conveyed, was not a "general power of appointment" since the grantor-donee could not validly exercise the power for its own benefit.

See Words and Phrases, Permanent Edition, for all other definitions of "General Power of Appointment".

13. Powers 🔑25

A "general power of appointment" is equivalent to a grant of absolute ownership.

14. Perpetuities 🔑4(4)

Where reservation to grantor of exclusive right, as against grantee, to lease and contract for drilling for, and to market and sell oil and gas was unlimited as to time of execution of lease, the rule against perpetuities was violated regardless of fact that an oil and gas lease was actually executed some

ten years subsequent to execution of the deed.

◆

Appeal from Superior Court, Los Angeles County; Robert W. Kenny, Judge.

Action to quiet title by Louis Dallapi and others against Patrick C. Campbell and others, and Sebastian Kraemer and others. From an adverse judgment, plaintiffs appeal.

Judgment reversed with directions.

Joseph A. Ball, and Frank C. Charvat, both of Long Beach, for appellants.

Wm. C. Day, Baldwin Robertson, Russell Breckenridge, and Arthur C. Fisher, all of Los Angeles, for respondents.

TUTTLE, Justice.

This action was brought to quiet title to several lots in the city of Los Angeles. General and special demurrers to the complaint were filed by defendants, Bank of American National Trust and Savings Association, Capital Company, Sebastian Kraemer, D & B Oil Company, Dawn Oil Company, Arthur C. Fisher, Petroleum Midway Company, and Owen E. Kupfer. The court sustained all of said demurrers without leave to amend. This appeal is taken from a judgment in favor of defendants entered pursuant to said order. The sole question is the sufficiency of the complaint to state a cause of action.

The complaint sets forth two causes of action. The first is on behalf of the first three plaintiffs. They allege that they are the owners in fee of said lots, having acquired title July 31, 1929; that defendant Capital Company is the successor in interest of Bank of Italy, plaintiffs' grantor, in respect to the reserved rights; that said defendant executed an oil and gas lease in respect to said property, in favor of defendant Petroleum Midway Company, and that the latter entered into a similar lease with defendant Sebastian Kraemer, and that defendants claim an interest in said real property under and by virtue of a *reservation* contained in the deed to said plaintiffs, which reads as follows:

"The exclusive right reserved in the grantor, as against the grantee, to lease and contract for drilling for and to market and sell all oil, gas and other hydro-carbon substances which may be recovered and saved from said tract. One six-hundredth part of the whole royalty which may accrue to the lessors under the above oil lease shall be appurtenant to each and every one of the numbered lots in said tract and shall be paid to the respective owners thereof, except that if any lot shall be divided into two parts, the owner of each part thereof shall, by virtue of such ownership, be entitled to one-twelve-hundredth part of such whole royalty accruing to said lessors, but the grantor shall be responsible only for the distribution as herein provided, of royalties which may be actually received by it in cash, and shall bear no other obligation with relation to such lease or royalties whatsoever. The grantor may make distribution to the person or persons who shall be entitled thereto, as may be shown by the records of the grantor, and the grantor shall not be required to take notice of any change of ownership of interest unless due notice in writing of such change shall have been given it and entered on the records."

They further allege that said claim is without right, and that defendants have no interest in said property.

The second cause of action is on behalf of plaintiff Fairfield. He alleges that on July 25, 1938, the owners of said property (the other plaintiffs), executed and delivered to him an oil and gas lease covering said lots. The other allegations of this cause of action are similar to those of the first. All plaintiffs join in the prayer that it be adjudged that defendants have no right, title or interest in said property.

It is the contention of plaintiffs that the said reservation contained in the grant deed is void in that it violates both section 715 of the Civil Code and the rule against perpetuities. Section 715 of the Civil Code was enacted to prevent restraints upon the alienation of property, and it is plaintiffs' position that the reservation, if given effect, prevents them (the grantees) from alienating a part of the freehold, and constitutes a limitation on the fee simple title. Section 715 prevents the restraint of alienation of property beyond the period of the lives of persons in being at the creation of the limitation, or beyond a period of twenty-five years from the time of the creation of the suspension.

[1, 2] The rule against perpetuities, as it existed under the common law, appears at this time to be an established rule of property law in this state. The rule is well stated in Estate of McCray, 204 Cal.

399, at page 406, 268 P. 647, at page 650, by adoption of the definition found in Tiffany on Real Property, 2d, section 179. The language employed is as follows: "as applied to interests in land, [the rule] may be stated as follows: Any limitation or provision, the purpose or possible effect of which is to cause an estate to commence in the future, is invalid if, as a result thereof, an estate may commence more than twenty-one years after a life or lives in being."

[3] The court in the McCray case, supra, continues the discussion and application of this rule at page 406 of 204 Cal., at page 650 of 268 P., as follows: "The rule against restraints on alienation has been, in some cases, confused with the rule against perpetuities; but the two rules, while having the same end in view, viz., that of preventing undue interference with the freedom of transfer of property, are of entirely different origin and application. The rule against perpetuities, ingrafted upon our system by the Constitution, relates only to future interests in property, the vesting of which is to be postponed beyond the allotted time. The rule relating to restraints on alienation, on the other hand, is statutory in origin, and has reference to an undue prevention of the transfer of estates *already vested*." (Italics ours.)

Plaintiffs contend that as the execution of an oil and gas lease constitutes the conveyance of an estate in real property, and as the reservation of the grantor reserved the right to lease plaintiffs' property for the purpose of drilling for oil and gas, without specifying a period of time in which such leasehold should be executed, that the rule against perpetuities is violated, in that the right or power is reserved to create a future interest beyond the period of the lives of persons in being, plus twenty-one years. The language purporting to reserve a right in the grantor to lease and deal with the oil and gas underlying the plaintiffs' property, reads in part as follows:

"The exclusive right reserved in the grantor as against the grantee, to lease and contract for, drilling for and to market and sell all oil, gas and other hydro-carbon substances which may be recovered and saved from said tract."

[4] The foregoing language contained in the fourth clause of the grant deed is the only expression which might be deemed to have reserved any property interest in the grantor. Clearly this language did not reserve any estate in the property conveyed. The reservation not only fails to reserve any ownership in the oil and gas, but does not even purport to constitute the grantor a lessee. The grantor, by the specific language contained in the reservation clause, only reserved a right or power to choose a lessee and distribute oil royalties among the lot owners. Whatever right may be deemed to have been reserved in plaintiffs' grantor, is in the nature of a contractual right, and does not carry with it any interest in the real property conveyed by the grant deed in question.

[5, 6] Because of the fact that the law of this state is unsettled as to the landowner's ownership of oil and gas in place, we shall not discuss the question as to whether the reservation by the grantor unlawfully restrains the right of plaintiffs to alienate a property interest in such oil and gas in violation of section 715 of the Civil Code. We do conclude, however, in view of the fact that the execution of an oil and gas lease constitutes the conveyance of an estate in real property, that the reservation of a power or a right to lease plaintiffs' property, unlimited as to the time of execution of such lease, was a violation of the rule against perpetuities, and therefore void and of no effect. Such a conclusion follows from the settled rule of law regarding the creation of property interests by virtue of the execution of an oil and gas lease. The leading case in this state establishing the law as to the property interests created by an oil and gas lease is Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822. At page 11 of 5 Cal. 2d., 53 P.2d at page 967 of the opinion the court used the following language (quoted and adopted from the case of Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A. L.R. 871):

"Under the usual oil and gas lease, the owner-lessor transfers to his lessee his right to drill for and produce oil and other substances. The right of the lessee presents a clear case of a profit a prendre in gross, a right to remove a part of the substance of the land. * * * This profit a prendre vests in the lessee an incorporeal hereditament, a present estate, an interest in the land, which is a chattel real *if it is to endure for years.*"

Continuing, the court quotes from Dabney-Johnston Oil Corp. v. Walden, 4 Cal. 2d 637, 52 P.2d 237, at page 12 of 5 Cal.2d, at page 967 of 53 P.2d, as follows: "This profit a prendre, whether it is unlimited as to duration or limited to a term of years, is an estate in real property. If it is for a term of years, it is a chattel real. * * * *Where it is unlimited in duration, it is a freehold interest, an estate in fee, and real property or real estate.*"

The rule of law laid down in the Dabney-Edwards case, supra, has been consistently followed in late decisions. A comparatively late case, Pimentel v. The Hall Baker Co., 32 Cal.App.2d 697, 90 P.2d 588, reiterates this now well accepted doctrine.

[7] If the grantor (Bank of Italy) had reserved a leasehold interest in plaintiffs' property, or by the language of the reservation clause, reserved any estate in the real property recognized in law, such real property interest would have become vested at the time of the execution of the grant deed, and consequently not subject to attack as violative of the rule against perpetuities. The rule, as indicated, only applies to *future* interests in property, and is not concerned with such interests which are vested.

[8-10] Without discussing at this time the validity and effect of contractual limitations that might be inserted in a grant deed as restricting the right of a grantee to deal in the oil and gas underlying the surface of the property conveyed, we are convinced that such contractual limitations, if otherwise valid and enforceable, may not prevail where they conflict with well settled rules of property law. We are unable to construe any language of the deed in question before us at this time, as reserving any estate in the real property conveyed to plaintiffs. In fact, the language of the grant deed indicates clearly that the grantor (Bank of Italy) was not to be the lessee under the terms of the reservation, but rather, was to have the right to designate the lessee and distribute among the numerous lot owners whatever oil royalties were received. No estate in the real property was reserved by the grantor, and the right intended to be reserved (that of designating an oil and gas lessee, and executing to such lessee an oil and gas lease sometime in the future) was a violation of the rule against perpetuities. The oil and gas lease, if ever executed, would constitute a conveyance of an estate in real property, and by virtue of the language of the reservation clause might be executed beyond the period of the lives of persons in being, plus twenty-one years. The rule against perpetuities was violated at the time of the execution of the deed to plaintiffs, because of the possibility that the future interest (oil and gas lease) might vest beyond the required period, as conformity to the rule does not permit speculation as to the vesting of such future interest *within the period* of lives of persons in being, plus twenty-one years. The mere possibility of the property interest vesting beyond the period, constitutes the violation of the rule. We have examined the case of Domestic and Foreign Petroleum Co., Ltd. v. Long, 4 Cal.2d 547, 51 P.2d 73, and Schiffman v. Richfield Oil Co., 8 Cal.2d 211, 64 P.2d 1081, and are unable to accept those cases as aiding the position of respondents. The language of the deed in the instant case fails to support a conclusion that the grantor intended to be the lessee, or was to "drill for or produce oil".

[11, 12] Recognizing the distinction between a general and a special power of appointment, and conceding that a general power of appointment in a donee of the power does not come within the prohibitions of the rule against perpetuities, nevertheless, the reservation of the power in the present case cannot be construed as a general power of appointment, as the grantor-donee of the power could not validly exercise such power for its own benefit, and as already indicated, it was never intended that the grantor was to be the lessee or was to operate the oil wells.

[13, 14] A general power of appointment is equivalent to a grant of absolute ownership. Corpus Juris, Perpetuities, vol. 48, § 62, p. 978. The grantor-donee (Bank of Italy) reserved no ownership in the property conveyed. The reservation by the grantor constituting a direct violation of the rule against perpetuities, the fact that an oil and gas lease was actually executed some ten years subsequent to the execution of the grant deed to plaintiffs does not alter the situation.

The case of Standard Oil Co. v. J. P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797, is not controlling of the question presented in the instant case. That case presented primarily the problem of apportionment of royalties among the various landowners, and the omission of the "oil clause" in a number of the deeds gave rise to a cause of action for reformation upon the ground of mistake. No such contention is raised in the present action.

The judgment is reversed and the trial court is directed to overrule the demurrer and permit the defendants to answer.

We concur: PULLEN, P. J., THOMPSON, J.

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45 Cal.App.2d 674

MILE v. CALIFORNIA GROWERS WINERIES, Inc.

Civ. No. 6590.

District Court of Appeal, Third District, California.

June 30, 1941.

1. Pleading 🔑389

Plaintiff cannot recover if evidence establishes a wholly different case from that which has been alleged, but the general rule is that a substantial, not a literal, agreement between pleadings and proof is all that is required.

2. Pleading 🔑398

A variance between pleadings and proof should be considered only where it has actually misled adverse party to his prejudice.

3. Pleading 🔑432

Objection to a variance between allegations and proof must be made before final judgment, otherwise the variance will be remedied by verdict.

4. Appeal and error 🔑1033(7)

On defendant's appeal, defendant could not complain of the omission of a finding where the finding, if made, would necessarily have been favorable to plaintiff.

5. Appeal and error 🔑1047(3)

In action on oral contract to pay plaintiff overriding commissions on wine sold for defendant by a third party where complaint contained allegation that defendant agreed to pay plaintiff a commission on wine sold for defendant by third party "and to customers furnished by" third party, that quoted allegation was not stricken to conform to evidence was not prejudicial against defendant under the testimony.

6. Contracts 🔑346(10)

In action on oral contract to pay plaintiff overriding commissions on wines sold for defendant by a third party, there was no "fatal variance" between allegations and proof, where complaint alleged that defendant agreed to pay plaintiff one cent, as an overriding commission, on every gallon of wine sold for defendant by third party to customers furnished by third party, and plaintiff's evidence showed that third party sold wine for defendant and that defendant agreed to pay plaintiff a commission, regardless of whether wine was sold to former customers of third party. Code Civ.Proc. § 471.

See Words and Phrases, Permanent Edition, for all other definitions of "Fatal Variance".

7. Contracts 🔑350(2)

In action on oral contract to pay plaintiff overriding commissions on wine sold for defendant by a third party, evidence *held* sufficient to support finding for plaintiff on issue whether contract called for defendant to pay plaintiff an overriding commission upon all wine sold for defendant by third party.

8. Appeal and error 🔑1071(6)

In action on oral contract to pay plaintiff overriding commissions on wine sold for defendant by a third party where complaint alleged another agreement to pay plaintiff additional stipulated commissions for plaintiff's personal services in selling wine as defendant's agent, failure to adopt findings upon issue respecting agreement to pay plaintiff commissions for his personal services was not prejudicial against defendant, where issue was apparently abandoned and judgment for plaintiff contained no allowance on that account.

9. Contracts 🔑9(3)

An oral contract to pay plaintiff overriding commissions on wine sold for defendant by a third party was not void for failure to specify time during which third party's employment by defendant was to continue, since contract was a contract for personal services continuing in nature.

10. Master and servant 🔑20

Oral contracts for personal services continuing in nature may be terminated by either party at will, upon giving the adverse party reasonable notice thereof.

11. Master and servant ⚿73(5)

When a contract for continuing services is terminated after services have been rendered pursuant thereto, the employer is liable for services already performed.

12. Contracts ⚿215(1)

A contract for services or commodities cannot be terminated so as to avoid liability for services or commodities already furnished.

13. Contracts ⚿189

Where plaintiff agreed to induce plaintiff's salesman to sell wine for defendant and defendant promised to pay plaintiff an overriding commission on wine sold for defendant by salesman, and salesman thereafter sold wine for defendant, and there was no evidence that salesman's services for defendant were terminated or that salesman ceased to perform duties for defendant, and no notice of any alleged change in relationship between salesman and defendant was ever given to plaintiff, defendant was liable to plaintiff for commissions on wine sold by salesman.

Appeal from Superior Court, Los Angeles County; Harley E. Riggins, Judge.

Action by H. F. Mile against California Growers Wineries, Incorporated, on an oral contract to pay plaintiff overriding commissions on wine sold by a third party and for the balance of the purchase price of plaintiff's equipment, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Edward L. Kellas and Richard Z. Lamberson, both of Fresno, for appellant.

Wm. P. Mealey, of Los Angeles, for respondent.

THOMPSON, Justice.

The defendant has appealed from a judgment which was rendered against it in a suit on an oral contract to pay plaintiff overriding commissions on wine sold by a third party, and for the balance of the purchase price of plaintiff's equipment.

The appellant contends there is an absolute failure of proof of the "general scope and meaning" of the contract as alleged in the complaint, pursuant to section 471 of the Code of Civil Procedure; that the findings and judgment are not supported by the evidence, and that the contract was terminated by the conduct of the third party.

The complaint alleges, and the court found, that the plaintiff was engaged in business as a wholesale commissioner of wines and brandies with his headquarters at Los Angeles; that he had a large number of regular customers; that his most successful salesman was Ed Syracuse who was well qualified as such and who had secured many regular personal customers; that the defendant corporation also conducted a separate wholesale wine business in Los Angeles, Fresno and Burbank; that on April 10, 1935, the defendant agreed with plaintiff, who was about to abandon his wine enterprise, that if he would persuade his salesman, Ed Syracuse, to transfer his business to the defendant and act as its salesman, defendant would pay plaintiff an overriding commission of one cent per gallon for all wine sold by the said Syracuse; that plaintiff did induce Mr. Syracuse to become the agent of the defendant and that, prior to February 28, 1936, Mr. Syracuse sold for the defendant 89,295 gallons of its wine, thereby becoming indebted to plaintiff in the sum of $892.95, no part of which was paid; that on or about July 1, 1935, plaintiff sold and transferred to the defendant his office furniture and equipment for the agreed price of $550, no part of which was paid, except the sum of $324, leaving a balance due thereon of $226. The complaint then asks for an accounting and judgment for the amount due on said contract for overriding commissions and for the balance of the purchase price of the furniture and equipment sold to the defendant.

No demurrer to the complaint was filed. The defendant answered, denying the material allegations of the complaint, and making certain counter demands in a cross-complaint. Findings were adopted favorable to the plaintiff in every material respect. Upon those findings judgment was rendered for plaintiff in the sum of $1,120.14, which included interest on the amounts found to be due. From that judgment this appeal was perfected.

[1-3] We are of the opinion there is no merit in appellant's contention that the judgment should be reversed for lack of proof of an essential allegation of the complaint according to the definition of a lack of due proof found in section 471 of the Code of Civil Procedure. That section distinguishes between a variance as defined by section 469 of the same code, and mere

lack of proof. It declares that a failure of proof exists when there is no substantial evidence to establish the "general scope and meaning" of an essential allegation. In effect, that section asserts that an absence of proof of more unessential allegations which does not prejudice the adverse party is not fatal to a recovery. In conformity with the provisions of the sections above referred to, it is said in 1 Jones on Evidence, 4th ed., page 446, sections 232–234, with respect to the doctrine of variance, that: "The plaintiff cannot recover if the evidence establishes *a wholly different case* from that which has been alleged. It has long been the general rule that a substantial, not a literal, agreement between pleadings and proof is all that is required. * * * A variance shall be considered only where it has actually misled the adverse party to his prejudice. * * * Objection to a variance between allegations and proof must be made before final judgment; otherwise the variance will be remedied by the verdict."

[4] In the present case there is no lack of proof upon the material allegations of the complaint. Paragraph III alleges that the defendant agreed to pay plaintiff one cent, as an overriding commission, on "every gallon of wine sold for said defendant by said Ed Syracuse and to consumers furnished by said Syracuse". The evidence conclusively shows that Syracuse did sell for the defendant 89,295 gallons of wine. That fact is not disputed. At the close of plaintiff's evidence there was no motion for judgment for failure of proof, or otherwise. It was not contended during the trial that plaintiff failed to prove the wine was sold to "customers furnished by said Syracuse". That failure of proof is raised for the first time on appeal. The record indicates that the only issue at the trial with respect to the overriding commissions claimed to be due to plaintiff, was the question as to whether defendant promised to pay him a commission of one cent per gallon for *all wine sold by Syracuse.* The answer does not raise the issue as to whether wine was sold by Syracuse *to former customers of his own.* All that the answer asserts in that regard is that "defendant expressly denies that it agreed with the plaintiff that it would pay plaintiff any additional commissions on the sales made by said Ed Syracuse". We assume that defendant's failure to raise the question at the trial or in its answer amounts to a concession that whatever wine Mr. Syracuse did sell, if any, was sold to his own former customers. The court found that the defendant promised to pay plaintiff the overriding commissions as alleged, and that he induced Syracuse to "transfer his business to the defendant", who thereafter sold wine for the defendant in the aggregate quantity of 89,295 gallons, and "that there is due, owing and unpaid from defendant to plaintiff the full sum of $892.95" on that account. The language of the finding last quoted infers that the wine in question was sold to former customers of Mr. Syracuse. If a more particular finding in that regard had been adopted to conform to the allegation of the complaint, it is evident that it would necessarily be favorable to the plaintiff. The defendant may therefore not complain of that omission. That omission does not constitute reversible error. Kramer v. Sanguinetti, 33 Cal.App.2d 303, 311, 91 P.2d 604.

[5] Moreover, the evidence shows that the defendant was to pay plaintiff one cent per gallon for all wine sold by Mr. Syracuse, regardless of whether it was sold to former customers of his or not. If the defendant had raised the question at the trial as to whether the wine had been sold to "customers furnished by said Syracuse", that evidence might have been supplied, or that language of the complaint might have been stricken from the pleading as surplusage. The defendant is not prejudiced by the fact that it was not stricken out to conform to the evidence adduced. Mr. Mile testified regarding the agreement to pay him one cent per gallon for all wine sold by Mr. Syracuse as follows:

"Q. And Mr. Leonard [manager of the defendant corporation] told you that if you could do so, he would be happy to pay you one cent a gallon for all purchases made by Syracuse, is that correct? A. Yes; not for all purchases; for all wines sold by Mr. Syracuse.

"Q. All wines sold by him? A. That is right.

"Q. In other words, any wine that Mr. Syracuse sold either as a broker or through the accounts which you say you controlled, the override obtained? A. Yes.

"Q. How long was that arrangement to obtain? A. I presume as long as Mr. Syracuse was associated with the concern. There was nothing said as to how long it was to carry on. I have always felt an arrangement of that kind carries on until you are discharged or your man leaves you."

[6] Under the circumstances of this case we conclude there was neither a fatal variance between the allegations of the complaint and the proof adduced, nor a lack of proof which will render the judgment void on that account.

[7] While there is a conflict of evidence regarding the oral contract to pay plaintiff one cent per gallon, as an overriding commission, upon all wine sold for the defendant by Mr. Syracuse, we are convinced there is sufficient evidence to support that issue.

[8] It is true the complaint does allege another agreement to pay plaintiff additional stipulated commissions for his personal services in selling wine as its agent. That issue, however, appears to have been abandoned. There is no substantial evidence that plaintiff himself sold any wine for the defendant. The court made no finding in that regard. The judgment contains no allowance on that account. The defendant is not prejudiced by the omission to adopt findings upon that issue.

No question is raised on appeal regarding the allowance to plaintiff in the judgment of the sum of $226 for the unpaid portion of the purchase price of office furniture and equipment. From that sum the court deducted $162.88 allowed to the defendant in accordance with the allegations of its cross-complaint. We assume those items were properly allowed.

[9-12] The contract was not void for failure to specify the time during which the employment was to continue. It was for personal services which were continuing in their nature. Such contracts may be terminated by either party at will, upon giving the adverse party reasonable notice thereof. Adkins v. Model Laundry Co., 92 Cal.App. 575, 581, 268 P. 939; 17 C.J. S., Contracts, p. 887, § 398. When a contract for continuing services is terminated after they have been rendered pursuant thereto, the employer is nevertheless liable for the services already performed. Allen v. Laughlin Fruit Refiners, Inc., 57 Cal. App. 46, 49, 206 P. 475; Great Western Distillery Products, Inc., v. John A. Wathen Distillery Co., 10 Cal.2d 442, 446, 74 P.2d 745; 17 C.J.S., Contracts, p. 888, § 398, and p. 893, § 404. At page 888 of the authority last cited it is said in that regard: "A contract for services or commodities cannot be terminated so as to avoid liability for services or commodities already furnished."

[13] In the present case there is no substantial evidence that the stipulated services of Mr. Syracuse were terminated, or that he ceased to perform those duties for the defendant. He continued to sell wine for the defendant until he had disposed of 89,295 gallons of wine as shown by the accounting. No notice of any alleged change in his relationship to the defendant was ever given to the plaintiff. There is no satisfactory evidence that his relationship did change. Certainly the defendant is liable, under such circumstances, for the overriding commissions it agreed to pay to plaintiff.

The judgment is affirmed.

We concur: PULLEN, P. J.; TUTTLE, J.

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45 Cal.App.2d 570

ROGNIER v. HARNETT.

Civ. 11505.

District Court of Appeal, First District, Division 1, California.

June 26, 1941.

Hearing Denied Aug. 22, 1941.

1. Landlord and tenant 🔑109(1, 4)

Whether tenant surrendered leased premises and landlord unqualifiedly accepted possession thereof are primarily fact questions for trial court to determine from whole transaction.

2. Landlord and tenant 🔑109(1)

A lease may be terminated by tenant's surrender of leased premises and landlord's acquiescence in such surrender.

3. Landlord and tenant 🔑109(8)

A landlord, taking possession unqualifiedly of leased property delivered to him by tenant, releases tenant.

4. Landlord and tenant 🔑109(4)

Even where leased premises are abandoned by tenant avowing his intention not to be bound by lease, landlord's assumption of actual possession and absolute control thereof, including efforts to let them to others, without saying or doing anything so qualifying his acts as to indicate that he is not acting in his own right and for his own benefit as owner entitled to possession or is acting for tenant's benefit or reletting on tenant's account and for his benefit, will not be heard to say thereafter that he did not accept surrender of term.

5. Landlord and tenant ⚷109(4)

To terminate lease by tenant's surrender of leased premises with landlord's consent, such consent need not precede surrender, but, if it exists at any time, surrender is completed and lease terminated.

6. Landlord and tenant ⚷109(4)

Where landlord accepts tenant's previous surrender or abandonment of leased premises with intent to terminate lease, it is terminated as effectually as if there had been valid agreement of surrender in advance.

7. Landlord and tenant ⚷112½

Evidence *held* sufficient to sustain trial court's finding that landlord agreed to termination of lease and that tenant's removal from premises was in pursuance of such agreement.

8. Landlord and tenant ⚷194(2)

A landlord, taking absolute possession of leased premises after tenant's removal therefrom and attempting to relet them without express or implied agreement that tenant's liability for future rent should continue, legally released tenant from further responsibility under lease.

9. Landlord and tenant ⚷230(2)

In landlord's action for rent and damages for alleged abandonment of leased premises by tenant, answer, alleging that tenant vacated premises with landlord's express consent and permission after landlord agreed to cancellation of lease and that landlord accepted premises on surrender thereof and retained absolute possession and control thereof for remainder of term fixed by lease, was sufficient to raise issue of surrender of lease, though word "cancellation", rather than "surrender", was used in such pleading.

10. Appeal and error ⚷1008(1)

In landlord's action for rent and damages for alleged abandonment of leased premises by tenant, question whether tenant's activity in trying to secure another tenant was inconsistent with his theory that landlord agreed to cancellation of lease was for trial court to determine.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Gaston Rognier against Allen F. Harnett for rent and damages for abandonment of leased premises. Judgment for defendant, and plaintiff appeals.

Affirmed.

J. E. McCurdy, of San Mateo, and J. W. Coleberd, of South San Francisco, for appellant.

Hugh F. Mullin, Jr., of San Mateo, for respondent.

KNIGHT, Justice.

The defendant, Allen F. Harnett, for about four years prior to September 30, 1936, was the tenant of a dwelling owned by plaintiff, and on that date the tenancy was extended by the execution of a lease for two years at a monthly rental of $110, which provided also for the payment of attorney's fees in case action was brought for a breach of the lease. Defendant continued in possession of the premises until November 17, 1937, when he moved therefrom. The rent was paid to December 1, 1937; and upon the expiration of the full term of the lease, in September, 1938, plaintiff brought the present action, which was tried on an amended complaint containing two counts, the first being for the rent from and after December 1, 1937, amounting to $1,100, the second for damages in the sum of $1,100 for the alleged abandonment of the premises, and in each count plaintiff asked for the additional sum of $250 as attorney's fees.

The defense interposed by defendant was based upon the claim that he vacated the premises with plaintiff's express consent and permission after plaintiff had agreed to a cancellation of the lease, and that upon the surrender of the premises plaintiff accepted the same and thereafter, for the remainder of the term fixed by the lease, retained absolute possession and control thereof. The trial court found in favor of defendant and entered judgment accordingly, from which plaintiff prosecutes this appeal, his principal contention being that the evidence is insufficient to support the trial court's finding upon the issue of the cancellation of the lease. There is no merit in the contention.

[1] Whether in any given case there has been a surrender of leased premises by a lessee and an unqualified acceptance of possession by the lessor are primarily questions of fact to be determined by the trial court from the whole transaction. Steel v. Thompson, 59 Cal.App. 191, 210 P. 430; Triest & Co. v. Goldstone, 173 Cal. 240, 159 P. 715. In the present case the evidence on many points is conflicting, and resolving such conflicts in favor of the prevailing party, and omitting minor details, the salient facts may be stated as follows: On or about October 5, 1937, which as will be noted was approximately six weeks prior to the date on which defendant vacated the premises, he informed plaintiff that he had an opportunity to buy a home, but before doing anything about the matter would like to know what plaintiff's attitude would be regarding the unexpired term of the lease; that is, whether plaintiff would release him therefrom, or permit him to sublet the premises, or require a cash settlement, or just what proposition plaintiff would make. Plaintiff replied he would think it over and let defendant know the next day. After waiting for a reply for two or three days, defendant sent his wife to call on plaintiff; and she also explained to him that they did not want to go ahead with the purchase of a home until they knew what plaintiff intended to do about the lease. Plaintiff replied in effect that inasmuch as they intended to buy a home they would no longer take any interest in his property; that therefore he would handle his property himself; and he asked her if she would show the place to prospective tenants, while she remained in possession of the property, which she said she would be glad to do.

Shortly after this conversation took place and on October 25, 1937, plaintiff listed the property for rent with several real estate agents in that locality at a rental of $150 a month; and on November 1, 1937, defendant closed the deal for the purchase of the property he intended to buy for a home, and on November 17 vacated plaintiff's property, leaving therein temporarily only a few articles to be used in cleaning up the place. The Harnetts notified plaintiff when they would vacate; and two or three days after they had moved Mrs. Harnett went back to the house to see that the place was in order and take away the few things she had left. She found plaintiff and his son in possession, making repairs to the fireplace, and at that time plaintiff told Mrs. Harnett that he thought he would be able to get $150 a month for the place; that the premises were worth that much; that he had never received adequate rent for the place; and that he formerly received $175 a month. Thereafter and on November 20, 1937, Mrs. Harnett called at plaintiff's office, handed him the keys personally, and told him that the house was in order and that she was grateful to him "for the release". He accepted the keys and neither then nor at any other time prior thereto did he indicate to her that he had changed his attitude respecting the termination of the lease. Before the Harnetts moved several prospective tenants called to inspect the premises. Some were shown about by Mrs. Harnett, and others, during her absence from home, by real estate agents; also before they moved, plaintiff, accompanied by Mrs. Harnett, visited the new home the Harnetts had purchased. Plaintiff was unable to procure a tenant for $150 a month, and on January 5, 1938, acting under the advice of his attorney, he instructed the real estate agents to offer the property for $110 a month until October 31, 1938, and thereafter at $125 a month. In the meantime, to-wit, on December 13, 1937, plaintiff wrote defendant asking what he intended to do about the lease; whereupon defendant sought the advice of an attorney, and in a reply letter this attorney set forth defendant's position relating to the termination of the lease. That letter was written on December 21, 1937, and so far as the record shows, nothing further was done in the matter by plaintiff until he filed the present action some ten months later.

[2-6] The situation here presented is no different from the one involved in Baker v. Eilers Music Co., 26 Cal.App. 371, 146 P. 1056, 1057, wherein the judgment in favor of the lessee was affirmed, the court saying: "It is alleged by the respondent in its answer, and found to be true by the trial court, that the premises were redelivered to the lessor on the 8th day of January, and that thereafter during the same month the lessor took possession of the same and offered them for rent to others. A lease [contract] may be brought to an end by the surrender of the leased premises and the acquiescence in such surrender by the lessor. Such acquiescence is perhaps

best evidenced by his taking possession of the property and assuming again all of the authority over it of an owner in possession. It is immaterial whether it be said in this case that the lessor acquiesced in the rescission attempted to be made by the lessee, or that the parties voluntarily brought their contract relationship to a close by the one delivering up the property to the other and the latter accepting it and proceeding to find another tenant. The same result follows. The contract would come to an end, and the relationship of landlord and tenant would cease. * * * A lessor, who takes possession of property delivered to him by his tenant, and does so unqualifiedly, thereby releases his tenants." Even where premises are abandoned by the tenant, who avows his intention not to be bound by his lease, the assumption of actual possession and absolute control of the premises by the lessor, including efforts to let to others, without saying or doing anything to so qualify his acts as to indicate that he is not acting in his own right and for his own benefit, as owner entitled to possession, without saying or doing anything to indicate that he is acting for the benefit of the lessee or relating on the lessee's account and for his benefit, he will not be heard thereafter to say that he has not accepted a surrender of the term. Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am.St.Rep. 145; Bernard v. Renard, 175 Cal. 230, 165 P. 694, 3 A.L.R. 1076. Nor is it essential that the consent of the lessor to a termination of the lease precede the surrender. If it exists at any time, surrender is completed and the lease terminated. For example, if the landlord accepts a surrender or abandonment of leased premises that has already taken place with the intent to terminate the lease, the lease is terminated as effectually as if there had been a valid agreement of surrender in advance. 3 A.L.R., note, p. 1080.

[7, 8] From the foregoing it is apparent not only that the evidence amply sustains the trial court's finding that plaintiff agreed to a termination of the lease and that defendant's removal from the premises was in pursuance of such agreement, but also that under the legal principles above set forth, plaintiff, by his subsequent actions in taking absolute possession of the premises and attempting to relet them, without any agreement, express or implied, that defendant's liability for future rent was to continue, legally released defendant from any further responsibility under the lease.

The cases cited and relied on by appellant are not in point for the reason that they were based upon facts establishing repudiation of the lease by the lessee, whereas here, the evidence shows and the trial court found in effect that the surrender of the premises during the term of the lease was in pursuance of an agreement on the part of the lessor to cancel the lease.

[9] Nor is there any merit in the contention made by plaintiff in his reply and supplemental briefs that the allegations of defendant's answer are insufficient to raise the issue of surrender of the lease. While the word "cancellation" rather than "surrender" is used therein, the pleading as a whole, including the denials contained therein, is legally sufficient to bring the case within the doctrine of those above cited, and to support the findings and judgment.

[10] Upon the question of the sufficiency of the evidence plaintiff calls attention to the testimony given by defendant that he tried to secure a tenant for the property, and plaintiff argues therefrom that defendant's activity in that respect is inconsistent with the theory that the plaintiff agreed to a cancellation of the lease. Defendant explained, however, that his only purpose in trying to secure a tenant was to assist plaintiff because plaintiff had released him from the lease. In any event, the question of whether or not there was any inconsistency on the part of defendant in his regard was a matter for the trial court's determination.

The judgment is affirmed.

We concur: PETERS, P. J.; WARD, J.

45 Cal.App.2d 586

JOHNSTONE v. E & J MFG. CO., Inc., et al.

Civ. 13066.

District Court of Appeal, Second District, Division 2, California.

June 27, 1941.

1. Limitation of actions ⚷46(1)

Where services are performed for a stated sum without any agreement concerning when payment is to be made, and the contract for the services is entire, the obligation to pay does not arise and the two-year statute of limitations does not begin to run until the services are completely performed. Code Civ.Proc. § 339, subd. 1.

2. Limitation of actions ⚷50(1)

Where services are rendered over a period of time under an express or implied agreement that they shall be paid for at the termination of the period, the two-year statute of limitations begins to run from the time the last service is rendered. Code Civ. Proc. § 339, subd. 1.

3. Limitation of actions ⚷50(1)

Where plaintiff over a period of years furnished to defendant services and advice which, in regard to a particular matter, were complete, no time for payment was specified and no written agreement existed, and evidence showed no intention that payment should not be made until all advice and assistance had been furnished, an implied obligation to pay "accrued" after services were performed and became an existing debt payable in praesenti, and hence the two-year statute of limitations began to run from date services were rendered, and plaintiff, in an action filed July 31, 1939, could not recover for any services rendered before August 1, 1937. Code Civ.Proc. § 339, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Accrue".

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by George A. Johnstone against the E & J Manufacturing Company, Incorporated, C. N. Erickson, and others, to recover the reasonable value of services rendered. From a judgment for plaintiff, C. N. Erickson and others appeal.

Judgment modified and, as modified, affirmed.

Joseph D. Taylor, of Los Angeles, for appellants.

Henry Brouillette, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover $22,702, the alleged reasonable value of services alleged to have been rendered to defendants, defendant C. N. Erickson appeals.

The evidence being viewed most favorably to plaintiff (respondent), the essential facts are:

Plaintiff, a physician and surgeon, in 1925 conceived the idea of manufacturing a resuscitator and gas anesthetic machine. He entered into a partnership with defendant Erickson to manufacture the same. This they did until 1926 when plaintiff and said defendant incorporated the E & J Manufacturing Company, Inc., portions of the stock being purchased by plaintiff and said defendant. The corporation continued the business formerly conducted by the partnership.

August 1, 1933, defendant Erickson purchased the E & J Manufacturing Company, Inc. stock owned by plaintiff, and thereafter continued the business himself under the firm name of E & J Manufacturing Company. From August 4, 1933, to and including May 10, 1938, plaintiff at various times furnished to defendant Erickson technical and professional services and advice in connection with the business which said defendant was operating. Such services were not rendered pursuant to any written agreement or contract nor was any time specified for the payment of the services. From August 1, 1937 to May 10, 1938 plaintiff devoted only six and one-half hours of time to defendant, which services were of the reasonable value of $10 an hour. All other services were prior to August 1, 1937. The present action was filed July 31, 1939.

This is the question which is material for us to determine:

Did the Statute of Limitations (section 339, subdiv. 1, Code Civ.Proc.) fixing a two year period of limitations upon actions not founded upon a written obligation or falling under the provisions of section 337 of the Code of Civil Procedure bar plain-

tiff's right of recovery for services rendered to defendant prior to August 1, 1937?

[1, 2] This question must be answered in the affirmative. It is the general rule that an action upon a contract, obligation, or liability not evidenced by an instrument in writing is barred two years after the cause of action arises. Sec. 339, subdiv. 1, Code Civ.Proc.

There are two recognized exceptions to this general rule:[1]

(1) If services are performed for a stated sum without any agreement as to when payment is to be made and the contract is entire, the obligation to pay does not arise until the services are completely performed. Hagan v. McNary, 170 Cal. 141, 143, 148 P. 937, L.R.A.1915E, 562.

(2) Where services are rendered over a period of time under an express or implied agreement that they shall be paid for at the termination thereof, the Statute of Limitations begins to run from the time the last service is rendered. (Corato v. Estate of Corato, 201 Cal. 155, 159, 255 P. 825; Mayborne v. Citizens' T. & S. Bank, 46 Cal.App. 178, 189, 188 P. 1034.)

[3] The evidence in the present case does not bring it within the purview of either one of the exceptions to the general rule. The contract was not entire. The plaintiff having given his advice and assistance relative to a particular matter, the services were complete and were not dependent upon those previously rendered or subsequently furnished. Neither can it be implied from the evidence that it was the intention of the parties that the services were not to be paid for until all advice and assistance to defendant had been furnished. Plaintiff's claim for services is simply one upon an implied obligation to pay for services rendered. That obligation accrued after the services were performed and became an existing debt payable in praesenti. Consequently the Statute of Limitations commenced to run from the date the services were rendered. The present case, therefore, falls within the purview of the general rule above stated as applied in Osborn v. Hopkins, 160 Cal. 501, 506, 117 P. 519, Ann.Cas.1913A, 413; Ackley v. Fishbeck, 124 Cal. 409, 410, 57 P. 207; and Hocker v. Glover, 113 Cal.App. 152, 156, 298 P. 72.

For the foregoing reasons plaintiff's right to recover for any services rendered prior to August 1, 1937, was barred by section 339, subdivision 1, Code of Civil Procedure and, since the record discloses that subsequent to this date he rendered only services of the reasonable value of $65, the judgment appealed from is modified to provide that plaintiff recover from defendant the sum of $65, together with interest thereon from September 14, 1937, and that defendant recover his costs incurred in the lower court. See sec. 1032, subdiv. a, Code Civ.Proc.

As thus modified the judgment is affirmed.

I concur: MOORE, P. J.

I dissent: WOOD, J.

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45 Cal.App.2d 695

SIMMONS v. SIMMONS.

Civ. 2761.

District Court of Appeal, Fourth District, California.

July 1, 1941.

1. Divorce ⚿218, 229

Where trial judge on his own motion reopened hearing on order to show cause, and plaintiff who had theretofore procured order for temporary alimony, attorneys' fees and court costs participated in hearing by his counsel without objection, there was a "waiver" of notice.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

2. Divorce ⚿285

On appeal from an order vacating a prior order awarding plaintiff temporary alimony, attorneys' fees and court costs, there was nothing presented for a review, where there was no bill of exceptions or a transcript sufficiently certified by the trial judge. Code Civ.Proc. § 951.

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[1] The following statement, "But if the contract is for an indefinite time and no time for payment is specified, the statute does not begin to run until the services end" (27 Cal.Jur. [1926] 218, sec. 24), is not an accurate statement of the law. Such rule is applicable only when the conditions mentioned in the two exceptions to the general rule exist.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Bert Simmons against Dorothy Simmons. From an order vacating a prior order awarding plaintiff temporary alimony, attorneys' fees, and court costs, the plaintiff appeals.

Appeal dismissed.

Barry Sullivan, of Los Angeles, and Carl L. Elver, of Ventura, for appellant.

LeRoy N. French, of Los Angeles, and Platt & Sinai, of Reno, Nev., for respondent.

MARKS, Justice.

This is an appeal from an order vacating a prior order awarding plaintiff, pending trial of the action, $100 per month for his support, $750 for attorneys' fees, and $25 for court costs.

The record consists of a clerk's transcript which bears no certificate of the trial judge. It shows that three witnesses were sworn and testified. There is no reporter's transcript nor bill of exception.

Waiving for the moment the technical reasons why we can not entertain this appeal, and directing our attention to the merits, there is no sound reason presented for a reversal of the order.

The original hearing was had on July 24, 1939, in response to an order to show cause. On that day, by leave of court, defendant filed a supplemental answer in which she set up a Nevada divorce rendered on July 21, 1939, and sought to have it determined that plaintiff and defendant were not then husband and wife.

On the following morning the trial judge, on his own motion, reopened the hearing on the order to show cause. Both parties were represented by counsel. No objection was made by either counsel to the order nor to the further hearing. The question of lack of notice was not raised.

The hearing proceeded without any objection being made and the trial judge vacated his prior order, principally on the grounds of defective allegations of the complaint and the Nevada decree which terminated the marital relation formerly existing between the parties.

[1] Plaintiff argues that the trial court had no authority, of its own motion and without notice, to vacate the former order. The voluntary appearance of counsel and his participation in the proceedings without objection was a waiver of notice. Hammond Lumber Co. v. Bloodgood, 101 Cal. App. 561, 281 P. 1101; Acock v. Halsey, 90 Cal. 215, 27 P. 193; Curtin v. Dunne, 10 Cal.App. 586, 102 P. 825; Walberg v. Underwood, 39 Cal.App. 748, 180 P. 55; Brown v. Superior Court, 65 Cal.App. 147, 223 P. 426.

[2] In the absence of a bill of exceptions or a transcript sufficiently certified by the trial judge, there is no record upon which we may consider this appeal. Code Civ.Proc., Sec. 951; Kwon v. Kwon, 39 Cal.App.2d 232, 102 P.2d 808, and cases cited.

The appeal is dismissed.

We concur: BARNARD, P. J.; KELLY, Justice pro tem.

45 Cal.App.2d 697

SIMMONS v. SIMMONS.

Civ. 2773.

District Court of Appeal, Fourth District, California.

July 1, 1941.

1. Dismissal and nonsuit 🔑19(1, 3)

A plaintiff may not dismiss his action if the defendant has appeared and has sought affirmative relief either by answer or cross-complaint. Code Civ.Proc. § 581.

2. Divorce 🔑139

In action for divorce where wife by separate defense set up a foreign divorce and sought the affirmative relief of a decree establishing validity of foreign divorce, there was no error in refusing plaintiff's request to dismiss the action. Code Civ.Proc. § 581.

3. Divorce 🔑177

An order denying plaintiff's motion for leave to dismiss divorce action is not appealable. Code Civ.Proc. § 963.

◆

Appeals from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action for divorce by Bert Simmons against Dorothy Simmons. From a judgment dismissing plaintiff's action, and from order denying motion to dismiss and certain other orders, plaintiff appeals.

Judgment affirmed, and attempted appeal from orders dismissed.

Barry Sullivan, of Los Angeles, and Carl L. Elver, of Ventura, for appellant.

LeRoy N. French, of Los Angeles, and Platt & Sanai, of Reno, Nev., for respondent.

MARKS, Justice.

This is an appeal from a judgment in an action for divorce which dismissed plaintiff's action and decreed that the parties were not husband and wife because of a final decree of divorce rendered in the state of Nevada which was held to be "a good, valid, regular and legal decree".

The only question raised by plaintiff, necessary for consideration, is the validity of the ruling on his unsuccessful attempt to dismiss his action prior to trial.

On May 2, 1940, plaintiff filed a written dismissal of his action with the clerk of the court. On the morning of May 3, 1940, when the case was called for trial, he called the attention of the trial judge to this dismissal and sought further dismissal by order of court which was denied him.

[1, 2] A plaintiff may not dismiss his action if the defendant has appeared and has sought affirmative relief either by answer or cross-complaint. Sec. 581, Code Civ.Proc.; 9 Cal.Juris. 511, and cases cited. Here, by a separate defense in her answer defendant set up the defense of the Nevada divorce decree and that because of that decree the parties were no longer husband and wife. She sought the affirmative relief of a decree of the trial court establishing the validity of the Nevada divorce. This issue was tried and the trial court determined it in favor of defendant.

As the answer of defendant sought affirmative relief there was no error in refusing plaintiff's request to dismiss the action.

The determination of the other questions raised by defendant all rested within the sound discretion of the trial court. No abuse of discretion is shown.

[3] The orders from which plaintiff has attempted to appeal are not appealable. Sec. 963, Code Civ.Proc.

The judgment is affirmed. The attempted appeal from the orders is dismissed.

We concur: BARNARD, P. J.; KELLY, Justice pro tem.

BERNHARD v. BANK OF AMERICA N. T. & S. A.*

Civ. 13023.

District Court of Appeal, Second District, Division 2, California.

June 25, 1941.

Rehearing Denied July 22, 1941.

Hearing Granted Aug. 22, 1941.

1. Judgment 🔑670

A judgment settling an executor's account, objected to by heirs at law, which determined that decedent during her lifetime had made gift of bank deposit to executor and discharged the executor, was "res judicata" on issue concerning the gift, in subsequent proceeding brought by one of the heirs at law, as administratrix with the will annexed, against bank's successor to recover amount of the deposit on ground that deposit was wrongfully paid to executor, and the administratrix was "estopped" from claiming that there was no valid gift. Code Civ. Proc. § 1908.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata" and "Estop".

2. Banks and banking 🔑119

Although a bank becomes a "debtor" promptly upon receipt of deposit, at the same time it becomes the depositor's "agent" to care for and repay upon demand, the moneys deposited, especially in the case of a commercial deposit, which is payable promptly upon depositor's order.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Debtor".

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* Subsequent opinion 122 P.2d 892.

3. Judgment ⚷678(1)

In determining whether judgment settling executor's account objected to by heirs at law, which determined that decedent during her lifetime had made a gift of bank deposit to executor, was res judicata on issue of the gift in subsequent proceeding brought by an heir at law as administratrix with the will annexed, against bank's successor to recover amount of the deposit, on ground that it was wrongfully paid by bank to the executor, the successor was in "privity" with the executor. Code Civ.Proc. § 1908.

See Words and Phrases, Permanent Edition, for all other definitions of "Privity".

4. Judgment ⚷634

A judgment which determines the absolute existence of a fact is binding not only on the parties to the decree but also it may be relied on as an "estoppel" in any subsequent collateral suit when either party or the privies of either party allege anything inconsistent with it, regardless of whether the subsequent suit is on the same cause of action. Code Civ.Proc. § 1908.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

5. Judgment ⚷666, 678(1)

Generally in order for the doctrine of "res judicata" to be available, each party to the action must have been bound by the prior determination, but an exception to such rule exists where liability of the defendant is altogether dependent on the culpability of one exonerated in a prior suit upon the same facts, when sued by the same plaintiff and in such case the unilateral character of the estoppel is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another when that other has been exonerated in a direct action. Code Civ.Proc. § 1908.

6. Judgment ⚷678(1)

If the immediate actor is free from responsibility because his act was lawful, one in privity with him who took no direct part in the transaction cannot be held responsible for the act.

7. Judgment ⚷678(1)

Where privies are identified with party in interest, they are bound by a judgment affecting such party and where the identity is found to exist, all alike are concluded. Code Civ.Proc. § 1908.

8. Judgment ⚷666

Where judgment was entered settling executor's account which was objected to by heirs at law, and determining that decedent during her lifetime made gift of bank deposit to executor, and subsequently an heir at law, as administratrix with the will annexed, brought proceeding against bank's successor to recover amount of deposit on ground that it was wrongfully paid by bank to the executor, the doctrine of "mutuality of estoppel" did not preclude bank from pleading the former judgment as "res judicata" because of fact that the bank was not a party to the probate proceeding, and held the money prior to the filing by the executor of his account. Code Civ.Proc. § 1908.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality of Estoppel".

9. Judgment ⚷666

Where a party tries a question in one suit, he may not try the same question involving the same testimony in another suit, notwithstanding the doctrine of mutuality of estoppel.

10. Election of remedies ⚷3(4)

Where an heir at law of decedent objected to account of executor in order to have determined question concerning whether decedent had made a gift of a bank deposit to the executor, the heir at law who was unsuccessful in such litigation was precluded by the "election of remedies" doctrine from subsequently bringing an action as administratrix with the will annexed against bank's successor to recover amount of the deposit on ground that bank wrongfully paid the deposit to the executor.

See Words and Phrases, Permanent Edition, for all other definitions of "Election of Remedies".

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Helen Bernhard, as administratrix with the will annexed of the estate of Clara Sather, deceased, against the Bank of America N. T. & S. A., to recover a bank deposit. From an adverse judgment, the plaintiff appeals.

Affirmed.

Joseph Brenner, of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for respondent.

MOORE, Presiding Judge.

This appeal is from a judgment denying recovery of a bank deposit to the administratrix of an estate. The money had been deposited with defendant by decedent through the agency of one Charles O. Cook who subsequently qualified as executor of decedent's estate. Because he did not include the amount of the bank deposit in his account, plaintiff in her individual capacity objected thereto and upon a trial of her objection, the account was confirmed and Cook was decreed to be the owner of the money.

In June, 1933, the decedent, then in failing health, made her home with Mr. and Mrs. Cook who resided in San Dimas. From that date until October 26th, Mr. Cook and one Dr. Zeiler were authorized jointly to make drafts against the commercial account of decedent in the Security First National Bank of Los Angeles, hereinafter referred to as the Los Angeles bank.

On the 24th day of August, 1933, Cook opened a checking account at the San Dimas bank as follows: "Clara Sather by Charles O. Cook." No authorization was forwarded to the San Dimas bank by the decedent and no communication was had between her and the bank prior to her demise. But after opening the account a number of checks, drawn by Cook and Zeiler on decedent's commercial account in Los Angeles, were deposited with the San Dimas bank and drafts were made upon that account by checks signed "Clara Sather by Charles O. Cook" to meet various expenses of Mrs. Sather.

On the 26th day of October, 1933, at the request of Mrs. Sather, Mr. Rappold, teller of the Los Angeles bank, called at the Cook home in San Dimas for the purpose of assisting decedent to transfer her money from her special account in Los Angeles to the San Dimas bank. A check was drawn upon the Security First National Bank for $4,155.68, payable to the First National Bank of San Dimas "for credit to the account of Mrs. Clara Sather" which Mrs. Sather signed by affixing her mark. Contemporaneously with the execution of that check, she signed a typewritten declaration addressed to the Los Angeles bank, directing it to transfer the balance of her savings account in the amount of $4,155.68 to the First National Bank of San Dimas.

At the time of her signing the check and order, there were present besides Mr. Cook, Mr. Marchant, manager of the San Dimas bank, Mr. Rappold, a teller of the Los Angeles bank, and Dr. Thomason, decedent's physician. Both of the instruments mentioned were witnessed by Mr. Cook and Dr. Thomason.

On the following day decedent's check was deposited in the San Dimas bank to the same account of "Clara Sather by Charles O. Cook" opened by Cook on August 24th. On that day, Cook withdrew the entire balance of $4,187.71 by check signed "Clara Sather by Charles O. Cook". With that check Cook opened a new account in the same bank in the names of himself and his wife. On the following day, he withdrew $2,500 from the last-mentioned account and deposited it in the Los Angeles bank, likewise in the name of himself and his wife. Subsequently he withdrew the balance from the San Dimas account and made a deposit thereof in the Los Angeles bank in the name of his wife alone. Mrs. Sather deceased the following November. Thereafter Cook qualified as executor of the estate of decedent and proceeded with its administration.

Some years passed during which he neglected to report the status of the estate or the items of its assets. Upon being cited to file an account, he did so but accompanied it with his resignation. His account made no mention of the money which had been transferred by decedent to the San Dimas bank. Helen Bernhard and her sister, as legal heirs of decedent, filed their objections to the account based upon his neglect to account for the moneys transferred by decedent to the San Dimas bank. Upon trial of the objections, the court settled the account and, as a part of its order, declared that the decedent during her lifetime had made a gift to Charles O. Cook of the sum of $4,187.71. Cook's account having been approved and he having been discharged, Helen Bernhard qualified as administratrix with the will annexed and instituted the present action against the defendant as successor to the San Dimas bank.

In addition to its general denial, the defendant plead two affirmative defenses, namely (1) that the money referred to in the complaint was Cook's property; and

(2) res judicata, by virtue of the determination made by the superior court sitting in probate at the time of the trial of the objection to the account filed by Cook. Plaintiff interposed a general demurrer to both of the last-mentioned special defenses and objected to the introduction in evidence of the record which was offered on behalf of the plea of res judicata. She also contended that the previous determination of ownership of the money by Cook was void for lack of jurisdiction for the reason that the executor had resigned before the filing of the objections.

The contention last mentioned was disposed of, before the judgment appealed from was entered, by the action of the Supreme Court in the case of Waterland v. Superior Court in and for Sacramento County, 15 Cal.2d 34, 98 P.2d 211. This left for consideration only two questions, namely, whether or not there was a valid gift of the money by decedent to Cook and (2) whether the rule of res judicata may be applied. In view of our conclusion, it will be necessary to consider only the second proposition.

[1-3] It is contended by appellant that the parties to the present action are not the same as the parties to the probate proceedings; that in the former proceeding she and her sister objected for themselves and that she then had no power to bind the estate; that she was not authorized to expend the moneys of the estate in the prosecution of an appeal and the estate was not responsibly represented. On the contrary, she contends that in the present action she is the administratrix of the estate and upon the trial of the present action she was in a position to carry on the prosecution of this action as such administratrix; that there is no privity between the defendant and Cook who was victorious in the probate proceedings in having himself declared to be the owner of the moneys mentioned in the pleadings. While plaintiff does appear in the present action in an official capacity, the benefits which she hoped to achieve were identical with the benefits which she expected in making her objections to the account of Mr. Cook. Should she succeed in the present action the moneys recovered would become an asset of the estate and would inure to the benefit of its creditors and legatees who also would have benefited and to the same extent had she succeeded in the probate proceeding in compelling Cook to restore the moneys to the estate. Having attempted in the present action to litigate the same right which she asserted in the probate proceedings, the prior adverse judgment estops her in the present action. 15 Cal.Jur. 189; Williams v. Southern Pac. Co., 54 Cal.App. 571, 202 P. 356; Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; In re Estate of Bell, 153 Cal. 331, 95 P. 372. Although not bearing the appellation of administratrix in the probate proceeding, in view of the fact that her purpose was identical with that which motivates her in the present proceeding, it is clear to us that there is no substantial difference between the capacities then and now. In re Estate of Bell, supra. As to the privity of defendant with Cook, this appears to be established. By the judgment of the probate court, it was determined that Cook was the owner of the money. Since the defendant held it for Cook, it was Cook's agent. Without Cook's authorization, defendant would not have been authorized to pay the money to any one. Since Cook, the owner, called upon his own agent to deliver to him the money which had become his by virtue of the gift of decedent, to declare now that the defendant is a tort-feasor against the estate of decedent because it has returned to Cook what belonged to him would indeed be a strange anomaly. Privity can be no more successfully created between two parties than by the establishment of an agency of one for the other. While a bank is ordinarily considered the debtor of a depositor, there is no doubt that the relationship is dual in character. Although the bank becomes debtor promptly upon receipt of the deposit, at the same time it becomes his agent to care for and repay upon demand the moneys deposited. 9 C.J.S., Banks and Banking § 267, p. 546; Willis v. Barrow, 218 Ala. 549, 119 So. 678, 680; Wall v. Franklin Trust Co. of Phil., 84 Pa.Super. 392, 394. This is especially true in the case of a commercial deposit which according to law, contract and usage is payable promptly upon the depositor's order. Therefore, since Cook, the rightful owner, has withdrawn his money from the custody of his agent, that agent could not be obligated to pay that same money to a third party. Code Civ.Proc., sec. 1908.

[4] Since defendant was thus in privity with Cook, it follows that the judicial decision of the ownership of the money which is the subject of this action, by the probate decree, is conclusive so far as it might af-

fect the defendant. No good reason appears why the adjudication of the ownership of Cook should not estop the plaintiff from contending for the contrary. A judgment which determines the absolute existence of a fact is binding not only upon the parties to the decree but also it "may be relied upon as an estoppel in any subsequent collateral suit * * * when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action". In re Estate of Clark, 190 Cal. 354, 360, 212 P. 622, 625.

[5-9] It is true as contended by appellant that before the doctrine of res judicata is available, each party to the action must have been bound by the prior determination. 34 Cor.Jur. 988; 15 R.C.L. 956; Freeman on Judgments, vol. 1, 5th Ed., p. 529, sec. 428. But the exception to the rule of mutuality exists "where the liability of defendant is altogether dependent upon the culpability of one exonerated in a prior suit upon the same facts, when sued by the same plaintiff; in such cases the unilateral character of the estoppel is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct action". 34 Cor.Jur. 988, p. 1407; Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 32 S.Ct. 641, 56 L.Ed. 1009, Ann.Cas.1913E, 875; McFaddin, etc., v. Texas Rice Land Co., Tex.Civ.App., 253 S.W. 916. If the immediate actor is free from responsibility because his act was lawful, one in privity with him, who took no direct part in the transaction, cannot be held responsible. New Orleans & N. E. R. Co. v. Jopes, 142 U.S. 18, 12 S.Ct. 109, 35 L.Ed. 919. Where the privies are identified with him in interest, they are bound by a judgment affecting him and where the identity is found to exist all are alike concluded. Greenleaf on Evidence, 13th Ed., vol. 1, sec. 523; Bigelow v. Old Dominion, etc., supra. Inasmuch as plaintiff has once litigated the ownership of the money here in question with Cook, plaintiff cannot invoke the principle of mutuality of estoppel. That doctrine is not essential to the right of defendant to plead the former judgment in bar, notwithstanding the fact that defendant was not a party to the probate proceeding and held the money prior to the filing by Cook of his account as executor of decedent's estate. McFaddin, etc., v. Texas Rice Land Co., supra. Neither would that doctrine be applicable had the objector in the probate proceeding charged that defendant and Cook by a joint endeavor had succeeded in depriving the estate of its money. Whatever wrong defendant might have done by paying the money to Cook, the judgment in probate was such that by no fair reasoning can defendant be held liable. Its interest was so interwoven with that of Cook that the judgment for him must be regarded virtually for the bank. Wilson v. Erickson, 152 Minn. 364, 188 N.W. 994; 34 C.J. 982, § 140. The supreme court of Maine has declared that when a party tries a question in one suit he shall not, without regard to mutuality, try the same question involving the same testimony in another suit, notwithstanding the doctrine of mutuality. Freeman on judgments, 5th Ed., sec. 429.

[10] At the time of making her objection to the account of Cook, because he failed to include the moneys claimed as a part of the estate of decedent, she thereby elected her remedy for the purpose of recovering on behalf of the estate the moneys which she now claims the bank held for the benefit of decedent and tortiously paid out to Cook. It is a practice without justification for a person claiming to be aggrieved to select one remedy after the other for the purpose of establishing his claim. Having elected to oppose Cook's account in probate and having there failed, though arrayed in the livery of an administratrix, plaintiff cannot now recover from Cook's agent what was once determined to be Cook's very own. Crook v. First National Bank, 83 Wis. 31, 52 N.W. 1131, 35 Am.St.Rep. 17.

The judgment is affirmed.

We concur: McCOMB, J.; WOOD, J.

45 Cal.App.2d 548

KOTT v. HILTON et al.

Civ. 11699.

District Court of Appeal, First District, Division 1, California.

June 25, 1941.

1. Evidence ⚿89, 383(7)

The recital of consideration in a written instrument establishes a "prima facie case" and is sufficient in absence of convincing evidence contradicting it, and, if presumption is wholly irreconcilable with facts and surrounding circumstances, presumption has been overcome. Civ.Code, §§ 1614, 1615; Code Civ.Proc. § 1962, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

2. Contracts ⚿90

The burden of showing lack of consideration as recited in written instrument may be accomplished through direct evidence or upon one or more circumstances, and, if evidence is cumulatively strong enough to overcome disputable presumption of consideration, trial court is justified in reaching a conclusion contrary to the recital. Civ.Code, §§ 1614, 1615; Code Civ.Proc. § 1962, subd. 2.

3. Mortgages ⚿224

In determining whether an unrecorded assignment of mortgage was fictitious and given without consideration, court would consider previous litigation wherein assignee, who was niece of one of assignors, attended trial wherein assignors sought to enforce a judgment for specific performance of a contract for sale of property secured by the mortgage. Civ.Code, §§ 1614, 1615; Code Civ.Proc. § 1962, subd. 2.

4. Mortgages ⚿578

In action to foreclose a mortgage on a half interest in realty by assignee, it was for trial court to determine whether there was adequate or any consideration for assignment which was not recorded and from all facts and circumstances whether assignee was a mere "dummy" for one of assignors. Civ.Code, §§ 1614, 1615; Code Civ. Proc. § 1962, subd. 2.

5. Mortgages ⚿270

In mortgage assignee's action to foreclose mortgage on a half interest in realty, evidence sustained a finding that the unrecorded assignment was sham and fictitious and that no consideration was given therefor, precluding recovery by assignee. Civ. Code, §§ 1614, 1615; Code Civ.Proc. § 1962, subd. 2.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Esther Kott against Albert Hilton and others, to foreclose a mortgage wherein certain loan associations filed a cross-complaint. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Hyman & Hyman, of San Francisco, for appellant.

Landels, Weigel & Crocker, of San Francisco, for respondent Citizens Building Savings & Loan Ass'n of San Francisco.

Rudolph A. Rapsey, of San Bruno, for respondent Marshalls.

WARD, Justice.

Plaintiff as alleged assignee of a mortgage on a one-half interest in real property situated in San Mateo county brought this action in foreclosure thereof. The trial court found that the assignment was sham and fictitious, was never recorded and that no consideration was given therefor, and gave judgment in favor of defendants and certain cross-complainants, from which judgment plaintiff appeals.

It appears that in 1912 Albert Hilton and Mary Hilton, his wife, became the owners of the property in question. In 1921, Marie Hilton (variously referred to in the record as Mary Hilton, Marie Moline, Mary Alberts, Marie K. Alberts, Marie C. Alberts, Mrs. C. Alberts and Mrs. C. G. Alberts), entered into a contract for the sale of the property to N. S. Marshall and Bird P. Marshall, his wife. In 1928 the Marshalls brought an action for specific performance of the contract and secured a judgment from which Marie Hilton appealed. In affirming the judgment, Justice Curtis who wrote the opinion stated: "There is no merit in this appeal, and it approaches exceedingly close to the border line of the frivolous." Marshall v. Hilton, 209 Cal. 531, 535, 289 P. 165, 167. A further controversy between the parties developed and the terms of the decree were not carried out.

On December 8, 1931, Mary Hilton executed a promissory note to one C. G. Alberts, secured by a mortgage on her half interest in the property, which mortgage was duly recorded. On June 30, 1932, for an alleged valuable consideration, "C. G. Alberts and Marie K. Alberts * * *, his wife" (formerly Mary Hilton), assigned and transferred the note and mortgage to Esther Kott, plaintiff herein, and a niece of Marie Hilton Alberts. The assignment was not recorded.

On July 7, 1932, less than six weeks later, "C. Alberts" commenced an action against the Marshalls to enforce the judgment of specific performance above referred to according to Alberts' interpretation thereof, or, to terminate all rights of the Marshalls in the property. A decree entered in the case provided that the Marshalls should, within sixty-five days, deposit with the commissioner of the court the balance due on the contract of sale, and that the clerk should thereupon deliver to them a deed conveying title "free and clear of encumbrances, outstanding taxes excepted". This order was complied with and the Marshalls received the commissioner's deed, which was recorded simultaneously with a deed of trust executed by them in favor of a loan association.

Incidentally, the note and mortgage assigned by C. G. Alberts and his wife Marie K. Alberts to the latter's niece, upon which no payment was ever made, became due and payable on December 8, 1933, the same date upon which the decree in the suit of Alberts v. Marshall was entered. Neither Marie Hilton nor the niece, plaintiff herein, was made party to that action.

On July 22, 1935, plaintiff assignee filed the present action naming as defendants Albert Hilton, C. G. Alberts, also known as C. Alberts, and Marie K. Alberts, his wife, Mary Hilton, N. S. Marshall and Bird P. Marshall, his wife, Citizens' Auxiliary Corporation, as trustee for Citizens' Building and Loan Association of San Francisco, Citizens' Building and Loan Association of San Francisco, and, in addition, several Does. Not only is the identification of some of the defendants not clear, but the appearance and disappearance of legal representatives, with the exception of the attorneys for the loan association in the present and in previous actions, is confusing. At one stage of the proceedings, until an explanation was presented, a grave question arose as to whether the trial attorney for plaintiff did not in fact represent the defendant Mrs. Alberts. Documents introduced in evidence did not in all instances receive exhibit numbers, and all of the exhibits do not appear in the transcript on appeal. The method of presenting the case was doubtless due to the fact that certain matters of record were not disputed, but the result here is an incompleteness which makes difficult a consideration of all the questions raised on appeal. Some of the dates and provisions of the pleadings above referred to have been taken from the briefs without opportunity to verify the correctness thereof. However, as to the loan association, it was stipulated "that all the facts set forth in the cross-complaint are true". The allegations of the answer and cross-complaint of such organization go back to the judgment in the suit for specific performance brought by the Marshalls against Marie Hilton. The Marshalls seem to place reliance squarely on the commissioner's deed and the judgment in the action brought by Alberts against them.

Appellant contends that notwithstanding the assignment of the mortgage to her was not recorded, the mortgage itself was, and hence defendants took subject thereto. She also contends that the judgment in Alberts v. Marshall, wherein it was determined that the Marshalls were entitled to a deed conveying title to them free and clear of encumbrances except outstanding taxes, is not binding on her, she not being a party to that action.

Respondent loan associations, filing a joint brief with the Marshalls, contend that their rights are to be determined by reference to the transactions which antedated the mortgage and assignment thereof to plaintiff. The briefs presented involved such question as: Could a reasonable inference be drawn from previous records and stipulations that Alberts had acquired ownership of the property prior to the assignment of the mortgage, thus effecting a merger? If so, there was no longer any mortgage subject to assignment. Incidentally such conveyance does not appear except by reference in the record. A second question presented is: Was appellant's interest in the mortgage, if any, subject to the contract of sale? The principal question is: Is respondents' priority of interest dependent on appellant's failure to record the assignment of mortgage? In view of the condition of the record, and the fact that appellant attacks the findings in other respects, we do not find it necessary to pass on these questions.

The court found that both the mortgage and assignment thereof were sham, fictitious and without consideration; that plaintiff "has no right, title nor interest in or to the real property" and that the loan associations are entitled to judgment upon their cross-complaint.

[1, 2] "A written instrument is presumptive evidence of a consideration" Civ. Code, sec. 1614, but it is not conclusively so in respect to a recital of consideration. Code Civ.Proc., sec. 1962, subd. 2. The recital establishes a prima facie case and is sufficient in the absence of convincing evidence contradicting it. 6 Cal.Jur., pp. 200, 201. If the presumption is wholly irreconcilable with the facts and surrounding circumstances, it has been overcome. The burden of showing lack of consideration rests upon the party seeking to avoid or invalidate the instrument. Civ.Code, sec. 1615. This may be accomplished through direct evidence or upon one or more circumstances. If the evidence is cumulatively strong enough to overcome the disputable presumption, a trial court is justified in reaching a conclusion contrary to the recital.

Paragraphs five and six of plaintiff's amended complaint set forth the promissory note, a description of the property mortgaged and that "C. G. Alberts and Marie K. Alberts, his wife, for a valuable consideration, by an instrument in writing, assigned and transferred to plaintiff herein Esther Kott, the said promissory note and the indebtedness evidenced thereby, together with that certain indenture of mortgage, as aforesaid". In a verified answer Albert Hilton and C. G. Alberts, each for himself, denied that there was any consideration for the promissory note and mortgage or for the assignment thereof; and likewise, under oath, but in a separate answer to the amended complaint, Marie K. Alberts filed an identical denial of consideration. It is true that on the trial of the cause Mrs. Alberts contradicted and repudiated her verified answer, her testimony in this regard being to the effect that her attorney had forced her to sign the answer; and that by reason of the absence of her spectacles she had no knowledge of its contents. As to this, a witness testified that Mrs. Alberts used her spectacles and read the document.

[3] In the present case, the previous litigation and the relations of the parties may be considered. Esther Kott, the niece of one of the assignors, attended the trial in the previous litigation, and, according to the testimony of Mrs. Alberts, was familiar with the proceedings. If so, she was aware that in the case of Alberts v. Marshall, Alberts sought to enforce a judgment for specific performance in connection with the contract for the sale of the property; that C. G. Alberts and C. Alberts was the identical Alberts who previously in conjunction with his wife assigned to her the promissory note and mortgage, the foundation of the present action. The record does not disclose that Mrs. Kott intervened or contested that action although she had full knowledge thereof. She knew that the Marshalls were living on the property, and, notwithstanding her knowledge of Alberts' acceptance of the balance of the purchase price in accordance with the decree of the court, she made no claim, so far as the record discloses, to any part thereof, nor, as stated, did she even record her assignment of the mortgage.

It may be noted that in the present action, Alberts took no part in the proceedings except to file an answer, and Mrs. Kott did not appear as a witness. Outside of the documents introduced, the only evidence presented on behalf of appellant was the testimony of Mrs. Marie Alberts who testified on the subject of consideration as follows:

"Q. What did she pay you? A. Well, she paid me, we owed her about $200 for work that she had done before she was married, and then she gives two—$250 besides, and she still had more claim to the property than that. * * *

"Q. To whom did she pay it, to you or to your husband? A. Mr. Alberts."

When the attention of the attorney representing Mrs. Alberts was called to the variance between the evidence and the pleading, he stated: "I am standing by the pleadings * * * filed, that is my defense, that there was no consideration, I will have to stand by them." Thereupon Mrs. Alberts repudiated the pleading as unauthorized.

A letter addressed by Mrs. Alberts to her attorney was introduced, which contained the following: "Mrs. Kott's case is based upon truth, and she has paid a good and valuable consideration for everything she has received in the matter, which is the subject of her action." The whole tenor of the letter, and the actions of Mrs.

Alberts throughout the trial, indicate a greater interest in the action than merely to enable her niece to collect through foreclosure, or to herself avoid a deficiency judgment.

[4] It was for the trial court to determine whether there was adequate or any consideration given, and from all the facts and circumstances whether Mrs. Kott was a mere dummy for her aunt Mrs. Alberts. Had plaintiff prevailed in the action, and foreclosure been decreed, the plaintiff niece, if acting for Mrs. Alberts, would simply have turned over her interest to the Alberts to the detriment of the Marshalls and in derogation of previous judgments.

The record shows that Albert Hilton, C. Alberts and Marie C. Alberts, all appearing "in pro per", filed an answer to the cross-complaint, which was verified by Marie C. Alberts, praying for restoration and possession of the property. No reference was made to the question of consideration given by Mrs. Kott for the assignment.

[5] It is unnecessary to pass upon other questions raised by appellant and the respondents. Judgments in previous cases have become final and we may not interfere. The trial court found that the assignment was "sham and fictitious" and the record substantiates this finding. Under all of the circumstances we are of the opinion that the appeal, similar to that of Marshall v. Hilton, supra, approaches the frivolous.

The judgment is affirmed.

We concur: PETERS, P. J.; KNIGHT, J.

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45 Cal.App.2d 598

In re EASTERDAY'S ESTATE.

EASTERDAY v. AMERICAN TRUST CO.

Civ. 11633.

District Court of Appeal, First District,
Division 1, California.

June 30, 1941.

Hearing Denied Aug. 28, 1941.

1. Trusts 🔑61(3)

If persons yet unborn have a contingent interest in trust property, a life beneficiary who has acquired interest of living remaindermen may not terminate trust.

2. Trusts 🔑61(1)

Under will providing for trust with income payable to testator's son for life and with corpus payable, on son's death, to descendants of testator's brother and sisters, and under evidence that testator created trust because he deemed his son incompetent to manage property, where niece assigned her remainder interest to testator's son, probate court did not err in refusing to terminate trust as to such interest, notwithstanding that if niece predeceased son, there would be an intestacy as to her interest, and that son was testator's sole heir.

3. Wills 🔑487(3)

Under will providing for trust with income payable to testator's son for life and with corpus payable, on son's death, to descendants of testator's brother and sisters, evidence of testator's declarations that he did not want to create spendthrift trust but created trust with intention that son, whom testator deemed incompetent, should receive adequate income for life without gaining control of corpus, was admissible.

4. Trusts 🔑61(3)

Where trust is established with object of placing trust property beyond control of beneficiary, effect may be given to this intention and termination of trust denied, although all persons who have interest in trust on its termination are in being and sui juris and assign their interest to sole life beneficiary, or otherwise consent to termination of trust, and this rule applies even though there is no spendthrift provision in trust.

5. Courts 🔑201

When there is any question as to effect of will, probate court should construe it and define interest of each devisee.

6. Wills 🔑466

"Taken collectively," within will giving to six named living sons of testator's sister and children of another deceased son, taken collectively, one-seventh of one-fourth of remainder of trust estate after termination of life estate, referred only to children of deceased son, rather than to six living sons and children of deceased son, and hence there was not an intestacy as to six-sevenths of one-fourth of remainder.

See Words and Phrases, Permanent Edition, for all other definitions of "Taken Collectively".

7. Wills ⚷448

The law favors a construction of will which will avoid intestacy.

8. Wills ⚷545(1)

Under will providing for trust with income payable to testator's son for life, and with one-fourth of corpus payable, on son's death, to living sons and daughters of testator's deceased sister and son of deceased son of testator's sister, "but in the event of the death of any of my said nephews or my grandnephew, without issue, then his or their share shall go equally to the survivors", where niece died without issue before testator there was an intestacy as to her remainder interest.

9. Wills ⚷435

The courts have no power to remake a will.

10. Wills ⚷545(4)

Under will providing for trust with income payable to testator's son for life and with one-fourth interest in remainder payable to children of testator's sister, but in the event of death of any of them without issue, deceased child's share to go to survivors, "death without issue" referred to death before termination of trust, rather than death before testator's death, and share of any child who died without issue before death of life beneficiary would go to surviving children, or if child died leaving issue, such issue would take in place of child, or if all children and their issue predeceased life beneficiary, there would be a lapsed gift to which life beneficiary, who was testator's sole heir, would succeed.

See Words and Phrases, Permanent Edition, for all other definitions of "Death Without Issue".

◆

Appeal from Superior Court, Santa Clara County; R. R. Syer, Judge.

Proceeding in the matter of the distribution of the estate of John D. Easterday, deceased. From the decree, John W. Easterday appeals, opposed by the American Trust Company.

Affirmed in part, and reversed in part, with directions.

Lloyd W. Dinkelspiel, Donald W. Falconer, and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellant.

Fry & Jenkins, of San Jose (Franklin Dill, of Chico, of counsel), for respondent.

PETERS, Presiding Judge.

John W. Easterday appeals from a decree of final distribution entered in the estate of his father.

The decedent devised his estate to respondent American Trust Company in trust to pay the net income to his son, the appellant, for life, and upon his death to convert the corpus into money or bonds, to be delivered to descendants of the testator's predeceased brother, of two predeceased sisters, and of one sister who was living when the will was executed. Under the will, one-fourth of the corpus, upon the death of appellant, was to be delivered to the testator's niece, Clara M. Prentice, daughter of the testator's predeceased brother. She has assigned her remainder interest to appellant. He contends that, since he has become the owner of the life and remainder interests in this fraction of the estate, this one-fourth interest should be distributed to him absolutely, rather than to the trustee, since he is now the sole person who has any beneficial interest therein. This result should follow, he contends, even though the interest of Mrs. Prentice is contingent on her surviving appellant. In such event, should she predecease him, there would be an intestacy as to this one-fourth interest, to which he would succeed as the sole heir of his father. There is no provision that in the event of the death of Mrs. Prentice her share shall go to her issue. The legacy to her is as follows: "To Clara M. Prentice, my niece, being the only daughter of my deceased brother, William T. Easterday, residing, at San Francisco, California, one-fourth (¼) of the residue of said trust fund."

Appellant further contends that by reason of the wording of the provision for the descendants of the testator's predeceased sister, Elizabeth H. Spitzer, there is an intestacy as to 6/28 of the corpus upon the termination of the trust, to which he succeeds as the heir of his father, and that this fraction also should be distributed to him absolutely.

[1] Appellant also contends that remainder interests in the balance of the property vested in descendants of the testator's predeceased sisters living at the testator's death, rather than in descendants living at the death of appellant, the life beneficiary. He desires such a construction of the will in order that he may seek to acquire their interests and terminate the

trust, thereby acquiring the balance of the estate absolutely. If persons yet unborn have a contingent interest in trust property, a life beneficiary who has acquired the interest of living remaindermen may not terminate the trust. Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306; Fletcher v. Los Angeles Trust, etc., Bank, 182 Cal. 177, 187 P. 425; Woestman v. Union Trust, etc., Bank, 50 Cal.App. 604, 195 P. 944; Hunt v. Lawton, 76 Cal.App. 655, 245 P. 803; 4 Bogert, Trusts and Trustees, § 1002, p. 2930.

The court refused to terminate the trust in part. It ordered the entire estate distributed to the trustee. It decreed that the entire corpus should be held in trust until appellant's death, and, further, that, upon appellant's death, the one-quarter Prentice interest should be distributed to appellant's executors, administrators, heirs or assigns, inasmuch as appellant has become the owner of the Prentice interest. The court also found that there was no intestacy as to the 6/28 interest on termination of the trust.

The theory of respondent trustee, sustained by the trial court, is that the testator, in his son's own interest, created a trust for his benefit, because he deemed him incompetent to manage the property, and did not wish him to have its control. Respondent urges that in such circumstances the court should give effect to the intention of the testator and refuse termination even as to portions of the trust principal in which no one but appellant has any beneficial interest. It is our opinion that, under the facts of this case, and the authorities hereafter cited, this contention is sound.

The testator died on October 18, 1936. By his will, dated October 17, 1927, he originally gave $2,000 to his sister, Lucy Blake, and $1,200 to appellant's divorced wife, Gertrude Bennett. He named the respondent, American Trust Company, executor. By paragraph fourth he gave, devised and bequeathed the residue of his estate to the American Trust Company, in trust as set forth in subsequent paragraphs. The trustee was given broad powers to sell the trust property, invest and reinvest the proceeds, and generally to do every act which it deemed for the best interests of the trust estate. The two specific money bequests were revoked by codicils, with the result that paragraph fourth operated upon the entire estate remaining for distribution, found to be of the value of $40,773.87 in the decree of distribution.

The provision by which the income is given to appellant is as follows: "That the said trustee shall pay all taxes, assessments and other charges and expenses of every kind and nature against or in connection with the trust estate and this trust, and shall pay the net income from the trust estate to my son, John Wallace Easterday, for and during his natural life." Paragraph fourth, subdivision 2.

Immediately following, in subdivision 3 of paragraph fourth, is the provision for division of the corpus upon the death of the son. It commences:

"That upon the death of my son, John Wallace Easterday, this trust shall terminate and the trustee shall convert, if necessary, any real property that may be in its possession so that all the estate may be converted into money or bonds in such denomination that the same may be delivered to the following persons, to wit:

"(a) To Clara M. Prentice, my niece, being the only daughter of my deceased brother, William T. Easterday, residing at San Francisco, California, one-fourth (¼) of the residue of said trust fund."

The bequest to Mrs. Prentice is followed by the several provisions relating to the descendants of the three sisters of the testator. The paragraph relating to children of his sister, Lucy Ellen Blake, is typical, and reads as follows: "(d) To Thomas F. Blake, John H. Blake and Stella I. Wilson, being children of my sister, Lucy Ellen Blake, a one-fourth (¼) interest in the residue of the said estate, share and share alike, but in the event of the death of any of said nephews and niece without issue, then his or their share shall go equally to the survivor or survivors."

The will further provided that pending distribution the trustee should pay $100 a month to the son, who was thirty-six years of age at his father's death. It contained no spendthrift provisions by which alienation by the son was prohibited and the trust benefits placed beyond the reach of his creditors. The appellant in fact had assigned his interest to a bank as security for advances, and, accordingly, the decree of distribution provided that income otherwise payable to him should be paid to the bank until the loans were discharged.

Over the objection of appellant, the respondent was permitted to introduce further evidence after the hearing on the trustee's petition for distribution had been concluded and the case had been continued to permit further argument after filing briefs. Attorney H. Ray Fry, who drew the will, and who is a member of the firm representing the trustee in the present proceeding, testified at the further hearing that the testator instructed him that he wished to create the trust to protect his son; that the boy needed "looking after"; that he could "give him these things", but it would only lead to his spending sums of money. The attorney suggested a spendthrift trust. The testator replied, according to the attorney's testimony: "No, I don't want such, I understand spendthrift trusts, and I don't want a spendthrift trust, I want him to get the income of this for, during his natural life. I want it so he can't go around and beat his creditors. I want him to live an honest, upright life. I am looking out for his interest."

The attorney further testified: "Concerning the protection of the son against disposal of his interest, the father was very careful about that. He wanted to fix it so that the estate would remain intact and for the son to get an income which would be sufficient during his life."

Fry also testified to difficulties between father and son over a long period. The son was unable to support himself and continually made demands on his father. He was unwilling to live in his father's home, in part because of friction with his aunt, who also lived there. His mother had died in childbirth. At the request of the father, and to save him "from being followed and molested by an ungracious son", it was arranged that Fry should handle advances to the son. In 1932 the son brought a maintenance action to compel his father to pay $100 a month for his support. The complaint averred that plaintiff was a confirmed invalid, that he had been for the past four years and always would be unable to maintain himself by work or in any other way. Further proceedings in the maintenance action do not appear from the bill of exceptions herein, except that it is to be inferred that no order was made against the father, since Fry testified that after this action the father refused demands of the son for money. Fry also testified that he believed the son had applied for relief in Los Angeles since he had received inquiries from relief committees there. Appellant contends that Fry's testimony was inadmissible for the reason that by such parol evidence the respondent was attempting to vary or add to the will.

[2-4] Under these facts, it is our opinion that the trial court did not abuse its powers in refusing to terminate the trust as to the one-fourth Prentice interest now owned by appellant. It is also our opinion that the parol testimony was admissible. It is the law in a majority of American jurisdictions that where a trust is established with the object of placing the trust property beyond the control of the beneficiary, effect may be given to this intention and termination of the trust denied, although all persons who will have an interest in the trust upon its termination are in being and sui juris and assign their interest to the sole life beneficiary, or otherwise consent to termination of the trust. This rule applies even though there is no spendthrift provision in the trust.

In an annotation in 123 A.L.R. 1427, entitled, "Termination of trust by consent of beneficiaries", where many cases are collected, it is said: "It may be stated at the outset that subject to considerations of public policy, the right of an owner of property to project his wishes into the future to regulate the disposition of his property is recognized in law, and any rule purporting to deal with the right of the beneficiaries to terminate a trust by mutual consent before the expiration of the limitation prescribed for the trust by its creator must, of necessity, be subordinate to the expressed or implied purposes of the settlor in creating the trust, and to his express or implied direction not to terminate the trust within its fixed duration. If those purposes are not executed but remain executory, and if they require the continuance of the trust so that the wishes and desires of the creator may be substantiated, by the better view the trust will not be terminated, although all the beneficiaries, both those who have a present interest in the trust and those who have or may have a future interest, vested or contingent, mutually consent to the termination of the trust and the surrender of the trust property to the respective beneficiaries as their interest may appear under the trust instrument."

In 2 A.L.R. 579, in an annotation entitled, "Effect of acquisition of remainder by beneficiary of a trust for life", is the following statement: "But the acquisition of the remainder will terminate the trust only where the effect is to do away with the necessity for its continuance; hence, it will not have such effect where the evident purpose of the trust is to put the corpus of the fund beyond the hazard of impairment and waste during the life of the beneficiary." But, "where the only purpose of the trust is to preserve the corpus of the fund for the person entitled to receive it, the acquisition by the life beneficiary of the right to receive the corpus at the termination of the trust, whether by purchase or inheritance, gives such beneficiary the right to have the trust dissolved." See, also, 4 Bogert, Trusts and Trustees, § 998, p. 2915.

The rule is expressed in the Restatement of the Law of Trusts, § 337, as follows:

"(1) Except as stated in Subsection (2), if all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination of the trust.

"(2) If the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination."

Comment is as follows: "If the purposes for which the trust is created are expressed in the instrument in which the trust is created, a different purpose cannot be shown by extrinsic evidence. If, however, the purposes are not expressed in the instrument, extrinsic evidence of the surrounding circumstances to aid in the construction of the instrument is admissible in order to determine the purposes of the trust." 2 Restatement of the Law of Trusts, p. 1022.

Comment g states:

"If a trust is created for successive beneficiaries and it is not the only purpose of the trust to give the beneficial interest in the trust property to one beneficiary for a designated period and to preserve the principal for the other beneficiary, but there are other purposes of the trust which have not been fully accomplished, the trust will not be terminated merely because both of the beneficiaries desire to terminate it, or one of them acquires the interest of the other.

"Thus, if one of the purposes of the trust is to deprive the beneficiary entitled to income of the management of the trust property for the period during which he is entitled to the income, the trust will not be terminated during the period, although both of the beneficiaries are of full capacity and desire to terminate it." 2 Restatement of the Law of Trusts, p. 1025.

The law in this state, both as to refusing termination where the intent of the trustor was to deny the trust beneficiary control of the principal, and as to the admissibility of parol evidence to prove such intent, is in accord with the Restatement. In Re Estate of Yates, 170 Cal. 254, 149 P. 555, the testator established trusts under which principal and interest were to be paid to named beneficiaries at the age of twenty-five. In so far as the provision was for accumulation of income beyond the age of minority of the beneficiaries it was invalid, and such beneficiaries became entitled to receive it on attaining majority. But that part of the decree which terminated the trusts as to those of the beneficiaries who were of age when the estate was distributed was reversed. The court was of the view that the interest of the beneficiaries had vested on the death of the testator, with the result that they had an absolute, indefeasible and disposable interest, the time of payment only being postponed. Upon the death of any beneficiary before reaching twenty-five, his interest would fall into his estate. Nevertheless, the court held that to give effect to the plain intent of the testator the trust should continue for the time specified. The court indicated that in England the rule was otherwise, and that there a legatee who is sole beneficiary and entitled to the remainder may terminate the trust if competent to give a discharge. See, 4 Bogert, Trusts and Trustees, § 1002, p. 2933; 46 Yale Law Journal, 1007.

Appellant herein contends that cases where the same person is by the terms of the trust instrument entitled to the income and to the principal when the trust ends are distinguishable from the present case. Where termination in the first situation is refused the intent of the testator may be carried out. The person named in the trust instrument may receive the income and principal. But here the will provides that Mrs. Prentice should receive one-fourth of the corpus when the trust ends. This intent will not in any event be carried out, since she has assigned her interest to the life beneficiary. This argument overlooks the fact that a major object of the testator was to deny his son management of the property, for the son's own protection, while giving him the entire net income for life. This object may be carried out notwithstanding the disposition of the property at the end of the trust may not follow the plan set by the testator by reason of an assignment to the life tenant by a person named to share in its ultimate division.

In re Estate of Yates, supra, also holds that, notwithstanding the trust lacks spendthrift features, termination may be denied. The court stated (170 Cal. at page 257, 149 P. at page 557): "The trustor may have had good reason, as in the case of a spendthrift son, for desiring that the principal sum of his bounty should not go absolutely to the legatee upon his attaining majority. Because the legatee himself might circumvent this purpose by making a sale of his vested interest is not, we think, a sufficient ground for destroying the legal intent of a trustor in creating such a trust. The fact that because of the particular wording of a valid trust the legatee may himself impair its efficacy is not a justification for equity to do so." The life beneficiary may be unable to find a buyer for an uncertain interest depending on the duration of his life. See, 4 Bogert, Trusts and Trustees, § 1002, p. 2938; 2 Restatement, Trusts, § 337, p. 1028, comment k.

In the following cases in which all persons prospectively interested in the trust corpus were not in being or not before the court, the opinions nevertheless recognize that even when all parties in interest consent, termination of the trust is discretionary with the court: Gray v. Union Trust Co., 171 Cal. 637, 641, 154 P. 306; Fletcher v. Los Angeles Trust, etc., Bank, 182 Cal. 177, 180, 187 P. 425; Woestman v. Union Trust, etc., Bank, 50 Cal.App. 604, 195 P. 944; In re Estate of Washburn, 11 Cal.App. 735, 106 P. 415.

Appellant relies on Eakle v. Ingram, 142 Cal. 15, 75 P. 566, 100 Am.St.Rep. 99, as establishing a rule requiring termination of the trust herein. Under the trust instrument the trustor was to receive the income for her life, and on her death it was to be paid to her son Henry for his life. There was no provision as to the disposition of the principal on the death of Henry. Following death of the mother intestate, her four children, who were her heirs at law, including Henry, sought to terminate the trust. Judgment in their favor was affirmed, all parties in interest being before the court. The opinion stated that continuance of the trust would result in the unnecessary sacrifice of a great part of its value, if not in its total loss. It does not appear that it was contended that the income had been given to the son Henry because the trustor did not wish him to have control of the principal. See, also, Moor v. Vawter, 84 Cal.App. 678, 258 P. 622, and Whittingham v. California Trust Co., 214 Cal. 128, 4 P.2d 142, where trusts were terminated.

Whether the rule that termination is discretionary with the court although all parties in interest consent, limits the court to the exercise of discretion in determining whether termination violates the intent of the trustor, or whether in exceptional cases the court may determine, as in England, that sound public policy calls for disregard of the wish of the deceased trustor in the interest of the living beneficiary, it is not necessary here to decide. The evidence in the instant case plainly shows that it was the purpose of the testator that his son should, for his own good, not have control of the principal, and that, in the circumstances, his purpose was a wise one. (A rule which permits no departure from the intent of the trustor has been criticized as of no practical individual or social benefit, and as paying undue deference to the "dead hand". 4 Bogert, Trusts and Trustees, § 1002, p. 2940; 46 Yale Law Journal, 1007, 1011.)

We have heretofore indicated that appellant's objection to admission of evidence bearing on the purpose of the testator is not well taken. The evidence received does not contradict the will. There is no ambiguous language in the will. By its terms the trust is to continue during the lifetime of the appellant. It is appellant himself who seeks to end it before the time provided in the will, and respondent who has offered evidence to uphold the will. We are not to be understood as indicating that evidence would be inadmissible to show that the sole purpose of the testator was to preserve the corpus for those to whom it is given when the trust ends, in which event it would be proper for the court to terminate the trust before the time provided in the will on the life beneficiary acquiring the interest of the remainderman. Since by reason of the life beneficiary acquiring the remainder interest the will is not to be carried out in full, it is pertinent to ascertain the intent of the testator with a view to determining what should be done in the changed circumstances. (For other situations in which evidence of the declarations of the testator is admissible, see, In re Estate of Dominici, 151 Cal. 181, 90 P. 448; In re Estate of Little, 170 Cal. 52, 148 P. 194; In re Estate of Donnellan, 164

Cal. 14, 15, 127 P. 166; In re Estate of Brisacher, 27 Cal.App.2d 327, 80 P.2d 1033.)

The above discussion disposes of appellant's contention as to his right to terminate the trust. In so far as the right to terminate is concerned, it is not necessary to determine if there will be an intestacy as to part of the principal upon the termination of the trust, or to decide whether the interests to take effect in possession when the trust ends vested on the testator's death in descendants of his sisters living at the testator's death, or whether persons unborn have a contingent interest. In any event, appellant is not now entitled to terminate the trust.

[5] However, appellant's interest as the sole heir at law of his father if an intestacy exists under the terms of the will, or may arise by the lapse of any bequest, gives him the right to urge that any uncertainty in the will in this regard should be construed by the decree of distribution. When there is any question as to the effect of a will, the probate court should construe it and define the interest of each devisee. In re Estate of Scrimger, 188 Cal. 158, 165, 206 P. 65; Goldtree v. Allison, 119 Cal. 344, 51 P. 561; 11b Cal.Jur., 773, 798. While appellant can have no interest in possession as to property concerning which there is an intestacy on termination of the trust, since it is to continue until his death, the effect of such an intestacy is to give him an interest of which he may dispose by will, or to which his heirs may succeed. In re Estate of Blake, 157 Cal. 448, 454, 469, 108 P. 287; In re Estate of Hamon, 136 Cal.App. 517, 29 P.2d 326. The decree herein recognized such an inheritable interest in appellant as to the one-quarter Prentice interest assigned to him, inasmuch as it is therein provided that this interest should be distributed to the executor, administrator, heirs or assigns of appellant upon his death.

The court found in the decree of distribution that there was no intestacy as to 6/28 of the trust property on termination of the trust under section 3(b) of paragraph fourth of the will. Appellant construes his paragraph as disposing of only ⅐ of ¼ of the corpus, leaving an intestacy as to 6/7 of ¼, or 6/28. The provision of the will follows: "To David Higginbotham, Tom Higginbotham, Simon S. Higginbotham, Frank E. Higginbotham, John Higginbotham, Joseph S. Higginbotham, and the children of Lester Higginbotham, deceased, taken collectively, one-seventh (⅐) share of a one-fourth (¼) share of the residue of my trust estate, said legatees being the sons of my sister, Margaret Higginbotham, deceased, all residing at Ogden, Utah, and in the event of the death of any of said legatees without issue, his or their share shall be divided equally among the survivors."

[6, 7] It is too clear to admit of doubt that the expressed intent of the testator was that the six living children of his sister Margaret should each receive ⅐ of ¼, and that the children of Lester, deceased son of the sister, together should receive the remaining ⅐. It is the children of the deceased son of the sister who are to be taken collectively, not the six living children of the testator's sister and the children of her deceased son Lester. The law favors a construction which will avoid intestacy. Appellant's interpretation would result in an intestacy in a scheme plainly intended to dispose of the entire estate. To descendants of his predeceased brother and of each of his three predeceased sisters the testator gave a one-fourth of the trust principal.

While finding that there was not an intestacy as to the 6/28 interest, the court incorporated the provisions of the above paragraph in the decree, thereby including as a legatee Joseph S. Higginbotham, who predeceased the testator, leaving issue. Since the legatees named in this paragraph receive no interest in possession until the termination of the trust, it is suggested by respondent that this is a matter which can be corrected at that time, and, further, that appellant is not aggrieved by the error. However, as will later be pointed out, since the decree must be modified by reason of the fact that it names as a legatee Mary E. Leavitt, a niece of the testator who predeceased him without issue, and the will fails to include a gift over in the event of her death without issue, with the result that there is a partial intestacy upon the termination of the trust, it is in the interest of orderly procedure that at the same time the name of Joseph S. Higginbotham be deleted and provision for his issue inserted in lieu thereof as provided by the will and section 92 of the Probate Code.

The provision in reference to Mary E. Leavitt is to be found in section 3(c) of paragraph fourth. It reads as follows:

"To Mary E. Leavitt, residing at San Francisco, California, Frank E. Spitzer, residing at San Jose, California, Margaret Werner, residing at San Jose, California, Ethel Jensen, residing at San Francisco, California, Florence Virginia Davis, residing at Fresno, California, Mrs. Sally Pitnam, residing at San Jose, California, being the living sons and daughters of my deceased sister, Elizabeth H. Spitzer, and Louis Spitzer of San Mateo, California, being the son of Louis Spitzer, a deceased son of Elizabeth H. Spitzer, deceased, a one-fourth (¼) interest in the residue of the said estate, share and share alike, but in the event of the death of any of my said *nephews, or my grandnephew*, without issue, then his or their share shall go equally to the survivors." (Italics added.)

[8, 9] Since Mary E. Leavitt died without issue before the testator, unless this provision gives her share to the surviving descendants of the testator's predeceased sister, Elizabeth H. Spitzer, there is as to it an intestacy when the trust ends, in which appellant is interested as the heir at law of his father and over which he would have the right of testamentary disposition. The paragraph names as legatees five nieces and one nephew and one son of a deceased nephew, but the survivorship provision refers to the death of "any of my said nephews, or my grand-nephew, without issue." Nieces are not included in the survivorship provision. No reason is apparent as to why the testator would wish to exclude nieces in this section of his will. No other provision of the will makes this distinction. But the fact remains that in this provision the nieces are not included, and it is not within the power of this court to remake the testator's will so as to include them. In re Estate of Beldon, 11 Cal.2d 108, 77 P.2d 1052; In re Estate of Maloney, 27 Cal.App.2d 332, 80 P.2d 998.

The only other question presented is in reference to what persons are entitled to share in the trust estate when the trust ends upon the death of appellant. In order to be in a position to seek termination of the trust upon acquiring interests of living legatees, appellant has contended that only nieces and nephews, and issue of those who predeceased the testator, living at the testator's death share in the division of the trust property, and that such persons acquired vested remainders upon the testator's death, to the exclusion of any possibility of after-born issue sharing in the division of the trust property. We have held heretofore that the trial court properly refused to terminate the trust, even as to the fraction of the estate in which appellant has the full beneficial interest. In view of this holding, it is to appellant's interest that it be held that the rights to take effect in enjoyment on the termination of the trust do not vest until the death of appellant, who is the life beneficiary. In such event should all legatees and their issue predecease appellant, an unlikely but not impossible contingency, an intestacy would result from lapsing, in which appellant, as the sole heir of his father, is interested. In re Estate of Hamon, 136 Cal.App. 517, 29 P.2d 326. In our view this is the effect of the decree of distribution.

The provision of the will for the children of the testator's sister, Lucy Ellen Blake, which is typical of the provisions for the children of other sisters of the testator, is as follows: "(d) To Thomas F. Blake, John H. Blake and Stella I. Wilson, being children of my sister, Lucy Ellen Blake, a one-fourth (¼) interest in the residue of the said estate, share and share alike, but in the event of the death of any of said nephews and niece without issue, then his or their share shall go equally to the survivor or survivors."

[10] The decree makes distribution in the language of the will, as follows: "To Thomas F. Blake, John H. Blake and Stella I. Wilson, children of Lucy Ellen Blake, sister of deceased, a one-fourth interest in the residue of said estate share and share alike, but in the event of the death of any of said nephews and niece of the deceased without issue, then his or their share shall go equally to the survivor or survivors." In his objections filed to the trustee's petition for distribution, appellant urged that the will was ambiguous as to the persons entitled to receive the remainder interests on termination of the trust, and that it required construction by the court. The court found in the decree of distribution that these objections were not good. Although the decree makes distribution in the language of the will, the reference in the decree to "death without issue" cannot reasonably be construed as referring to death without issue as a past event, that is, such death before the death of the testator, but must be construed as referring to death without issue in the future, that is, to death

between distribution and termination of the trust on the death of the life beneficiary. If the court had interpreted the will as giving a vested interest, not liable to divest, to children of Lucy Ellen Blake living at the death of the testator, the reference in the decree to "death without issue" would be superfluous. In such event, the decree would simply provide: "(d) To Thomas F. Blake, John H. Blake and Stella I. Wilson, being children of my sister, Lucy Ellen Blake, a one-fourth (¼) interest in the residue of said estate."

The effect of the decree, as rendered, is that in the event of the death of any of the three named children of Lucy Ellen Blake without issue before the death of appellant, his or her share goes to the survivors living at the death of appellant. In the event of the death of any one of the named legatees with issue during such period, there is a gift by implication to the issue of such legatee living at the death of appellant. In re Estate of Blake, 157 Cal. 448, 466, 108 P. 287; Woestman v. Union Trust, etc., Bank, 50 Cal.App. 604, 195 P. 944. Should the named niece and two nephews and their issue all predecease the life beneficiary, there would be a lapsed gift to which appellant would succeed as sole heir of his father.

Appellant herein is not aggrieved by this interpretation of the trial court, since under it there is a contingency of intestacy in his favor. The respondent trustee urges that this construction is the correct one. The living nephews and nieces, and issue of any nephews and nieces who predeceased the testator, who are the parties aggrieved by error, if any, in the denial of interests vested as of the death of the testator, are apparently satisfied with the decree as thus interpreted, for they have not appealed. In the circumstances, there is no person before this court who is aggrieved by the interpretation of the decree as made by the trial court. This court, therefore, is not called upon to determine the propriety of that interpretation.

Those portions of the decree which are based on paragraph fourth of the will, sections 3b and 3c, are reversed, with directions to the trial court to enter a decree in accordance with the views herein expressed. The balance of the decree is affirmed. Both parties to bear their own costs on this appeal.

We concur: KNIGHT, J.; WARD, J.

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45 Cal.App.2d 510

SCHWARZ et al. v. HATCH et al.

Civ. 11698.

District Court of Appeal, First District,
Division 1, California.
June 23, 1941.

1. Appeal and error 🔑1033(9)

Defendants cannot complain that court did not award plaintiffs all it could have awarded them.

2. Appeal and error 🔑907(3)

On appeal from judgment roll alone, a contention which was directly contrary to court's findings which expressly negatived the contention would not be considered.

3. Money paid 🔑3

Where individuals advanced moneys to complete drilling of oil well with knowledge of express limitation of liability in certificates representing royalty interests in well, but with expectation that some arrangement could be worked out whereby individuals would participate in oil, relationship of individuals to certificate holders was not that of "creditor" and "debtor", but was similar to that of a "sublessee" or "assignee", such as individuals would have been had they taken an assignment of drilling contract, on issue of certificate holders' liability to individuals for moneys advanced.

See Words and Phrases, Permanent Edition, for all other definitions of "Assignee", "Creditor", "Debtor", and "Sublessee".

4. Money paid 🔑1

Where certificates representing royalty interests in oil well provided that certificate holders would not be liable for cost of drilling, individuals who advanced moneys to complete drilling of well on promise of person who did not represent holders that he would get holders to compensate individuals could not recover from holders moneys advanced on theory that individuals were "interlopers", since an "interloper" takes his chances that those who have benefited by his intrusion may recognize some moral obligation to him.

See Words and Phrases, Permanent Edition, for all other definitions of "Interloper".

5. Money paid 🔑1

The principle that one who purchases stock, sale of which is unauthorized by corporation commissioner, may sue in assumpsit to get his money back, was inapplicable to issue whether holders of oil royalty certificates were liable in "assumpsit" to individuals who advanced moneys to complete drilling of well, where certificates provided that holders would not be liable for cost of drilling. Civ.Code, §§ 1589, 2310, 3521.

See Words and Phrases, Permanent Edition, for all other definitions of "Assumpsit".

6. Money paid ⚿1

The holders of oil royalty certificates which provided that holders would not be liable for cost of drilling were not liable in "assumpsit" to individuals who advanced moneys to complete drilling of well, notwithstanding that had individuals not volunteered lease would have been forfeited, since a "volunteer" cannot recover moneys advanced by him. Civ.Code, §§ 1589, 2310, 3521.

See Words and Phrases, Permanent Edition, for all other definitions of "Volunteer".

7. Money paid ⚿1

A volunteer cannot recover moneys advanced by him.

◆

Appeal from Superior Court, Alameda County; Peter J. Crosby, Judge.

Suit by Paul W. Schwarz and others against Robert E. Hatch and another to recover a share of proceeds from sale of oil from an oil well, wherein defendants filed a cross-complaint. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Robert E. Hatch, of San Francisco, Decoto & Hardin and J. Meredith Wortz, all of Oakland, and Preston & Preston and Carl Conradi, Jr., both of San Francisco (Charles H. McDonald, of San Francisco, of counsel), for appellants.

Thos. C. Ryan, of San Francisco, and Geo. F. Snyder, of San Andreas, for respondents.

BRAY, Justice pro tem.

Appeal on the judgment roll alone from a judgment in favor of plaintiffs in the sum of $1,617.60, which amount the court found due from defendants to plaintiffs as their share of the proceeds from oil produced by the "Hub No. 1" well at Signal Hill. Defendants had cross-complained for the sum of $65,000 for moneys alleged to have been paid by defendants to and for the benefit of plaintiffs. The court found against this claim, both upon the merits and because of the statute of limitations.

The findings of fact evidently were carefully drawn and considered and disclose the following facts: The owners of certain oil bearing property in 1930 executed a lease of the property to one Newton. Newton then executed a drilling contract or sublease to a corporation called Hub Petroleum Corporation, Ltd. (hereinafter referred to as "Hub Ltd."), under which the corporation was entitled to retain 56 per cent of all oil produced, the balance of the oil belonging to Newton and the landowners. Only three shares of the capital stock of Hub Ltd. were ever issued. Before the defendants came into the picture, one share was owned by Lewis Jones, drilling superintendent of the well; one share by George C. Terry, then president of the company; and one share by Verner Allen. Allen was one of four partners of a securities firm called Sanborn & Co., which was employed by Hub Ltd. to sell certificates of the corporation, which certificates will be discussed in detail later as they are the basis of plaintiffs' claims herein. In August, 1931, Allen replaced Jones with one Douglas as drilling superintendent, and from that date on Hub Ltd. did not function as a corporation except by and through Allen and Douglas. From then on the three shares of stock stood in the names of dummies and were endorsed in blank.

Hub Ltd. had no assets except the drilling contract or sublease from Newton, requiring the company to drill for oil and giving it 56 per cent of all oil or gas produced. To raise money to carry on the necessary drilling Hub Ltd. issued and sold, through Allen's firm, certificates entitled "Assignment of Royalty Interest in Hub Petroleum Corporation, Ltd." These certificates set forth that the holder was assigned an undivided certain per cent (depending upon the amount purchased) "Over-Riding Royalty Interest in and to the proceeds of the total gross production of the oil, gas or other hydrocarbon substances produced, saved, or sold from that certain well known as Hub No. 1, now being drilled" on the leased property. There was a provision that the over-riding royalty interest covered by the particular certificate "shall be subject to the expense for upkeep and maintenance in the amount of Eight ($8.00) Dollars per month per one

(1%) per cent payable out of oil only, and the said Hub Petroleum Corporation, Ltd., reserves this amount to itself for this purpose, *this interest not being otherwise subject to any assessments* other than pro rata share of taxes". Then follows the clause upon which plaintiffs mainly rely: "It is mutually understood and agreed that this assignment constitutes a purchase of said interest herein specified, and *that said assignment is not an agreement of co-partnership; and that said assignee is not in any way obligated to pay any of the costs of drilling said well, nor shall assignee be responsible for any debts incurred in and about the drilling or operating of said well.*" (Italics added.)

Prior to August 27, 1931, Hub Ltd. had sold and delivered to various persons (hereinafter referred to as the "certificate holders"), certificates of this type totalling the entire 56 per cent of the prospective production which the Hub Ltd. owned. These certificates constituted the only written or oral agreement between the company and the certificate holders. Plaintiffs were the owners and holders of certificates totalling 25 per cent of the prospective production. At no time did any of the certificate holders exercise any management or control over the drilling or other affairs of Hub Ltd. It would appear that Hub Ltd. was organized for the purpose of holding the drilling contract and managing the oil drilling enterprise. There was no provision in the certificate requiring Hub Ltd. to drill, but undoubtedly it was understood that the moneys from the sale of the certificates would be used by Hub Ltd. for that purpose.

The sale of all the certificates, after paying a commission to Allen and his associates, netted Hub Ltd. $67,200, which amount the company expended prior to August 27, 1931, in drilling the well from a depth of 4000 feet (that being its depth at the time of the execution of the drilling contract or sublease by Newton to Hub Ltd.) to 7500 feet. The money being exhausted and the well not completed, Sanborn & Co. contacted such of the certificate holders as were their clients, explained to them the fact that the drilling could not continue unless funds were raised, and solicited from them voluntary contributions at the rate of $300 for each 1 per cent of certificates held. Many, but not all, of the certificate holders, including certain of the plaintiffs, contributed upon this basis, the contributions totalling $12,000. There was no written contract stipulating the terms of these contributions but it was understood by the contributors that they were to receive nothing in addition to that which they already owned. The money was to be expended by Sanborn & Co. in the deepening of the well without any restrictions and without any supervision or control by any of the certificate holders.

The drilling continued until October 1, 1931, when these contributions were exhausted. In fact, during the month of September, bills for labor and materials used in the drilling had been incurred to such extent that there were thousands of dollars owing for which there were no funds to pay.

About this time the defendants began to enter the picture. The defendant Robert E. Hatch was and now is a practicing attorney of this state. Up to September 14, 1931, neither he nor his co-defendant knew anything of the affairs of Hub Ltd. and probably did not know there was such a corporation. About that date, Hatch was employed by Clinton L. Walker, who was a certificate holder (he is not a plaintiff herein) to investigate for Walker the affairs of Hub Ltd.

After Hatch started his investigations, the three shares of stock of Hub Ltd. were endorsed by their owners to him in blank, but as attorney for Walker. Hatch has never claimed to own them for himself. Hatch thoroughly investigated the affairs of Hub Ltd. and by October 1, 1931, was completely cognizant thereof, as well as of the fact that its certificates had been sold at public offering to the certificate holders without the requisite permit from the California Corporation Commissioner. He, of course, knew the form of the certificates and the circumstances under which they had been sold and the contribution made by some of the certificate holders.

At this time Allen solicited Hatch and the other defendant, Young, an engineer, to advance money and credits for the continuation of the drilling of the well, explaining, as the defendants then well knew, that unless funds were produced from some source the well would be a total loss, and that Newton would declare a forfeiture of the lease for non-continuous drilling. Allen stated that if Young and Hatch would advance money and credit to continue the drilling, he would undertake to get the certificate holders to make an arrangement to compensate Young and Hatch on some basis to be agreed upon, and that in the meantime Young and Hatch could have the drilling equipment of Hub Ltd., or a lien thereon, as security. On October 2, 1931, Young and Hatch agreed to proceed upon this basis outlined by Allen. However, no consent of the certificate holders was ever obtained. Apparently defendants became the owners of the Hub Ltd. drilling equipment.

On October 2, 1931, the board of directors of Hub Ltd. held a meeting and elected as directors three persons named by Allen, Hatch and Young. On October 6, 1931, articles of incorporation for a new corporation were filed using the same name as the old but dropping the "Ltd." Allen, Young and Hatch planned to get the certificate holders to exchange their certificates for shares in the new corporation, and Hatch and Young were to receive some of its stock. Negotiations along these lines were attempted with the certificate holders, but nothing came of it. October 5th the old corporation through its newly elected board of directors, purported to convey to the new corporation the drilling contract or sublease executed by Newton to Hub Ltd. This conveyance never became effective because the new corporation never actually acquired a corporate existence, never functioned as a corporation, and the directors of the old corporation were never validly elected.

During October and November, 1931, the well was continuously drilled with funds supplied by Hatch and Young to the amount of $29,303.53. December 1, 1931, a production test proved the well to be "wet". For three weeks the drilling was discontinued. December 30, 1931, Newton recorded a note of forfeiture for default in drilling. December 26, 1931, Newton executed a new drilling contract similar to the Hub Ltd. contract, to Hatch's brother-in-law—admittedly a "dummy". The notice of forfeiture was inoperative because not preceded by a notice of default, apparently required by the contract itself. As the old contract was never terminated, the new one never went into operation, and Hub Ltd., the old corporation, continued to be the holder of the Newton drilling contract. Actual drilling operations after Hatch and Young appeared on the scene were conducted by the defendant Young. Further sums were advanced by Hatch and Young to the amount of $17,880.79, making a total advanced by them in the sum of $47,184.32. February 1, 1932, the well was put on production.

In January, 1935, one Carson became the owner of the entire 56 per cent without notice of plaintiffs' claims and entirely free thereof. Accordingly, plaintiffs would be entitled only to the proceeds of oil up to that date.

Apparently the well was not a great producer. The 56 per cent of the proceeds of the well which the Hub Ltd. was entitled to under the Newton contract, was applied by Young and Hatch in the payment of the expenses in connection with the operation of and production from the well, in the necessary payment of taxes and purchase of equipment. The moneys expended by defendants were necessarily and properly expended in the preservation and completion of the well and had Young and Hatch not advanced the moneys they did, the well would probably have been lost to Hub Ltd. and to the certificate holders.

[1] It was stipulated that 25 per cent (the proportion owned by the plaintiffs) of the proceeds of the well, after making the deductions of expenses specifically prescribed in the certificates, amounted to the sum of $2,426.40. The court did not allow plaintiffs this sum but the sum of $1,617.60 only. The court arrived at this figure by using an offer made by some certificate holders to Hatch and Young during the time of certain negotiations which never came to fruition. However, the plaintiffs are not complaining, and of course, the defendants cannot complain that the court did not award plaintiffs all it could have awarded them. The court made a finding that the acts of defendants were "in the best of good faith and with the best of intentions to do whatever was right, proper and necessary for all concerned including the Hub Ltd. and its certificate holders".

The certificate holders divided themselves into three classes after the well came into production. Some did nothing, evidently satisfied to leave the proceeds of the well go to discharging the drilling costs, or else had lost interest in the outcome. A second class, known as the "Holmes group", sued defendant Hatch in the case of Holmes v. Hatch, 11 Cal.2d 376, 80 P.2d 70. There the court held that as Hub Ltd. had not procured a permit from the Corporation Commissioner their certificates were voidable and the holders were entitled to receive from the defendant therein a return of the money they had paid for their certificates. It is interesting to note that in the decision of that case (page 381 of 11 Cal.2d, page 72 of 80 P.2d) the court states that the defendant Hatch "frankly states that he has written off the venture as a loss and waives all claim for any and all such advances". This covers the very amounts claimed in the cross-complaint herein. The third class are those who are the plaintiffs in this action, who sued for an accounting of the proceeds of the oil produced. The defendants contend that this third class should be held legally liable for the entire loss suffered by the defendants in the enterprise.

The basis of this appeal is the claim of the defendants that oil produced should be applied on account of the moneys advanced by the defendant to complete the well and that as the proceeds from the oil produced was not equal to the sums advanced by the defendants, the certificate holders should be required to personally reimburse the defendants for all sums advanced and not covered by proceeds from the sale of oil, —in other words, that the defendants should recover on their cross-complaint against the plaintiffs for all the $47,184.32 advanced above receipts. They claim that they extended credit in expectation of making a special contract; that the contract, through no fault of theirs, was never consummated; that the defendants' moneys were used for plaintiffs' benefit; therefore the defendants were creditors of plaintiffs and as creditors entitled to hold plaintiffs for the entire amounts advanced by defendants for the benefit of the 56 per cent certificate holders, even though plaintiffs are only 25 per cent certificate holders.

The plaintiffs stand upon the terms of their certificates which state that except for the $8 per month provision they are "not in any way obligated to pay any of the costs of drilling said well, nor * * * responsible for any debts incurred in or about the drilling or operating of said well", and that to give effect to defendants' contention would make the asisgnment in the certificate an agreement of copartnership, which the certificate expressly states it is not.

Defendants answer this by claiming that the Hub Ltd. was merely a dummy and fictitious entity designed and utilized by the certificate holders for the purpose of defrauding and avoiding responsibility to their creditors, and ask the court to adopt a rule to the effect that royalty certificate holders are in reality joint adventurers and partners in the oil development, and that, regardless of the terms of their certificates, they must be held to have the legal liability of partners towards persons supplying funds, labor or material to the development of the oil.

[2] Defendants make the second point that even if certificate holders in general are not always responsible to the creditors they should be held so here because the corporate fiction was abandoned and the certificate holders themselves were conducting the drilling when defendants extended the credit. This contention, however, is directly contrary to the court's findings, which expressly negatived this entire contention. As the appeal is on the judgment roll alone, the lower court's finding in this behalf makes it unnecessary to discuss this contention further.

The third contention is that plaintiffs at the trial demanded the receipts from the oil which were only possible because of the advances made by defendants, and that by taking the benefit they must bear the burden.

The fourth and fifth contentions have to do with the statute of limitations. Defendants contend that the court erred in allowing the pleading at the end of the trial by the plaintiffs of certain statutes of limitations, in defense of defendants' cross-complaint, and also erred in finding that their cross-complaint was barred by certain statutes of limitation. In view of the determination of the merits of the case, it becomes unnecessary to consider either one of these contentions.

[3] The principal contention of the defendants is that the court should establish a rule in California that oil royalty certificates are a device to defraud creditors and that the holders should be held liable as partners to creditors. The facts in this case do not require a determination of the legal relationship between an oil royalty certificate holder and a creditor. The relationship of defendants to plaintiffs here is not that of creditor and debtor. Defendant Hatch and his partner Young advanced their money with their eyes open, knowing the express limitation of liability in the certificates, but with the hope and expectation that some arrangement could be worked out by which the defendants would receive, not alone their money back with a

reasonable rate of interest, but that they would participate to some considerable extent in the oil itself. A creditor advances money or supplies labor and materials expecting merely the usual profit from the transaction. Here Hatch and Young expected large returns from their actions. While it is true that the certificate holders would have lost their well had not the defendants volunteered to help them, still they should have been given the opportunity of deciding whether or not they desired help and upon what conditions that help was to be given. A large number of them by refusing to contribute any money to the enterprise when the sale of the certificates failed to produce money sufficient to complete the well, indicated that they were through. Defendants' position, instead of that of a creditor, is similar to that of a sublessee or assignee, such as they would have been had they taken an assignment of the Hub Ltd. contract with Newton. Practically speaking, they stepped into the shoes of Hub Ltd., and with full knowledge of the entire situation, accepted its responsibilities. True, Hub Ltd. had no interest in the production of the well. It only had the obligation to Newton to drill the well, yet the defendants knew that, and gambled upon their ability to work out some sort of an arrangement with the certificate holders which would redound to defendants' advantage. The defendants assumed to carry on the Hub Ltd. contract, of their own volition and without any request or consent of the certificate holders, confident of their ability to persuade the certificate holders to give them an interest in the production of the well or by the transactions between the new and the old corporation or the Newton forfeiture and a new drilling contract from Newton to the dummy of the defendants, to compel the certificate holders to make a favorable division or arrangement with defendants.

[4] At the oral argument on this appeal, counsel for defendants made the statement that possibly the position of the defendants was that of interlopers, and that they thought that as interlopers they should be reimbursed for the moneys they had advanced for the benefit of the certificate holders. But an interloper has no rights. He takes his chances that those he has benefited by his intrusion may recognize some moral obligation to him. But surely he has no greater rights than would a sublessee or assignee of Hub Ltd. The corporation had made a definite contract with its certificate holders that they would not be liable for the cost of drilling, yet the defendants, after a complete examination and understanding of the whole situation advanced their money based upon an understanding with Allen, who did not represent the certificate holders in any way, that Allen would undertake to get the certificate holders to make an arrangement to compensate the defendants "on some basis to be agreed upon".

In re Lathrap, 61 F.2d 37, can readily be distinguished from the case at bar. There the court held that in bankruptcy, the proceeds of the oil should be distributed to the general creditors in preference to persons holding royalty certificates similar to those issued by Hub Ltd. It did not consider the question of whether or not the certificate holders would be personally liable to creditors, although there are cases in other states which seem to so hold. But the chief distinguishing feature of In re Lathrap and these other cases is that there were creditors who had dealt with the company in good faith and "only for a normal profit". 61 F.2d page 44. Thus the rule there applied seems to be limited to credit "for a normal profit". Again in the Lathrap case, page 45 of 61 F.2d, the court uses this extremely significant language: "These per cent. holders are junior in right to the general creditors who furnished commodities to the bankrupt *not at speculative, but at normal profit.*" (Italics added.) Here, the actions of the defendants were not for a normal profit but for a highly speculative one, a percentage interest in the production of the well when completed. In the letter of the defendant Hatch to the stockholders, included by reference in the findings, he stated there was to be a division of the interests of the certificate holders with Hatch and Young as compensation for their services in continuing the well and assisting in financing it. In this same letter the defendant Hatch notified the certificate holders that due to the forfeiture declared by Newton (which the lower court held to be void), and the making of a new drilling contract between Newton and an undisclosed party (who actually was a dummy for the defendants), all interests of the certificate holders, as well as of Hub Ltd. in the well and its production had terminated and ended. This letter shows that at that time the defendant Hatch, at least, if not the defendant Young, his partner, did not regard themselves in the light of creditors of the certificate holders, or feel in any way that the relationship between them and the certificate holders was one wherein they could claim reimbursement from the certificate holders. This is significant, in view of the fact that Mr. Hatch was an attorney and completely conversant with every phase of the matter. His own interpretation at that time of the relationship between the certificate holders and him and his partner, and the position he took in Holmes v. Hatch, supra, as to the moneys expended, are at variance with the contentions urged at this time.

[5-7] Defendants' third contention is that, irrespective of the relationship created by the royalty certificates, the certificate holders are bound in assumpsit to the defendants for the moneys advanced by them which enabled the well to be completed and which provided the oil, the proceeds from which plaintiffs are now claiming. To support their position defendants cite the Golden Rule, sections 3521, 1589 and 2310 of the Civil Code, to the effect that he who takes the benefit must bear the burden, and several cases such as MacDonald v. Reich & Lievre, Inc., 100 Cal.App. 736, 281 P. 106, and Pollak v. Staunton, 210 Cal. 656, 293 P. 26, which hold that one who purchases stock, the sale of which is unauthorized by the Corporation Commissioner, may sue in assumpsit to get his money back. However, these principles do not apply here because of the fact that the very advances made by defendants were those which it had been stipulated in the certificates the holders were not to pay, and their interests in the proceeds of the oil not to be liable for. Defendants contend that had they not volunteered as they did, the Newton lease would have been forfeited, and that, moreover, there was so little time left in which to act when the drilling stopped that the defendants had to proceed without making any arrangement with the certificate holders. While this is true, it appears that Hatch and Young were much more concerned at the time about this question of forfeiture than were the certificate holders themselves. The certificate holders did not seem disturbed about the lease being forfeited, but the defendants apparently were. Hence, they injected themselves into the situation as volunteers, expecting to reap a harvest, but being volunteers they are bound by the rule that a volunteer cannot recover the moneys advanced by him. 48 C.J., p. 734, sec. 280, et seq.; 5 Pomeroy's Equity Jurisprudence, 4th ed., sec. 2335, p. 5163 (Equitable Remedies, 2d ed., sec. 912, p. 5166). Moreover, the entire circumstances under which defendants intruded into the situation and the entire history of the matter negatives any right to reimbursement from the certificate holders or from the oil produced. To deny plaintiffs their recovery herein would be to totally disregard the express conditions set forth in their certificates, of which conditions defendant had full knowledge before and during the making of their expenditures. As a matter of fact, when the invalid transfer of the Newton contract was made by Hub Ltd. to the new corporation it was apparently intended to wipe out any relationship between the certificate holders on the one hand and Hatch and Young and the proceeds of the oil, on the other, except such as would have resulted had the certificate holders exchanged their certificates for stock in the new company. Had the transfer not been invalid, there would have been no attempt by Hatch and Young to hold the certificate holders for the money advanced by them. This is another instance of the fact that the defendants, during the whole proceeding, never claimed that there existed between them and the certificate holders the relationship which they now attempt to assert.

The only reasonable result is, that the defendants, by reason of the peculiar circumstances of the case and their actions, have placed themselves in a position where their rights can be no greater than would be those of one to whom Hub Ltd. had made a valid assignment or sublease of its rights under the Newton drilling contract. Such an assignee or sublessee would take fully subject to the certificate holders' rights to receive their shares of the oil, undiminished by any costs of drilling or operating as specifically provided in their certificates.

Judgment affirmed.

We concur: KNIGHT, Acting P. J; WARD, J.

BEKINS VAN LINES, Inc., v. JOHNSON.

Civ. 6302.

District Court of Appeal, Third District, California.

June 25, 1941.

Hearing Granted Aug. 22, 1941.

1. Automobiles 🔑97

The statute imposing license fee for transportation of property by motor vehicle over public highway for compensation based on the gross receipts thereof was enacted for purpose of compelling transportation companies to contribute their fair proportion of necessary cost of maintaining public highways over which their vehicles travel, and not to regulate traffic on the highways. St. 1933, pp. 928, 930, 936, §§ 1(d), 4, 14.

2. Licenses 🔑1

Regulatory licenses of occupations are imposed under "police power" of state to protect the health, morals, and general welfare of the public, as distinguished from statutes enacted for chief purpose of raising revenue.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

3. Licenses 🔑8(1)

In construing a license tax statute, courts are governed by disclosed purpose of the act rather than mere technical language employed.

4. Statutes 🔑245

Where doubt exists regarding meaning or application of statute levying taxes, uncertainty is to be resolved in favor of taxpayer.

5. Statutes 🔑245

In cases involving interpretation of statutes levying taxes, the rule is not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out.

6. Automobiles 🔑98

The statute authorizing a license tax for the transportation of property upon the state highway based on a percentage of the gross receipts from the "operation" manifests the intent to base the percentage on the gross receipts from operation on the public highway outside incorporated cities or towns, and does not manifest the intent to include, in the gross receipts, the amount received by trucking company for loading and unloading, and for picking up and delivering goods which constituted 56 per cent. of the time and labor necessarily employed in the transporting of the goods. St.1933, p. 928, 929, 930, 936, §§ 1(d), 2, 4, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Operation".

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit by the Bekins Van Lines, Incorporated, against Charles G. Johnson, etc., to recover license taxes paid under protest. From a judgment for defendant, the plaintiff appeals.

Reversed, and trial court directed to render judgment for the plaintiff.

Harry A. Encell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and R. L. Chamberlain, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The plaintiff has appealed from a judgment rendered against it in a suit to recover license taxes which were paid under protest for the years 1935 and 1936, for transportation of property over public highways in California. A rebate from the taxes paid during that period of time, in the sum of $2,016.63, was claimed, on charges for "loading and unloading" and for "pick-up and delivery" of goods, as services separate and distinct from actual transportation of property on the highways. The suit was brought under section 9 of the act authorizing the license tax for transportation of property upon the highways of California. Stats.1933, p. 928, and amendments thereto; 1 Deering's Gen.Laws of Cal. of 1937, p. 2160, Act 5130d.

The plaintiff is duly licensed and extensively engaged as a common carrier in conveying household goods and other personal property over the highways of California, by means of motor vehicles. Its principal place of business is at Los Angeles. All license taxes levied and assessed against the plaintiff pursuant to the statute above mentioned have been fully paid. Verified reports were regularly filed with the board of equalization, as required by section 4 of the act, showing the gross receipts of the business in which deductions were separately made and claimed for charges for "loading and unloading goods" and for "picking up and delivering packages" as distinguished from strictly highway transportation charges. In the years of 1935 and 1936, the taxes on the last-mentioned deductions amounted in the aggregate to $2,016.63. After an investigation, accounting and hearing, at which the plaintiff was represented, the board disallowed the deductions and levied and assessed against plaintiff the last-mentioned sum as a part of its regular license tax for that period of time. That sum was promptly paid under protest. This suit was then commenced.

The essential facts of this case are undisputed. The Bekins Van Lines, Incorporated, was assessed as a licensed tax for conducting a transportation business under the statute on the basis of all gross receipts without credit for any portion thereof received for services in assembling goods, in preparation for hauling, loading or unloading or separate pick-up and delivery of the goods as distinguished from actual conveyance over the highways outside of incorporated cities.

Reports were regularly filed with the board pursuant to law in which receipts for compensation for different classes of services were separately itemized. Several waybills were received in evidence which distinctly show the custom of segregating charges for "pick-up and delivery services" separate from actual conveyance of the goods on the highways. The evidence is undisputed that 56 per cent of the time and labor necessarily employed in transporting goods is consumed in assembling, packing, preparing for shipment, removing goods from the houses to the trucks, loading and unloading and pick-up services. The remaining 44 per cent is consumed in actual transportation on the highways. For the purpose of fixing rates to be charged, it is the custom of the railroad commission to allow 40 per cent for such preparation services. Mr. Reed J. Bekins, who has served as vice-president and general manager of the plaintiff company for many years, testified in detail regarding the customary services rendered in transporting household goods and other personal property. He described the method of packing books, dishes and fragile articles, the removal of mirrors from chiffoniers, pictures from the walls, the legs from pianos, and taking down and setting up beds, together with the manpower, time and equipment necessary to transport such property from upper stories of apartment houses or from ordinary dwelling houses, to the trucks. He explained the care with which the property is packed and protected by pads in the vans, and the frequent necessity of rendering separate pick-up and delivery services. He said: "A large majority of our business consists of assembling or pooling small lots of household goods * * * into one load going to a certain destination; * * * that lot of goods will be picked up from the residence, will be hauled to our warehouse, where they are unloaded, listed, packed, and set aside for assembly with other lots; and then they are reloaded onto a line haul truck and sent on to destination. At destination the reverse process may be taken * * * and then delivered to the residence with a pickup truck."

In ascertaining the amount to be charged for transportation, Mr. Bekins said they followed the rule established by the railroad commission to segregate the time consumed in preparing the goods for shipment, from the time actually employed in traveling on the highways. In computing compensation, the custom was followed to charge a fixed rate per hundred weight, to which 40 per cent was added, under the railroad commission's rule, for the actual distance traveled on the highway. It was estimated that one man could ordinarily handle about 375 pounds of household goods per hour. The charges varied according to the time consumed in preparing goods for shipment and in loading and unloading as well as the distance to be traveled on the highways.

The trial court held that the charges for loading and unloading and for picking up and delivering goods, although such services are not performed on the highways of California, are, nevertheless, incidental to the business of hauling goods upon the highways, and that they should, therefore, be included as a part of the gross receipts which constitute the basis for computing the three per cent license tax authorized by law to be collected. Judgment was accordingly rendered against the plaintiff to the effect that it take nothing by this action. From that judgment this appeal was perfected.

It is apparent from the entire act that it was not the intention of the legislature to fix the amount of tax to be paid for transportation, estimated at three per cent of the gross receipts, upon all services performed by the companies, both incidental to and in the direct process of hauling goods upon the highways. It is true that section 4 requires the operator to file with the board verified reports "showing the gross receipts from operation of said operator". It provides that "A license tax equal to three per cent of gross receipts from operation derived" shall be levied. But the term "gross receipts" upon which the amount of taxes is to be estimated is defined in section 1(d) of the act, which clearly indicates that it is based on the mileage actually traveled on public highways within the state of California outside of incorporated cities. The statute specifically excludes from consideration the proceeds derived from mileage covered within incorporated cities, and it also excludes receipts from mileage covered outside of cities where "no portion of the public highway * * * is traversed". Section 14 reads in that regard: "This act shall not apply to motor vehicles operated exclusively within incorporated cities or towns, nor shall it apply to such vehicles operating between incorporated cities or towns *where no portion of public highway outside of the corporate limits of said cities or towns is traversed in said operation.*"

[1] The preceding section clearly indicates that the tax is to be computed on the basis of the mileage traversed over and upon public highways only and when such highways are outside of incorporated cities and towns. This section positively refutes the theory that the taxes are to be computed on the entire gross receipts of a transportation company regardless of the nature of the services performed, or of the source of revenue derived from the business. It has been definitely determined that the statute was enacted for the purpose of compelling transportation companies to contribute their fair proportion of the necessary costs of maintaining public highways over which their vehicles travel. Bacon Service Corp. v. Huss, 199 Cal. 21, 248 P. 235; In re Bush, 6 Cal.2d 43, 56 P.2d 511. In the Huss case, supra, it is said in that regard at page 29 of 199 Cal., at page 238 of 248 P.: "An examination of the entire statute discloses that the obvious and only purpose of the act was to provide a revenue with which to maintain and repair the public highways of the state outside of incorporated cities, and that such revenue was to be obtained by the imposition of a license or privilege tax on the business of operating motor vehicles for hire *over such public highways.*"

In the Bush case, supra, it is likewise said at page 53 of 6 Cal.2d, at page 515 of 56 P.2d: "We are satisfied that the purpose of the enactment of the License Tax Act of 1933 was to secure a fair return to the state *for the use of its public highways.*"

[2-4] From the foregoing authorities and from an examination of the transportation act in question, we assume it was adopted to raise revenue for the maintenance of public highways, and not to regulate traffic on the highways. The provisions of the Vehicle Code, St.1935, p. 93, were evidently intended to cover the regulation of traffic on the highways. Regulatory licenses of occupations are imposed under the police power of the state to protect the health, morals and general welfare of the public, as distinguished from statutes enacted for the chief purpose of raising revenue. 33 Am.Jur. 336, sec. 17. In construing a license tax statute, courts are governed by the disclosed purpose of the act rather than the mere technical language employed. When a doubt exists regarding the meaning or application of the statute, the uncertainty is to be resolved in favor of the taxpayer. Pioneer Express Co. v. Riley, 208 Cal. 677, 687, 284 P. 663, 667; 33 Am. Jur. 329, sec. 4; 37 C.J. 180, sec. 21.

[5] In the Riley case, supra, it is said in that regard: "In every case involving 'the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.'"

[6] Applying the foregoing rule of construction to the language of the statute in question we are satisfied the legislature did not intend to require the procuring of an occupational license tax based on the entire gross receipts of the carrier's business, regardless of the necessary costs of assembling goods for the purpose of shipping, the charges for loading and unloading the vehicles or the expense incident to a separate "pick-up and delivery service". We are of the opinion section 4 of the act, which provides for a tax of "three per cent of gross receipts *from operation*" should be construed to mean three per cent of the gross receipts from operation *on the public highways.* Section 1(d) of the act rein-

forces the preceding conclusion. It provides that "the term 'gross receipts from operation' shall include all receipts *from the operation of such motor vehicle or motor vehicles.* The italicized language from the last-quoted section clearly excludes receipts derived from sources other than that of operating the vehicles. Likewise section 2 of the act provides that the license shall be procured by each operator who desires to transport persons or property for compensation "upon or over any public highway within this State". Moreover, section 1 (d) of the act specifically declares that the estimated taxes shall be "based upon *the proportion of the mileage* within this State to the entire mileage over which such business is done". Section 14 (now section 22 of the amended act) excludes from consideration in estimating the taxes due, transportation within incorporated cities or towns, and roadways outside of such cities and towns other than public highways. It is significant that the act does not mention, directly or inferentially, the necessity of including within gross receipts the compensation received from services performed in packing or assembling goods, in loading or unloading them or for "pickup and delivery" charges. The very purpose of the act would seem to exclude such services for clearly they do not tend to injure the public highways in any manner whatever. Indeed, a similar tax levied for highway purposes only, which did include such services might be deemed to be unreasonable and void, for the undisputed evidence in this case is that more than one-half of the time and labor employed in the business of transporting household goods and other property, commonly conducted by such companies or individuals, is necessary to assemble, pack, carry by hand to the vehicles, load and unload the property. Recognizing that fact, the Railroad Commission uniformly makes an allowance of forty per cent of the time and labor of transporting goods for such preparation, in fixing the rates which may be charged by common carriers of this nature. If the legislature had intended to include in the definitions of "transportation" or "gross receipts" such services it would have been very easy to have clearly done so. It seems quite significant that they failed to do so.

In support of its contention that the act includes all such services as incidental to the business of transporting goods, the respondent cites several cases based on the Interstate Commerce Act. Pletcher v. Chicago, R. I. & P. Ry. Co., 103 Kan. 834, 177 P. 1; Lehigh Valley R. Co. v. United States, 3 Cir., 188 F. 879, 884; 42 Words and Phrases, Perm.Ed., 359. It appears to us those cases are not applicable to the present suit. They are clearly distinguishable from this case. They are founded on a specific definition of the term "transportation" as it is used in the Interstate Commerce Act, 49 U.S.C.A. § 1(3), which declares that: "The term 'transportation' as used in this chapter shall include * * * all services in connection with the receipt, delivery, elevation, and transfer in transit * * * and handling of property transported."

No such services are included in the definitions used in the transportation act of California. To read such services into the present statute would violate the established rule of construction recognized by uniform authorities and expressed in the Riley case, supra, prohibiting an extension of the provisions of an act, which, in case of uncertainty, should be interpreted favorably to the taxpayer and not the state.

For the foregoing reasons we are convinced the highway carrier's license should not be computed and levied on the basis of all gross receipts of the company, but, on the contrary, should be confined to receipts derived from actual mileage covered in transporting goods on public highways outside of incorporated cities and towns.

The judgment is reversed and the trial court is directed to render judgment for the plaintiff as prayed for.

We concur: PULLEN, P. J.; TUTTLE, J.

45 Cal.App.2d 614

JOHNSON et al. v. WESTERN AIR EXPRESS CORPORATION et al.
(two cases).
Civ. 12368, 12369.

District Court of Appeal, Second District, Division 1, California.

June 30, 1941.

Hearing Denied Aug. 28, 1941.

1. Death 🔑72

In wrongful death action by heirs at law, evidence of the financial condition of such heirs at law, as to either poverty, or affluence, is inadmissible. Code Civ.Proc. § 377.

2. Death 🔑95(3)

The measure of damages for wrongful death is what heirs at law were receiving at time of the death and what such heirs would have received had decedent lived. Code Civ. Proc. § 377.

3. Action 🔑57(2)
Appeal and error 🔑1046(1)

The consolidation of wife's action for injuries with wrongful death action by wife and sister of decedent was not an abuse of discretion nor prejudicial in view of fact that both causes of action arose out of the same accident, that witnesses were the same, and that court clearly instructed jury concerning evidence to be considered in each case, notwithstanding that counsel indulged in argument, applicable only to the action for injuries, regarding financial status of wife. Code Civ.Proc. §§ 377, 1048.

4. Appeal and error 🔑1031(1)

A trial by jury after waiver of such trial was not presumptively prejudicial. Code Civ. Proc. § 631.

5. Jury 🔑28(17)

The trial court in its discretion could relieve defendants from consequences of their waiver of jury trial by failure to demand one or deposit jury fees within time and could try the case with a jury in response to subsequent request. Code Civ.Proc. § 631.

6. Jury 🔑28(17)

Submitting causes of action for personal injuries and for wrongful death to a jury after plaintiffs and defendants had waived trial by jury was not, under the circumstances, an abuse of discretion. Code Civ. Proc. § 631.

7. Appeal and error 🔑1001(1)

Where there is material evidence offered to support verdicts of the jury in actions for injuries and for wrongful death, judgments on the verdicts must be affirmed.

8. Carriers 🔑320(15)

In actions against airline company for wrongful death of one passenger and for injuries sustained by another in airplane crash, whether pilot was negligent in abandoning radio beam and flying on an average compass reading, was not a "question of law" but was a "question of fact" for the jury. Code Civ.Proc. § 377.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

9. Carriers 🔑320(30)

In actions against airline company for wrongful death of one passenger and for injuries sustained by another in airplane crash, whether failure of pilot to do exact things provided in "procedure to land down through with aid of radio range" was a proximate cause of accident, was for the jury to determine in light of existing conditions. Code Civ.Proc. § 377.

10. Carriers 🔑320(15)

In actions against airline company for wrongful death of one passenger and for injuries sustained by another in airplane crash, whether pilot in exercise of the highest degree of care was unable to do the things required for a beam landing because of an act of God was for the jury. Code Civ.Proc. § 377; Civ.Code, § 3526.

11. Carriers 🔑318(4)

In actions against airline company for wrongful death of one passenger and for injuries sustained by another in airplane crash, evidence warranted implied conclusion of jury that pilot's failure to remain tuned to radio beam was not proximate cause of crash, that unusual conditions of icing and turbulence were such that pilot could not have followed the beam, that the disaster occurred because of the unusual forces of nature and that it could not have been reasonably anticipated, guarded against, or resisted. Code Civ.Proc. § 377; Civ.Code, § 3526.

12. Appeal and error 🔑996

In actions against airline company and terminal company for wrongful death of one passenger and for injuries sustained by another in airplane crash, where there was creditable evidence that propeller de-icers when in operation do not remove ice already formed on propellers and that primary function of such mechanism is to prevent initial formation of ice, and that ice had formed on propellers immediately upon plane's entering clouds or overcast, implied finding of jury that failure to utilize the de-icers was not proximate cause of crash, would not be disturbed on theory that an absolute inference of negligence could be predicated on failure of copilot to turn on de-icing equipment when ordered to do so by pilot.

13. Negligence 🔑136(14)

In actions against terminal company for wrongful death of one passenger and for injuries sustained by another in airplane crash, whether terminal dispatcher was negligent in failing to advise pilot of certain weather reports was for the jury, in absence of evidence that reports should have aroused the apprehension of the dispatcher.

14. Negligence 🔑134(11)

In actions against terminal company for wrongful death of one passenger and for injuries sustained by another in airplane crash, evidence warranted implied finding of jury that there was no causal connection between failure of terminal dispatcher to transmit weather report and the crash.

15. Negligence 🔑134(1)

In actions against terminal company for wrongful death of one passenger and for injuries sustained by another in airplane crash, evidence warranted implied finding of jury that terminal dispatcher had no duty to furnish localizer beam until after it was requested by pilot.

16. Carriers 🔑320(15)
Negligence 🔑136(14)

In actions against airline company and terminal company for wrongful death of one passenger and for injuries sustained by another in airplane crash, whether pilot should have requested localizer beam or whether radio operator was negligent in matter of furnishing beam was for the jury.

17. Evidence 🔑117

In actions against airline company and terminal company for wrongful death of one passenger and for injuries sustained by another in airplane crash, testimony of passenger regarding plane maneuvers occasioned by operative conduct of pilot, such as that he throttled back the motors and dived, was properly rejected for want of proper foundation showing that passenger could see pilot.

18. Evidence 🔑498½

Whether airplane passenger was qualified to give her opinion regarding certain matters in operation of plane prior to crash was for the trial judge in the first instance and qualifications of passenger were to be determined by trial court before such opinion could be given.

19. Appeal and error 🔑971(2)
Evidence 🔑498½, 546

The qualification of a witness to give an opinion is in the nature of a trial of a "question of fact" by evidence addressed to the judge alone, and as on other decisions on questions of fact by a trial judge, his ruling thereon is a matter of discretion and will not be overturned on appeal unless there was an actual want of evidence to support it, or a clear abuse of discretion in ruling on the evidence given on the subject.

20. Appeal and error 🔑992

If there is any substantial evidence to support the ruling of the trial judge regarding qualification of witness to give an opinion, the ruling will be upheld.

21. Appeal and error 🔑1056(1)

Where there was evidence to support trial court's ruling refusing to permit passenger to give opinion regarding matters in connection with operation of plane prior to crash, refusal was not prejudicial.

22. Carriers 🔑317(10)
Negligence 🔑124(3)

In actions against airline company and terminal company for wrongful death of one passenger and for injuries sustained by another in airplane crash, testimony offered as to what was customary in connection with procedure to "land down through with aid of radio range", and as to custom among pilots in matter of calling for localizer beam on an instrument approach was properly rejected, since issue involved was conduct on particular occasion.

23. Trial 🔑295(1)

Where instructions considered as a whole fairly and correctly advised jury of the rules of law applicable to the issues presented by the pleadings and raised by the evidence, none of instructions given was subject to exception.

24. Negligence 🔑121(5)

In actions against terminal company for wrongful death of one passenger and for injuries sustained by another in airplane crash, burden rested on plaintiffs. in establishing cause against terminal company, to show that alleged negligent omissions or acts on part of terminal company were an efficient cause from which injury complained of followed in a natural and continuous sequence, unbroken by any efficient intervening cause.

25. Negligence ⟹134(11)

In actions against terminal company for wrongful death of one passenger and for injuries sustained by another in airplane crash, evidence sustained denial of recovery from terminal company because of failure to show negligence contributing to accident, either in matter of failing to supply radio localizer beam or otherwise.

Appeals from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Osa Johnson against the Western Air Express Corporation and others for injuries sustained in an airplane crash, consolidated for trial with an action by Osa Johnson and another against the Western Air Express Corporation and others for the wrongful death of the named plaintiff's husband in the same airplane crash. During the trial the actions were dismissed as to all individual defendants. From judgments on verdicts in favor of the remaining corporate defendants, plaintiffs appeal.

Affirmed. See, also, 37 Cal.App.2d 713, 100 P.2d 517.

Hearing denied; SHENK, CURTIS, and CARTER, JJ., dissenting.

Leonard E. Thomas, of Los Angeles, and John M. Schaupp, of Fort Dodge, Iowa, for appellants.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, for respondent Western Air Express Corporation.

George L. Greer, of Los Angeles, and Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for respondent United Airports Co. of California, Ltd.

WHITE, Justice.

On January 12, 1937, defendant Western Air Express Corporation (hereinafter referred to as Western Air Express) was operating an airline as a common carrier of passengers, mail and express between Salt Lake City, Utah, and Burbank, California, with an intermediate stop at Las Vegas, Nevada. Defendant United Airports Company of California, Ltd. (hereinafter referred to as United Airports Company), was at the same time engaged in operating an airport known as Union Air Terminal located at Burbank, California. Among the services furnished by the last-named defendant at said terminal to airlines and airplanes was that of maintaining and operating, under and through an agreement with airlines operating in the vicinity of Los Angeles, California, and with the consent and authorization of the Department of Commerce and the Federal Radio Communications Commission, a radio control tower and station (hereinafter referred to as radio station KBLA), with radio voice transmission facilities and likewise a radio "localizer beam" station to provide local radio beams for the purpose of guiding and assisting airplanes in landing at said Union Air Terminal. On the day here in question an agent and employee of defendant United Airports Company was in sole and exclusive charge of the radio control tower and of KBLA radio localizer station.

On the morning of January 12, 1937, Martin E. Johnson and his wife, Osa Johnson, engaged passage from defendant Western Air Express at Salt Lake City, Utah, for an airplane trip to Burbank. Accordingly, Mr. and Mrs. Johnson were assigned space on an airplane known as a Boeing 247 airliner, carrying ten passengers and a crew of three employees of defendant airline company, together with certain mail and express on what was designated as "trip No. 7". Included in the aforesaid employees of defendant Western Air Express were defendant William W. Lewis, pilot of said airplane, and Clifford P. Owens, copilot, both of whom were rated pilots under the Department of Commerce, and likewise possessed so-called airline and instrument ratings. The plane in question was equipped with two motors and was supplied with all necessary flying instruments and gauges, including what are commonly referred to as primary blind flying instruments and secondary blind flying instruments. The plane was also equipped with three radio receivers and a radio transmitter, together with a carburetor de-icer and propeller de-icers. It is conceded that at no time on the trip was any mechanical failure or trouble encountered with the motors or the airplane itself.

The evidence reveals, in substance, that methods and types of flying are divided into two classes—contact flying, which is the type done by a pilot when visibility is good and he can visually observe the terrain around him; and instrument flying, which is the type of flying done by a pilot while he relies solely upon the reading of the instruments before him in the cockpit, and which mechanisms are known as the primary blind flying instruments and secondary blind flying instruments, together with radio directional guides. When he resorts to instrument flying it is normally unnecessary for the pilot to have visual recourse to conditions outside the cockpit because he can depend exclusively upon the instruments on the instrument board in front of him and the radio advices he receives through his earphones. In the instant case, the flight from Salt Lake City to the intermediate stop at Las Vegas was made by contact flying on the part of the pilots and was uneventful. At Las Vegas the plane was held for 33 minutes by the chief dispatcher of defendant Western Air Express at Burbank "until he had checked the weather reports and decided whether he should let the plane continue to Burbank". At 9 o'clock Pilot Lewis was directed to proceed to Daggett, California, where he would receive further instructions from the aforesaid chief dispatcher. Upon arrival at Daggett, Pilot Lewis communicated with the Western Air Express ground station at Burbank by radio and "gave them his estimates", that is, advised that he would be over Palmdale at 10:40 a. m. and would arrive at Burbank terminal at 11:05 a. m. At the same time Pilot Lewis "requested instrument clearance into Burbank", that is to say, he requested authorization and approval of his plan to make an instrument approach and entry into the Burbank airport. The Western Air Express operator radioed the pilot between 10:15 and 10:25, giving the latest weather reports at Palmdale, Saugus and Burbank. These reports also advised the pilot of an estimated ceiling at Burbank of 1,500 feet (the ceiling being the distance from the ground to the base of the clouds or overcast); Palmdale was reported as having a 2,000-foot ceiling, with light snow. The ceiling prevailing at Saugus was estimated by the radio operator as 800 feet, with light rain. The terminal dispatcher also approved the pilot's request to make an instrument approach and authorized and instructed him "to fly an instrument problem into Burbank". The term "instrument problem" had reference to the "procedure to land down through with aid of radio range"; which procedure had been adopted by defendant Western Air Express with the approval and authorization of the Department of Commerce. (Paragraph 190, section 7, chapter 8, Air Commerce Regulations governing scheduled operations of interstate airline service in effect at the time pertinent hereto.)

A radio range station sends out a beam signal in four directions. The space between two beams is termed a quadrant, there being two "A" and two "B" quadrants. When a pilot whose radio is tuned to such a station is "on the beam", that is, flying on the course of the directional signal, either directly toward or directly away from the station, he will hear a steady hum in his earphones. If while so tuned in he strays off the course into the "A" quadrant, he will hear the international Morse code signal for "A"—a dot followed by a dash. If he wanders to the other side he will hear the signal for "N" —a dash followed by a dot. By the "cone of silence" is meant that area immediately above the radio station. When a pilot flies along a radio beam toward a station the signal becomes continuously louder in his earphones until he passes into the "cone of silence", when all signals cease; when he reaches the other side of the cone of silence the signal returns.

With respect to a pilot approaching Burbank on instruments from the Saugus area, the approved "procedure to land down through" provided: "Pilots approaching this station will maintain an altitude of not less that 5,500 feet above sea level pending definite location of the radio range station. Planes arriving from the northeast will follow the Palmdale leg of the Saugus radio range, magnetic course 221 degrees—to the cone of silence. After definitely determining the cone of silence and noting the change of signal in quadrants, pilot will proceed out the Bakersfield leg, magnetic course 316 degrees, at an altitude of not less that 5,500 feet above sea level for approximately two minutes, during which time he will lower wheels, place propellers at low pitch and set throttles for an air speed of 120 m. p. h. He will then reverse direction, course 136 degrees, and again pass through the cone of silence at 5,500 feet above sea level. After passing cone of silence and checking change of signal in quadrants, he will start letting down on the San Diego leg, magnetic course 125 degrees, remaining on the beam, rate of descent 525 feet per minute, air speed 120 m. p. h. At the end of two minutes altitude should be about 4500 feet indicated and the long-wave receiver shifted to 278 kilocycles which should bring in the localizer at Union Air Terminal (station KBLA at Burbank). At the end of four minutes, after passing through cone of silence at Saugus, altitude should be about 3,400 feet indicated. At the end of six minutes, altitude should be about 2,300 feet. At the end of eight minutes, altitude should be about 1,200 feet, at which time the lowest allowable altitude will soon be reached and the plane flown on in to the cone of silence at the minimum altitude if the ground has not been sighted. After passing through cone of silence and no sight of ground is visible, the pilot will pull up in a right turn, getting on top for another approach."

Following the last-mentioned radio communication, Pilot Lewis continued his flight to the vicinity of Palmdale, California, still flying by contact, and was able to see the ground and the flying field at Palmdale. When he arrived over the last-named place he had a further radio communication with Western Air Express ground station at Burbank, at which time he gave definite estimates as to when he expected to arrive over Saugus and into Burbank. At this time Pilot Lewis was further advised that the ceiling at Burbank was about 3,000 feet, with a lower stratum of clouds at 1,500 feet around the east hills. Pilot Lewis radioed back to Western Air Express dispatcher's office that he would be over the cone of silence at Saugus at 10:50, would make the return or second trip across the cone of silence at 10:57, and would be in Burbank at 11:06. The trip between Palmdale and Saugus was made flying at an altitude a little in excess of 7,000 feet, and on top of the clouds or fog. In accordance with the aforesaid approved "procedure to land down through with aid of radio range", Pilot Lewis followed the Palmdale leg of the Saugus beam until he came to the cone of silence at Saugus, which he crossed, exactly as he had predicted, at 10:50. After "hitting the cone of silence", Pilot Lewis continued until he got what is called the "build-up" or return of signals in his earphones on the other side of the cone, whereupon he made, as he was required to do, a right turn to go out along the Bakersfield leg of the Saugus beam, which runs northwesterly from Saugus. He then radioed the ground station of Western Air Express, stating that he had passed the Saugus cone of silence and would repass it at 10:57 and arrive in Burbank at 11:06. It might here be stated that as the pilot nosed the plane down to the 5,500-foot level, he encountered considerable turbulence and "icing conditions", but he was nevertheless able to maintain his course on the Bakersfield leg of the beam, make his turn, and again pass over the cone of silence at 10:57.

The route from the Saugus radio range station (elevation 1,100 feet above sea level) to the Burbank airport (airline distance approximately 17 miles) lies in a general southerly direction through Newhall pass, between the San Gabriel mountains on the left and the Santa Susanna mountains on the right. The highest point in the pass is 3,000 feet above sea level. In the center of the pass was located an airline beacon light at an elevation of 2,040 feet. It was while en route from Saugus to Burbank that the plane went approximately three miles off its course to the left, or east, in connection with which we shall have more to say làter in this opinion. Upon the pilot's being advised that he was off his course, and while he was attempting to regain his position thereon, the plane crashed on Los Pinetos peak in the San Gabriel mountains, at an elevation of approximately 3,550 feet.

As a result of the accident plaintiff Mrs. Johnson sustained several personal injuries and her husband was killed. Two law suits are involved in this appeal. One is a cause of action by the surviving heirs at law, namely plaintiff Osa Johnson and a surviving sister, Freda Cripps, under the provisions of section 377 of the Code of Civil Procedure, for the death of Martin E. Johnson as a result of the airplane crash, allegedly caused by the wrongful act or neglect of the defendant corporations and their employes. The other is a cause of action filed solely by the plaintiff Osa Johnson to recover damages for her own personal injuries sustained in and arising out of the same airplane accident.

By their answers defendants denied negligence, and in both cases the answers of Western Air Express set up affirmative defenses of inevitable and unavoidable accident and act of God. The two causes were consolidated for trial, during which trial the actions were dismissed as to all individual defendants. Following such trial the jury returned verdicts in each action in favor of the remaining corporate defendants. From the judgments entered on such verdicts plaintiffs have appealed, and present both appeals upon a single transcript and one set of briefs.

[1, 2] Appellants first urge a reversal of the judgments on the ground that the court committed prejudicial error in making its order, over their objection, consolidating the two cases for trial. This claim is grounded on the contention that such order militated against the material and substantial rights of the plaintiffs and therefore constituted an abuse of the discretion vested in the trial court to make an order of consolidation. Code Civ.Proc., § 1048. In this connection it is claimed that in the action brought pursuant to section 377 of the Code of Civil Procedure no evidence was either proper or admissible touching upon the earning capacity or financial condition of plaintiffs, while in the action brought by Mrs. Johnson individually to recover damages for her personal injuries, loss of earning capacity and other detriment suffered by her as a result of the crash, it was required that evidence be given as to her earning capacity, actual earnings and financial condition for the purpose of determining the extent of the damage, if any, sustained by her as alleged in the complaint filed in her individual action. Such evidence, it is argued, would necessarily tend to prejudice the right to recover on the part of the heirs-at-law in the action brought under the aforesaid statutory provision, in which action such evidence of financial condition was inadmissible. Undoubtedly it is the established law in California that in an action instituted by the heirs-at-law under the provisions of section 377 of the Code of Civil Procedure, evidence of the financial condition as to either poverty or affluence of such heirs-at-law is clearly immaterial and inadmissible. The measure of damages in such case is what the heirs were receiving at the time of the death of the deceased and what such heirs would have received had decedent lived. It is the destruction of their expectations in this regard that the law deals with and for which it furnishes compensation. Shebley v. Peters, 53 Cal.App. 288, 293, 200 P. 364; Mahoney v. San Francisco & S. M. Ry. Co., 110 Cal. 471, 42 P. 968, 43 P. 518; Gilmore v. Los Angeles Ry. Corp., 211 Cal. 192, 295 P. 41; McLaughlin v. United R. R., 169 Cal. 494, 147 P. 149, L.R.A. 1915E, 1205, Ann.Cas.1916D, 337; Ensign v. Southern Pac. Co., 193 Cal. 311, 223 P. 953; Wright v. Broadway Dept. Store, 199 Cal. 562, 250 P. 572.

[3] By section 1048 of the Code of Civil Procedure it is provided that in its discretion the court may direct the consolidation of actions whenever it can be done without prejudice to a substantial right. In the instant case we perceive no showing of an abuse of the court's discretion, nor of any prejudice to the substantial rights of the parties because of the court's action in directing a consolidation of the two cases. Both arose out of the same accident; witnesses in both were the same; as was the testimony, except so far as the latter pertained to the financial condition of the parties, which last-mentioned issue became material only in Mrs. Johnson's individual action for personal injuries and consequent damage. However, the trial court painstakingly and clearly instructed the jury concerning the evidence they were to consider in each of the two cases, as is evidenced by the following instructions:

"Two entirely separate cases are submitted to you for decision on the facts. One, Cause No. 422944, concerns the claim for damages of Osa Johnson as the surviving widow and Freda Cripps as the surviving sister of Martin E. Johnson for the death of Martin E. Johnson on January 12, 1937, while he was riding in an airplane owned and operated by the defendant Western Air Express Corporation, on a trip from Salt Lake City, Utah, to Burbank, California. The other case, No. 423449, concerns the claim of Osa Johnson for damages for personal injuries claimed to have been suffered by her on the 12th day of January, 1937, while riding in the same airplane owned and operated by the defendant Western Air Express Corporation, on a trip from Salt Lake City, Utah, to Burbank, California.

"If you find that the plaintiffs in Case No. 422944 are entitled to a verdict from one or both of the defendants, then you will proceed to assess the damage in that case as though Case No. 423449 had not been filed or brought to your attention and as though you had heard no testimony whatever in respect to the earning power or want of earning power of the heirs Osa Johnson and Freda Cripps since the death of Martin E. Johnson or of their financial dependence or financial independence. In other words, the fact, if it be a fact, that Osa Johnson has earned since the death of her husband Martin E. Johnson, or is capable of earning amounts large or small cannot and must not be considered by you in assessing the damages in Cause No. 422944. This is for the reason that the law which you must follow specifically provides that an heir is entitled in an action for wrongful death to the pecuniary loss suffered and that amount is not to be reduced or enlarged by reason of the financial condition of the heir or heirs.

"If you find that Osa Johnson, the plaintiff in Case No. 423449, is entitled to a verdict from one or both of the defendants then you will proceed to assess her damage in that case as though case No. 422944 had not been filed or brought to your attention and as though you had heard no testimony in respect to the earning power of Martin E. Johnson or the value or lack of value of the estate, if any, left by him. In other words, in assessing the damages in her individual case you will neither increase nor decrease them because of the knowledge you may have of the character just mentioned nor because of the amount you may award in Cause No. 422944."

The following language taken from Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237, 239, is here most pertinent and decisive: "Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language * * *. We will not assume that they may not have understood the charge as we understand it." In view of the clear and unequivocal instructions of the court, we cannot agree with appellants that the jury was misled by opposing counsel's argument based on the financial status of Mrs. Johnson. Such argument was proper in connection with her individual action for damages based on personal injuries allegedly sustained by her. Furthermore, the jury was admonished in plain and understandable language that they were not to consider the question of damages unless they first determined the existence of a liability for damages on the part of the defendants.

[4-6] Appellants next complain of the action of the trial court in submitting the causes to a jury after plaintiffs, prior to the commencement of the trial, waived trial by jury theretofore demanded by them. Immediately upon receipt of notice from plaintiffs' counsel that a jury had been waived, defendants, on the day before the commencement of the trial, deposited the requisite jury fees and demanded a jury trial. On the day of the trial plaintiffs moved the court for trial without a jury, which motion was denied. Appellants' contention that respondents had at least impliedly waived a jury by not demanding one within the time required by law cannot be sustained. There is creditable authority for the statement that the purpose of section 631 of the Code of Civil Procedure is to grant the parties the right to waive a jury trial, but not to make such waiver irrevocable. Duran v. Pickwick Stages System, 140 Cal.App. 103, 35 P.2d 148. Neither does any presumption exist that prejudice resulted from a trial by jury. From a very early date it has been held that notwithstanding such waiver the court has a right to direct that an issue of fact be submitted to a jury. Doll v. Anderson, 27 Cal. 248, 251. Notwithstanding that a jury was waived by defendants in accordance with the statute, it is within the discretion of the trial court to disregard such waiver and try the case with a jury. In the instant cause we find no grounds for disturbing the exercise of the discretion with which the trial court was clothed.

We come now to a consideration of appellants' claim that the evidence is insufficient to justify the verdicts, in that undisputed negligence and negligence as a matter of law, constituting the proximate cause of the accident, was proved and admitted upon or by the pilot, the copilot, the dispatcher and the radio operator of defendant Western Air Express, and against the agent of the defendant United Airports, and that the affirmative defense of Western Air Express that the accident occurred because of an act of God was not established by the defendants.

A review of the evidence indicates without contradiction that up to the time the pilot passed the cone of silence at Saugus the first time, he had encountered no trouble. His optimistic frame of mind is reflected by the fact that when he originally passed the cone of silence he radioed the station, giving his estimate that he had passed the cone at 10:50 a. m., would repass it at 10:57, and arrive at Burbank at 11:06. As the pilot himself testified, "That conversation was not necessary, but I felt good that day, and every thing was clicking, so I just radioed that in." At that time the station replied that "the weather was the same". At this time the pilot's compass was straight along the beam, and as he came upon the cone the first time his elevation was 7,150, his radio was on, and "working nicely and clearly". After first passing the cone of silence he proceeded out on the Bakersfield leg and started to let down into the overcast. According to the pilot's testimony, immediately upon entering the overcast he encountered ice, and the ship started tossing, rolling and vibrating, but as he testified, he had the plane under control, He nosed it down to the 5,500-foot level, maintained his course on the Bakersfield leg, made his turn and again passed over the cone of silence at 10:57, exactly as he had predicted. At the time he encountered ice the pilot directed the copilot to turn on the deicers, but the latter did not do so, and admittedly the pilot was aware of that fact. In describing the performance of the plane just before he came to the cone of silence for the second time, the pilot testified: "The ship just sunk. * * * Sunk with what we commonly call a downdraft." It should here be noted that just as he passed over the cone of silence the second time and got the "build-up" (meaning a return of signals), he switched off his radio from the Saugus station beam. What then transpired is thus described by the pilot in his testimony:

"Well, I immediately got busy and started adjusting the stabilizer and, as I say, I was lucky enough to cross the cone of silence, and I glanced at the watch at 10:57 and got the other side of the cone and switched over and tuned into KBLA and heard KBLA—I heard KBLA's voice, and I thought that was great. I hauled on the airplane, and what was my reward? It was 80 miles an hour and the airplane sinking, the throttles were open and no power. I watched those 'tachs' go back and forth; I shoved the thing down to regain speed, because I knew I couldn't hold altitude at 80 miles an hour, and the ship sinking. I pulled back on the throttles, and I was hoping to get the ice broke out of the carburetors. I adjusted the automatic pitch control, I was trying to fly the ship right side up. I glanced over at my watch. KBLA was still talking, and I knew I was faced with an emergency. I told the copilot to tell KBLA to shut up, and for some reason he didn't hear me. I grabbed the mike. I told KBLA, 'Hey, somebody tell KBLA to shut up.' Well, my decision was trying to get back, but try to get back! I knew what I had passed through. I was plenty depressed at this point, wondering what had happened to the ground crew, did they run out on me? I was wondering if they thought they had a superhuman in that cockpit. Well, my decision was to go on. The beam came on, and I heard the 'N.' (Meaning, as heretofore indicated, that he was off his course to the left.) Of all places I didn't want to be was the 'N'. I made a turn, and I looked back to see how much ice there was on the airplane, and what did I see—two bushes. I pulled back on the throttles and grabbed that wheel—that was all—that was all. * * * KBLA was talking all about my trip, and they were expecting me any moment. And it seems to me that I recall them saying I would be in there at 11:06. I was all over the cockpit, and I didn't catch everything they said. Things were going bad, and from bad to worse, at that point. * * *

"Q. Will you please tell us approximately how long they kept talking? A. Well, after I was wrestling around with this ship, and being buffeted all over, and trying to keep a safe air speed, and trying to break the motors loose, I glanced at the watch and it was 10:59.

"Q. So it was a period, then, of two minutes that you heard KBLA, would you say? A. That is correct. * * *

"Q. Now, when you had turned over to the KBLA frequency and were waiting for the beam, the KBLA beam, why didn't you call in to them? Will you just tell us? A. Mr. Hanson, I was all over the cockpit, and when I heard their voices I thought that was great, here is the beam. I thought I was getting some relief then. I looked at those motors, and the tachometers were just barely putting out, and when I looked at that air speed and saw that falling, and the airplane sinking. * * *"

In the course of his testimony the pilot admitted that when he switched off the Saugus station beam he was depending upon an "average" compass reading to guide him on his course, because as he testified, "I had to make an average of it because the ship was tossing and rolling, the whole thing was just vibrating like that, and it was tossing and rolling."

The only other survivor of the crash who testified as a witness at the trial was plaintiff Mrs. Osa Johnson. In substance, she testified that after the plane left Saugus "we got into very bad weather * * * the plane was doing all sorts of funny things * * * it was all over the sky in other words. * * * We seemed to be going down in the plane like a dive * * * it was just sort of all over, like being in a terrible rough boat or something * * *"; that the weather was "very very bad". Asked to describe in her own words the movements of the plane for a period of two or three minutes immediately preceding the crash, Mrs. Johnson testified, "As I said, he (the pilot) throttled back the motors and was gliding in just a few minutes before, a very few, and I remember praying to God that we would hit the airport."

[7, 8] It therefore devolves upon us to determine whether there is in the record evidence to support the implied finding of the jury that the pilot and copilot were free from negligence, or that no negligence, if any, on their part, proximately contributed to the crash. We think there was material evidence offered to support the verdicts of the jury, and of course if there was, under the well established rule the judgments must be affirmed. It was a question of fact for the jury to determine, and not a question of law, whether the pilot was guilty of negligence in abandoning the Saugus beam and flying on an average compass reading, and in consideration of this question they were entitled to consider that during all of his difficulties the pilot was trying to hold to a compass course of 125 degrees, because, as he testified, he knew that was the compass course which would lead to the Burbank airport.

[9-11] Whether the failure of the pilot to do the exact things provided in the "procedure to land down through with aid of radio range" was a proximate cause of the accident was a question of fact for the jury to determine in the light of existing conditions. Respondent Western Air Express concedes that if conditions had been normal and Pilot Lewis had been able to follow each step of the "procedure" and had simply failed to do so, with the resultant crash and no explanation for its occurrence, there would be no question whatsoever but that the accident was due to the negligence of the pilot; but respondent contends, and its contention must be upheld, that it was for the jury to determine whether the pilot, in the exercise of the highest degree of care, was unable to do the things required by the "procedure" because of an act of God (Civ. Code, § 3526); and further, that it was within the province of the jury to conclude that the pilot's failure to remain tuned to a beam under the facts and circumstances present was not the proximate cause of the crash and that unusual conditions of icing and turbulence were such that the pilot could not have followed a beam because the combination of ice in the carburetors and extreme air turbulence made it impossible for the pilot to control the plane either as to course or altitude. The testimony of both the pilot and plaintiff Mrs. Johnson herself furnished grounds upon which the jury could predicate a finding that the disaster occurred by reason of the unusual forces of nature, and was one which could not have been reasonably anticipated, guarded against or resisted; that the crash was occasioned by the violence of the elements alone, and that the agency of men had nothing to do therewith.

[12] Appellants' contention that an absolute inference of negligence must be predicated upon the failure of the copilot to turn on the de-icing equipment when ordered so to do by the pilot cannot be upheld. We are without authority to disturb the implied finding of the jury that the failure to utilize the de-icers was not the proximate cause of the crash, because there is creditable evidence in the record to show that the propeller de-icers when in operation do not remove ice already formed on the propellers, at least not for an appreciable period, and that the primary function of such mechanism is to prevent ice from forming if the de-icers are operated before ice has formed. The testimony in the case at bar indicates that immediately upon the plane's entering the overcast the ice formed on the propellers.

[13-16] Appellants' contention that Dispatcher Whitney was guilty of negligence as a matter of law cannot be sustained. The qualifications of Mr. Whitney as a competent aircraft dispatcher were established. Appellants assert that the dispatcher was negligent in not advising the pilot of the receipt by the dispatcher of the United States Weather Bureau teletype reports at 9:41 and 10:41 a. m. notwithstanding that at 10:50 a. m. the pilot radioed into the Western Air Express dispatching office informing them he had just passed the cone of silence at Saugus for the first time. In this regard appellants contend that from

such meteorological information and data, it was reasonable for the dispatcher to anticipate that freezing and icing conditions were present some place in the overcast above Saugus. However, we find in the record no evidence that the weather reports in question were indicative of an existing condition that should have aroused the apprehension of or caused alarm to Dispatcher Whitney. Neither does the evidence indicate a causal connection between the failure to transmit such weather report and the crash. Therefore the jury was justified in so finding. In other words, there is no showing in the evidence that had such weather reports been transmitted to the pilot the accident would not have occurred, or that the pilot would not have gotten off his course. Neither do we feel that negligence upon the part of Dispatcher Whitney can be inferred from his failure to request KBLA to furnish the localizer beam until after it was requested by the pilot at 11:01 a. m. From the record before us we must agree that the jury was warranted in concluding that no such obligation devolved upon the dispatcher, and that such request should emanate from the pilot. What we have just said is equally applicable to the claim that Radio Operator Hoorn was guilty of negligence as a matter of law. He testified that the making of such request devolved upon the pilot, and it was therefore the function of the jury to determine whether the pilot should have requested the beam, as well as what would have ensued if he had made such request.

[17-21] Appellants next assert that the trial court erred in certain of its rulings made during the trial. In this connection it is claimed that the court sustained objections to testimony of plaintiff Mrs. Osa Johnson concerning the actual maneuvers of the airplane while flying in the overcast and prior to the occurrence of the crash. This contention is not borne out by the record, which indicates that the witness was permitted to testify as to the actual motions made by the plane as the same were experienced by her, as is evidenced in one instance by the following answer: "Well, the plane just went down like that and came up and nosed and dropped several hundred feet." When, however, she was interrogated as to the maneuvers of the plane which was allegedly occasioned by the operative conduct of the pilot, such as that he "throttled back the motors and dived", and as the plane "stalling", objections were properly sustained and motions to strike correctly granted, for the reason that no proper foundation was laid to show that the witness could see the pilot, she being back in the cabin of the ship and the pilot being in the cockpit with the door closed between them. True, Mrs. Johnson was an experienced pilot, and as appellants contend may have been qualified as an expert, but she was not such in the operation of planes of the type and design of the one involved in the accident here in question. Therefore the question of whether she was qualified to give her opinion as evidence in the matter in issue was one for the decision of the trial judge in the first instance, and the qualifications of the witness are to be determined by the trial court before such opinion may be given. Fairbank v. Hughson, 58 Cal. 314. It is in itself in the nature of a trial of a question of fact by evidence addressed to the judge alone, and as on other decisions on question of fact by a trial judge, his ruling thereon is a matter of discretion and will not be overturned on appeal unless there was an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence given on the subject. Howland v. Oakland, etc., Co., 110 Cal. 513, 521, 42 P. 983; Mabry v. Randolph, 7 Cal.App. 421, 427, 94 P. 403. If there is any substantial evidence to support the ruling of the trial court, it will be upheld. If the court had decided to admit the expert testimony here in question, such decision would in like manner be sustained. There being in the record evidence to support the ruling of the trial judge, and perceiving no abuse of discretion in such ruling, we cannot say that it was sufficiently prejudicial to warrant a reversal. Rudat v. Carithers, 137 Cal.App. 92, 97, 30 P.2d 435.

[22] Testimony offered as to what was customary in connection with the "procedure to land down through with aid of radio range" was properly excluded. The issue before the court involved the conduct of respondents and their employees on the particular occasion in question. The same is true of the interrogatories calling for the custom among pilots as to whether or not they would call for the localizer when they were on the instrument approach. We perceive no prejudicial error in the other rulings of the court on the admission or exclusion of evidence to which exception is taken.

[23] We have painstakingly read the instructions given, and particularly those to which exception is taken, and conclude that when considered as a whole the instructions fairly and correctly advised the jury of the rules of law applicable to the issues presented by the pleadings and raised by the evidence. Regarding appellants' complaint concerning the instructions given and claimed to be erroneous on the doctrine of res ipsa loquitur, it may well be said that at no time during the trial did plaintiffs rely on the res ipsa loquitur doctrine, but on the contrary asserted by their pleadings and presented by their evidence several acts of "specific negligence" on the part of defendants and their employees which allegedly caused the crash. The instructions complained of dealt with this phase of the case and not with the doctrine of res ipsa loquitur. Furthermore, appellants made no request of the court to instruct the jury upon such doctrine, and manifestly did not rely upon it. Appellants' entire case is predicated upon claimed and stated specific negligence of the pilot and other employees as hereinbefore narrated.

[24, 25] We come now to a consideration of that phase of the appeal which concerns respondent United Airports Company. Concededly this respondent did not undertake to nor did it transport any passengers riding in the plane operated by its codefendant, Western Air Express. Appellants insist that liability rests upon United Airports by reason of the latter's failure to supply a radio localizer beam to the Western Air Express plane for instrument approach to the airport at such times as the same was requested. We find in the record no evidence that respondent United Airports failed to supply such beam, and certainly the record is devoid of even a scintilla of evidence that such beam was ever requested and refused. Moreover, there is nothing in the pleadings or evidence to indicate that the giving or failure to give such beam in any way caused the airplane, as contended by appellants, "to depart from its position of safety". The burden rested upon plaintiffs to show that the alleged negligent omissions or acts on the part of defendant United Airports Company were an efficient cause from which the injury complained of followed in a natural and continuous sequence, unbroken by any efficient intervening cause. In the case at bar the evidence fails utterly to show that any negligence on the part of respondent United Airports Company caused or contributed to the accident and consequent injury. The judgment in favor of such respondent must therefore be upheld.

The attempted appeals from the orders denying plaintiffs' motion for a new trial are dismissed. The judgments are affirmed.

We concur: YORK, P. J.; DORAN, J.

45 Cal.App.2d 803

PEOPLE v. GORDON.

Cr. 1769.

District Court of Appeal, Third District, California.

June 24, 1941.

Criminal law ⚷1182

Where no brief on appeal was filed by accused and no appearance was made for him at time case was called for hearing, conviction of forgery was affirmed. Pen. Code, § 1253.

Appeal from Superior Court, Shasta County; C. A. Paulsen, Judge.

John A. Gordon was convicted of forgery, and he appeals.

Affirmed.

John A. Gordon, in pro. per.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

The appellant was convicted in the superior court of Shasta county of the crime of forgery, a felony.

The transcript on appeal was filed in this court May 28, 1941. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on June 24, 1941. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

BENTE v. DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al.

Civ. 13087.

District Court of Appeal, Second District, Division 2, California.

June 27, 1941.

Hearing Denied Aug. 25, 1941.

1. Municipal corporations ⟹216(1)

On issue whether an auto machinist was blanketed into civil service of city, the controlling feature in determining position held by an employee is the nature of duties which he performs, while the name attached to position is immaterial. St.1925, p. 1069, § 121.

2. Municipal corporations ⟹216(1)

A person who performed duties of position of auto machinist for city of Los Angeles continuously for more than six months prior to effective date of charter was "in the service of" city within charter provision authorizing the blanketing into civil service of employees who have been continuously in the service of city for six months prior to effective date of charter. St.1925, p. 1069, § 121.

"Service" is defined as the act of serving, or labor performed in the interest and under the direction of others, or the work of a servant.

See Words and Phrases, Permanent Edition, for all other definitions of "In the Service of" and "Service".

3. Municipal corporations ⟹216(1)

Under provision of charter of city of Los Angeles authorizing the blanketing into the civil service of employees holding a position included in classified civil service and who continuously were in service of city for six months prior to effective date of charter, a person who performed duties of auto machinist for more than six months prior to effective date of charter was properly blanketed into the classified civil service of city regardless of whether his original employment was legal or not. St.1925, p. 1069, § 121.

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action by Herman W. Bente against the Department of Water and Power of the City of Los Angeles and others for declaratory relief to have it declared that plaintiff was blanketed into the civil service of the City of Los Angeles as an auto machinist under a provision of the Charter of the City of Los Angeles. From a judgment for plaintiff, defendants appeal.

Affirmed.

Hearing denied; SHENK, J., dissenting.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and George William Adams, and Louis A. Babior, Deputies City Atty., all of Los Angeles, for appellants.

Loren A. Butts, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in a declaratory relief action by which plaintiff sought to have it declared that he was blanketed into the civil service of respondent city as an "auto machinist", because of the provisions of section 121 of the charter of respondent city adopted July 1, 1925 (Stats. [1925] 1069), defendants appeal.

The essential stipulated facts are:

February 20, 1920, plaintiff was employed by Board of Public Service Commissioners to perform the duties of the position of "auto machinist" in the Department of Public Service, the predecessor in interest of the present Department of Water and Power. This position had been duly created by the Board of Public Service Commissioners and included in the classified civil service of defendant city for more than six months prior to July 1, 1925, the effective date of the present charter of defendant city, which contains section 121, hereinafter set forth in *haec verba*.

Plaintiff from February 20, 1920, at the request and with the full knowledge and consent of his superiors in the Department of Public Service, and later its successor in interest, the Department of Water and Power, performed in a capable and satisfactory manner the duties of auto machinist.

Section 121 of the present city charter of defendant city, so far as material here, reads as follows:

"Sec. 121. All officers and employees who, at the time of taking effect of this Article, would be included in the classified civil service, and who shall have been continuously in the service of the city for a period of six months prior to the adoption of this Article, shall be deemed to have the necessary qualifications required by the provisions hereof, and shall retain their respective positions until removed for cause, as provided herein. * * *" Stats. (1925) 1024, 1069.

This is the sole question for us to determine:

Was plaintiff blanketed into the classified civil service of defendant city under and pursuant to the provisions of section 121, supra, of the present charter of the city of Los Angeles?

This question must be answered in the affirmative. So far as material in the instant case, under the provisions of section 121, supra, each of the following conditions must exist for an employee to be blanketed into the civil service system of defendant city, to wit:

(1) The position which he seeks must be a position included in the classified civil service of defendant city;

(2) Such employee must have been continuously in the service of the city for a period of six months prior to July 1, 1925.

[1] In the present case it is conceded that the position of auto machinist is one included in the "classified civil service" of defendant city. Therefore, the first element exists. It is also stipulated that plaintiff performed the duties of the position of auto machinist for defendant city continuously for more than six months immediately prior to July 1, 1925. It is the established law of California that the controlling feature in determining the position held by an employee is the nature of the duties which he performs, while the name attached to the position is immaterial, Barry v. Jackson, 30 Cal.App. 165, 170, 157 P. 828.

[2, 3] Service is defined as "the act of serving; labor performed in the interest and under the direction of others; the work of a servant". Funk and Wagnalls Practical Standard Dictionary (1938) 1036. It is therefore evident that plaintiff was "in the service of" defendant city. Both elements prerequisite to plaintiff's being blanketed into the civil service of defendant city are present in the instant case. Thus, since he falls within the terms of the statute, it is immaterial whether his original employment was legal or not; and, therefore, having met the requirements of section 121, the trial court properly decreed that plaintiff was blanketed into the classified civil service of defendant city.

Numerous cases from other jurisdictions cited by defendants are factually different from the instant case, for example, People v. Chew, 68 Colo. 158, 187 P. 513, 514. The provisions there involved provided for the blanketing into the civil service of "all persons holding positions in the classified service * * *." As pointed out above, our charter provision reads, "all persons * * * in the service of the city." It would serve no useful purpose to here differentiate each of the cases from other states from that upon which defendant relies. Suffice it to say that they are not here in point.

For the foregoing reasons the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

45 Cal.App.2d 806

RUBIO v. BOARD OF CIVIL SERVICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 12981.

District Court of Appeal, Second District, Division 2, California.

June 27, 1941.

Hearing Denied Aug. 25, 1941.

Municipal corporations 🔑216(1)

A person who had been appointed to position of mechanic in service of city of Los Angeles and thereafter was appointed to position of structural steel worker, which title was subsequently changed to structural steel shop worker, which position had been created by the board and included in classified civil service of city for more than six months prior to effective date of charter, was blanketed into classified civil service of city under charter provision authorizing the blanketing of employees who at time of effective date of charter would be included in classified civil service and who had been continuously in service of city for six months prior to adoption of charter. St.1925, p. 1069, § 121.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Reversed.

Proceeding by Joseph H. Rubio against the Board of Civil Service Commissioners of the City of Los Angeles and others to require defendants to allow plaintiff seniority credit as a mechanic in the Department of Water and Power of the City of Los Angeles. From a judgment for defendants, plaintiff appeals.

Reversed.

Hearing denied; SHENK, J., dissenting.

Loren A. Butts, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and George William Adams and Louis A. Babior, Deputy City Attys., all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in a proceeding to require defendant Civil Service Commissioners to allow him seniority credit from July 1, 1925, to and including December 16, 1935, as a "mechanic" in the Department of Water and Power of the city of Los Angeles, the successor in interest of the Department of Public Services of said city, plaintiff appeals.

The essential facts are these:

July 17, 1922, plaintiff was appointed to the position of mechanic in the Department of Public Service, the predecessor in interest of the Department of Water and Power of the city of Los Angeles. This position he held until July 1, 1923, when he was appointed to the position of "structural steel worker", which title was subsequently changed to "structural steel shop worker". This position had been duly created by the Board of Public Service Commissioners and included in the classified civil service of defendant city for more than six months prior to July 1, 1925, the effective date of the present charter of defendant city, which contains section 121, hereinafter set forth *in haec verba*.

Plaintiff from July 1, 1923, at the request and with the full knowledge and consent of his superiors in the Department of Public Service, and later its successor in interest, the Department of Water and Power, performed in a capable and satisfactory manner the duties of structural steel shop worker.

Section 121 of the present city charter of defendant city, so far as material here, reads as follows:

"Sec. 121. All officers and employees who, at the time of taking effect of this Article, would be included in the classified civil service, and who shall have been continuously in the service of the city for a period of six months prior to the adoption of this Article, shall be deemed to have the necessary qualifications required by the provisions hereof, and shall retain their respective positions until removed for cause, as provided herein. * * *" St. 1925, p. 1069.

This is the sole question for us to determine:

Was plaintiff blanketed into the classified civil service of defendant city under and pursuant to the provisions of section 121, supra, of the present charter of the city of Los Angeles?

This question must be answered in the affirmative, for the reasons stated in Bente v. Department of Water & Power, 114 P.2d 699, which we have this day decided.

For the foregoing reasons the judgment is reversed and the trial court is ordered to issue a writ of mandate as prayed.

We concur: MOORE, P. J.; WOOD, J.

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45 Cal.App.2d 808

LITTLE v. DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES et al.

Civ. 13088.

District Court of Appeal, Second District, Division 2, California.

June 27, 1941.

Hearing Denied Aug. 25, 1941.

Municipal corporations ⚷216(1)

Under charter of city of Los Angeles authorizing the blanketing into the civil service of employees holding a position included in classified civil service and who continuously were in service of city for six months prior to the effective date of charter, a person who performed in capable and satisfactory manner duties of motor truck driver for more than six months prior to the effective date of the charter was blanketed into the classified civil service of the city. St.1925, p. 1069, § 121.

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Action for declaratory relief by Thomas C. Little against Department of Water and Power of the City of Los Angeles and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hearing denied; SHENK, J., dissenting.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and George William Adams and Louis A. Babior, Deputy City Attys., all of Los Angeles, for appellants.

Joseph Scott and J. Howard Ziemann, both of Los Angeles, (Cuthbert J. Scott, of Los Angeles, of counsel), for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in a declaratory relief action by which plaintiff sought to have it declared that he was blanketed into the civil service of respondent city as a "motor truck driver", because of the provisions of section 121 of the charter of respondent city adopted July 1, 1925 (Stats. [1925] 1069), defendants appeal.

The essential stipulated facts are:

January 28, 1924, plaintiff went to work as a laborer and later became a motor truck driver for defendant city and continuously performed services for such city until on or about March 25, 1938. This position had been duly created by the Board of Public Service Commissioners and included in the classified civil service of defendant city for more than six months prior to July 1, 1925, the effective date of the present charter of defendant city, which contains section 121, hereinafter set forth *in haec verba*.

Plaintiff from April 1, 1924, at the request and with the full knowledge and consent of his superiors in the Department of Public Service, and later its successor in interest, the Department of Water and Power, performed in a capable and satisfactory manner the duties of motor truck driver.

Section 121 of the present city charter of defendant city, so far as material here, reads as follows:

"Sec. 121. All officers and employees who, at the time of taking effect of this Article, would be included in the classified civil service, and who shall have been continuously in the service of the city for a period of six months prior to the adoption of this Article, shall be deemed to have the necessary qualifications required by the provisions hereof, and shall retain their respective positions until removed for cause, as provided herein. * * *"

This is the sole question for us to determine:

Was plaintiff blanketed into the classified civil service of defendant city under and pursuant to the provisions of section 121, supra, of the present charter of the city of Los Angeles?

This question must be answered in the affirmative, for the reasons stated in Bente v. Department of Water & Power, 114 P.2d 699, which we have this day decided.

On the authority of the case just mentioned, the judgment is affirmed.

We concur: MOORE, P. J.; WOOD, J.

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45 Cal.App.2d 730

SCHMIDT et al. v. SCHMIDT et al.

Civ. 11678.

District Court of Appeal, First District, Division 2, California.

July 7, 1941.

Rehearing Denied Aug. 6, 1941.
Hearing Denied Sept. 3, 1941.

1. Exceptions, bill of 🔑33

The duty of preparing a sufficient proposed bill of exceptions rests primarily upon appellant. Code Civ.Proc. § 473.

2. Exceptions, bill of 🔑43(1)

An applicant seeking relief from his failure to file a proposed bill of exceptions within time allowed by law is required to show that he has performed or is prepared to perform his duty of preparing a sufficient proposed bill of exceptions, and in absence of such showing, his application should be denied. Code Civ.Proc. §§ 473, 1054.

3. Appeal and error ⚷956(2)
Exceptions, bill of ⚷43(1)

The trial court has a wide discretion in passing upon an application seeking relief from failure to file a proposed bill of exceptions within time allowed by law, and action of trial court will not be disturbed except upon a showing of clear abuse of discretion. Code Civ.Proc. §§ 473, 1054.

4. Exceptions, bill of ⚷43(1)

Trial court did not abuse its discretion in denying appellants' application for relief from failure to file proposed bill of exceptions within time allowed by law, although failure occurred as result of relying on void order of trial court purporting to extend time, where proposed bill filed after time allowed by law but within time provided in invalid order extending time was in nature of a skeleton bill, and was so deficient that an entirely new bill was required, and appellants failed to serve with their application for relief any new or amended proposed bill, or to offer to present any new or amended bill in event that their application was granted. Code Civ.Proc. §§ 473, 1054.

◆

Appeal from Superior Court, Monterey County; H. S. Jorgensen, Judge.

Action by Elsa O. Schmidt, Emma Louise Schmidt and others against August Henry Schmidt and others. From an order refusing to grant relief from failure to file a proposed bill of exceptions within the time allowed by law and refusing to settle proposed bill of exceptions after expiration of time allowed by law, plaintiff Emma Louise Schmidt and others appeal.

Affirmed.

Harry Gottesfeld, of San Francisco, for appellants.

Russell Scott, of Salinas, for respondents.

SPENCE, Justice.

This is an appeal from an order of the trial court refusing to grant relief from appellants' failure to file a proposed bill of exceptions within the time allowed by law and refusing to settle appellants' proposed bill of exceptions filed after the time allowed by law had expired.

On March 28, 1938, appellants were served with notice of the order denying their motion for a new trial. Their proposed bill of exceptions was not filed until May 13, 1938, and it is conceded that it was not filed within time. Code Civ.Proc., sec. 1054. On May 23, 1938, respondents filed their objections to said proposed bill upon the ground that it had not been filed within time and upon the further ground that said bill was a "mere skeleton bill, so bald of the essential requirements of a bill of exceptions contemplated by law that it cannot in any true sense be regarded as such". The numerous alleged deficiencies in the proposed bill were set forth in detail. Respondents, without waiving the foregoing objections to the proposed bill, also proposed numerous amendments thereto. On June 3, 1938, appellants filed a notice of motion for relief from their default and for permission to file the proposed bill of exceptions theretofore filed by them as the bill of exceptions for settlement by the court. After the hearing of said motion the trial court signed and filed its written order as above indicated in which it found that the proposed bill had not been filed within the time allowed by law; that the default of appellants was not the result of any mistake, inadvertence, surprise or excusable neglect; that the proposed bill contained only a very small portion of the material testimony and was "a mere skeleton of the said proceedings and testimony, so bald of the essential requisites of a bill of exceptions contemplated by law that it cannot in any true sense be regarded as a bill of exceptions"; that counsel for appellants had not presented or proposed to present any required bill of exceptions as an amendment or substitute for the proposed bill theretofore filed; and that the interests of justice did not require the granting of the motion for relief.

Relying upon the fact that they had obtained an invalid order of the trial court for an extension of time to May 13, 1938, to file the proposed bill, appellants first contend that the trial court abused its discretion in refusing to grant them relief under section 473 of the Code of Civil Procedure. Lewith v. Rehmke, 217 Cal. 563, 20 P.2d 687. Under a separate heading, they further contend that a trial court cannot refuse to settle a bill of exceptions merely because it is a skeleton bill. St. Clair v. Bullock, 12 Cal.2d 450, 85 P.2d 867; Kouts v. Superior Court, 135 Cal. App. 699, 27 P.2d 788; Clough v. Superior

Court, 17 Cal.App.2d 14, 61 P.2d 375. We find none of the authorities cited directly in point here. In none of the authorities cited by appellants to support their first above-mentioned contention does it appear that there was any deficiency in the proposed bill of exceptions which had been filed after the time allowed by law but within the time provided in the invalid order extending time. In none of the authorities cited by appellants to support the second above-mentioned contention does it appear that the skeleton bill was filed after the time allowed by law.

Contrary to the claims of appellants, we are satisfied that the proposed bill of exceptions, although of some length, was in the nature of a skeleton bill and was so deficient in the essential requirements for a bill of exceptions that an entirely new bill of exceptions was required. The application for relief under said section 473 was made by appellants after service upon them of the objections of respondents to the proposed bill in which the deficiencies of said proposed bill were pointed out in great detail. Appellants failed, however, to serve with their application for relief any new or amended proposed bill of exceptions and it does not appear that they presented any new or amended proposed bill at the hearing or that they offered to present any new or amended bill in the event that their application was granted.

[1-4] The duty of preparing a sufficient proposed bill of exceptions rests primarily upon an appellant. Said section 473 requires that an application for relief thereunder "must be accompanied by a copy of the * * * pleading proposed to be filed therein, otherwise the application shall not be granted * * *." While a proposed bill of exceptions may not strictly speaking, be a pleading within the meaning of that section, we are of the view that an applicant seeking relief from his failure to file a proposed bill of exceptions within the time allowed by law is required to show that he has performed or is prepared to perform his duty of preparing a sufficient proposed bill of exceptions and that in the absence of such showing, his application should be denied. We are further of the view that the proposed bill of exceptions filed by appellants in the present case was wholly insufficient. It is well settled, of course, that a trial court has a wide discretion in passing upon such applications and that the action of the trial court will not be disturbed except upon a showing of a clear abuse of discretion. Lien v. Morrill, 130 Cal.App. 335, 19 P.2d 1024; Willett v. Schmeister Mfg. Co., 80 Cal.App. 337, 338, 251 P. 932; Smith v. Riverside Growers Co., 19 Cal.App. 165, 166, 124 P. 870; Ingrim v. Epperson, 137 Cal. 370, 70 P. 165. The record before us does not show any abuse of the trial court's discretion.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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45 Cal.App.2d 643

WOMAR v. CITY OF LONG BEACH.

Civ. 12500.

District Court of Appeal, Second District, Division 1, California.

June 30, 1941.

Hearing Denied Aug. 28, 1941.

1. Municipal corporations 🔑845(4), 846

In action against city to recover damages caused by surface water which flowed on plaintiff's property at intersection of streets and to abate nuisance, evidence was insufficient to sustain finding regarding direction of flow of surface water in natural state prior to grading of streets.

2. Appeal and error 🔑1071(1)

In action against city to recover damages caused by surface water which flowed on plaintiff's property at intersection of streets and to abate nuisance, where court's decision against city was based, at least in part, on theory of wrongful diversion of surface waters, error in finding regarding direction of flow of surface waters in state of nature was prejudicial.

3. Municipal corporations 🔑845(4), 846

In action against city to recover damages caused by surface water which flowed on plaintiff's property at intersection of streets and to abate nuisance, evidence established existence of a natural depression at or near the street intersection and that the intersection itself had been flooded in times of heavy rainfall prior to the grading of the streets.

4. Municipal corporations ⚷845(4), 846

In action against city to recover damages caused by surface water which flowed on plaintiff's property at intersection of streets and to abate nuisance, evidence was insufficient to sustain finding that in a state of nature there was no natural depression upon or about the intersection and that prior to the grading of the streets, the surface water flowing thereon was much less in quantity than thereafter.

5. Municipal corporations ⚷845(4), 846

In action against city to recover damages caused by surface water which flowed on plaintiff's property at intersection of streets and to abate nuisance, in absence of convincing evidence to that effect, it could not be determined that the establishment of street grade so as to remove "hump" of 6 inches occurring directly at intersection and to replace that hump with a gradual rise of a little over 8 inches to a point 400 feet from the intersection did not constitute an engineering blunder which would render city liable for damage to property.

6. Municipal corporations ⚷832, 840

In action against city to recover damages caused by surface water which flowed on plaintiff's property at intersection of streets and to abate nuisance, the test of city's liability is whether in conduct of its work in grading and paving streets the city committed an act of trespass upon adjoining property or was guilty of act of negligence which proximately caused damage thereto.

7. Municipal corporations ⚷832

Where city was confronted with a difficult drainage problem in a low-lying area, in its effort to combat flood waters and to solve the problem the city could not be held strictly accountable by owner of property which was still flooded after grading and paving of streets merely because city failed to completely remedy the existing condition.

8. Municipal corporations ⚷831(1)

In action against city to recover damages caused by surface water which flowed on plaintiff's property at intersection of streets and to abate nuisance, the city could not be held liable because it chose to put into execution one of a number of plans where there was no evidence of negligence or trespass on part of city or that the flooding of plaintiff's property was in any manner caused by the city.

9. Municipal corporations ⚷829

Where city grading and paving streets was confronted with difficult drainage problem in low-lying area, no civil liability to plaintiff whose property was flooded attached for failure to provide adequate drainage where the accumulation of water was not caused by the paving or grading of streets.

10. Municipal corporations ⚷329

Liability of a municipal corporation for failure to provide adequate drainage, aside from specific statutory liability, is based on theory of either negligence or direct trespass.

11. Municipal corporations ⚷845(4), 846

Where city grading and paving streets was confronted with difficult drainage problem in low-lying area and there was no evidence of negligence or trespass on part of city, and evidence indicated that accumulation of water was not caused by paving or grading of streets but that surface waters had always collected to some extent near intersection where plaintiff's property was flooded, the city was not liable for the damages.

12. Municipal corporations ⚷845(4), 846

Where city grading and paving streets was confronted with difficult drainage problem in low-lying area and there was no evidence of negligence or trespass on part of city and evidence indicated that accumulation of water was not caused by paving or grading of streets but that surface waters had always collected to some extent near intersection where plaintiff's property was flooded, evidence did not justify finding that flooding of plaintiff's property was caused by negligence of city.

13. Municipal corporations ⚷846

Even if flooded condition of street intersection causing damage to plaintiff's property at corner of intersection constituted a nuisance, city which was in no way shown to have created it or maintained it was not subject to civil action compelling its abatement. Civ.Code, § 3482.

14. Municipal corporations ⚷846

Where plaintiff's property located at corner of street intersection was damaged by flood waters and it appeared that surface waters had collected near intersection before grading and paving of streets, the inadequacy of drains could not be considered a "nuisance" so as to subject city to civil action compelling abatement. Civ.Code, § 3482.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge.

Action by J. S. LePage against the City of Long Beach for the abatement of a nuisance and for damages. From a judgment enjoining the defendant from permitting surface waters resulting from rainfall usual in nature to flow upon plaintiff's property, defendant appeals and from the portion of the judgment which limits relief to usual rainfall, plaintiff appeals. During the pendency of the appeal, the plaintiff died and Myrtle D. Womar, executrix of the estate of J. S. LePage, was substituted as a party plaintiff.

Judgment reversed with directions to enter judgment for defendant.

Hearing denied; CARTER, J., dissenting.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., Clifford E. Hayes, Deputy City Atty., and Roy J. Brown, Deputy City Atty., all of Long Beach, for defendant appellant.

Davis & Pitney, of Los Angeles, for plaintiff respondent.

DORAN, Justice.

The appellant city appeals from a judgment herein whereby appellant, as defendant, "is perpetually enjoined from causing or permitting the surface waters on Atlantic avenue or Hill street, or the intersection of said streets in the City of Long Beach, State of California, resulting from rainfall, usual in nature and not extraordinary or unprecedented, to flow upon plaintiff's real property at the southwest corner of said intersection of said streets, or to flow, collect or concentrate upon said streets, or said intersection, in such quantities as to interfere with the ready ingress to and egress from plaintiff's said real property", and whereby certain damages were assessed against appellant for injury to property caused by the flooding of the said real property. Plaintiff has also appealed, from that portion of the judgment which limits relief only from the effects of usual rainfall, contending that the decree should have provided for relief from all rainfall of whatever nature. The plaintiff died prior to the hearing on the appeals herein and his executrix, Myrtle D. Womar, has been substituted as party plaintiff in the place and stead of J. S. LePage. However, to avoid confusion, and for convenience, the terms "plaintiff", "respondent" or "appellant" will be applied as though such a substitution had not been made, and will be understood hereinafter to refer to the original plaintiff in this action, as appellant or respondent, as the case may be.

At the time of the commencement of this action respondent plaintiff was the owner of a lot located at the southwest corner of the intersection of Atlantic avenue and Hill street in the City of Long Beach, the lot being improved with a one-story brick building containing two storerooms, one occupied as a drug store and the other as a restaurant. Respondent brought the instant action against the appellant city, alleging that the appellant, by the grading of Hill street and Atlantic avenue at and near their intersection, and by the grading of other streets, in the general locality, caused surface run-off water to be diverted to and accumulate upon Atlantic avenue and Hill street and to overflow into the respondent's building, thus causing damage to respondent's building and to the personal property of respondent's tenants (who assigned their claims herein to respondent). The prayer was for the abatement of the nuisance thus allegedly created and for damages.

The trial court found that the appellant city had created a nuisance at and near the said intersection and gave judgment for the plaintiff as above stated.

For the purpose of consideration upon this appeal by the city, the intersection of the streets in question lies somewhere near the center of an area in the City of Long Beach bounded by State street on the south, the right of way of the Pacific Electric Railway on the north, California avenue on the east and American avenue on the west. Atlantic avenue runs north and south, Hill street east and west. Elevation charts, contour map and relief map introduced in evidence reveal the area to be generally low land.

Running from State street on the south to Burnett street on the north, two blocks north of Hill street, the elevation along Atlantic avenue drops approximately 7 feet. The general drop in elevation along Atlantic avenue from State street north to Hill street is about 5 feet. Along Hill street, running west into Atlantic avenue, covering a distance of several blocks, the elevation drops roughly about 1 foot; and running east along Hill street to its intersection with Atlantic avenue, covering about the same distance, the elevation drops about 3 feet. The elevations mentioned, according to the maps in evidence, are "derived from property line grades based on Old Long Beach Datum Plane". Within the area bounded as above the land slopes generally to the northwest, with the exception of the extreme lower southeast section, where the slope is to the southeast. Atlantic avenue, from State to Hill street, appears to mark a low point on streets crossing it from east to west. In other words, the land directly east and west of Atlantic avenue, over the territory mentioned, slopes toward Atlantic avenue. At the intersection of Atlantic avenue and Hill street the general elevation is about 20 feet, and this general elevation prevails to 23d street, one block north of the said intersection, where there is a drop to 19 feet. The elevation at the southwest corner of Hill street and Atlantic avenue, the location of plaintiff's property, is given as being from 20.2 to 20.6.

In January, 1907, the grades on Atlantic avenue north of Anaheim street were established by a resolution of the board of trustees of the City of Long Beach, which resolution established the grade at the southwest corner of Atlantic avenue and Hill street at 19.2 feet. In July, 1913, the grades on Hill street in the area above described were established by ordinance of the city, whereby the grade of Hill street at the west line of Atlantic avenue was established at 19.1 and at the east line thereof at 19.2 feet. It is not disputed that both streets were graded to the grade so established.

The maps in evidence indicate a fairly large natural depression existing in the block at the southeast corner of Hill and Atlantic in a state of nature. The elevation in this depression is shown as 19 feet. The existence of such a depression was borne out by the testimony of witnesses for both sides. It appears that water collected there when it rained and that upon occasions there was a considerable body of water at that point. At the time the property was subdivided there was a "pond" there, and the depression was thereafter filled in. Witnesses for both sides gave evidence that the intersection in question had been flooded during rains before as well as after the grading of the streets; and it appears from the testimony that the entire area had always been more or less subject to flooding during heavy rains. At least one witness, an old inhabitant, testified to having seen the southwest corner of Hill and Atlantic avenue "under mud and water" prior to the time the streets were graded. His testimony, together with that of the other witnesses for both sides, clearly established the existence of a serious drainage problem in the area, a problem created by the natural topography of the land coupled with conditions of rainfall peculiar to a semi-arid region like that of Southern California.

[1, 2] The trial court found that the surface of the lands embraced within the general area under consideration, south of Hill street, "had a gradual slope and fall to the east into a large natural sump or basin east of said block of territory"; and that the lands north of Hill street largely sloped and drained to the northwest. Appellant city attacks this finding as not supported by the evidence, and the attack thereon is plainly justified. As already pointed out, the maps in evidence established a general slope of the land to the north or northwest in all but the portion of territory lying to the southeast. The accuracy of the maps is not disputed, nor is there any competent evidence to the contrary. In fact the disputed finding is contrary to the allegations of the complaint in this respect. This finding established a natural divide at Hill street between surface waters flowing to the north and those flowing to the south. Apparently no such divide existed at this point. The general slope both north and south of Hill street definitely appears to be toward the north and northwest. Since the court also found that the grading of the streets in question altered the course of the surface water in the area, and since the court's decision appears based, at least in part, on a theory of wrongful diversion of surface waters, the finding of the court as to the direction of surface waters in a state of nature is necessarily material and the error in this respect must be held to be prejudicial.

The trial court also found "that in a state of nature there was no natural depression or basin of appreciable size and dimensions upon or about said intersection of Hill street and Atlantic avenue where the surface run-off waters from any of the said territory stood in any appreciable quantity; that prior to the grading of said streets and alleys the surface run-off waters flowing thereon were much less in quantity than thereafter". Appellant city assigns as error that portion of such finding concerning the existence of a depression where surface waters stood.

[3] It has already been pointed out that the evidence established the existence of a natural depression at or near the southeast corner of the intersection in question and that the intersection itself had been flooded in times of heavy rainfall prior to the grading of the streets.

In considering this latter finding of the court here attacked by appellant city, it would be well to quote at length certain other findings in order to present more clearly the situation as found by the trial court. The quotations immediately following are from findings VI, VII and VIII of the trial court.

"It is true that on January 22nd, 1907, defendant established the grades of Atlantic avenue north from Anaheim street to the south line of Hill street and at such a grade in front of plaintiff's lot that a cut and excavation on said street was to be made to the depth of 16 inches, the same ending at the south line of Hill street with an uprise thereat; that Atlantic avenue was soon thereafter graded down and curbs thereof were set in conformity to the grades so established; that rains caused the excavation so made in front of plaintiff's lot to fill up with surface run-off waters from South Atlantic avenue to the surface level of the lots thereat, the surplus thereof flowing on northward; that after said conditions had so remained for some time, defendant excavated an open drain westward on Hill street from said intersection, and also another open drain northward on Atlantic avenue for the purpose of draining the said basin on Atlantic avenue in front of plaintiff's property, and the two open drains so constructed drained said basin dry; that such drainage was insufficient and inadequate to carry off the said surface waters as fast as they arrived at the time of heavy showers of rain, and the said basin continued to fill up and flood to the level of the surface of the surrounding lots; that during such times there was a frame grocery and residence building located on the natural surface of plaintiff's lot; that such floodings at said times never invaded the natural surface of plaintiff's lot; that when said basin so filled up with flood waters the surplus thereof continued to flow northward therefrom;

"It is true that thereafter defendant imbedded a corrugated pipe in said open ditch on west Hill street for the purpose of more effectively draining said basin but nevertheless, such drainage was also insufficient and inadequate, and said basin continued to fill up with flood waters at heavy showers of rain; that on July 10th, 1913, defendant established the grades of Hill street from American avenue to California avenue, which involved a drop from American avenue to the intersection in question of about 16 inches and from California avenue to said intersection of two and one-half feet; that soon thereafter the defendant excavated and graded down said Hill street in accordance with the grades thereof so established, which grades and excavations for said intersection were made in conformity to the grades and excavation so made in front of plaintiff's property on Atlantic avenue; that said intersection and Atlantic avenue in front of plaintiff's property was excavated to a depth 16 inches lower than the original surface thereof and of plaintiff's lot; that Hill street west of said intersection to American avenue was graded down from two to three feet so that said run-off waters arriving on it were channeled to the intersection of Hill and Atlantic; that Hill street east of Atlantic avenue to California was so graded down as to channel all run-off waters arriving on it to the intersection of Hill and Atlantic also; that all said avenues and alleys of said territory were so graded down as they approached Hill street both from the north and south thereof as to conform to the grades and excavations of Hill street and said intersection; that Atlantic avenue and Hill street thereby were made channels to convey run-off waters to said intersection, the result of which grading was and is to make an unnatural basin and depression at and about said intersection of Hill street and Atlantic avenue wherein a large part of the run-off waters of said large block of territory are concentrated; *that such grading of Hill street and the intersection in question made the basin much larger than formerly;* that after Hill street had been so graded down, the present brick building on plaintiff's lot was in process of erection in the latter part of 1913 or the first part of 1914, and was uncompleted, at which time the said basin flooded with run-off waters from said streets, and also flooded the lot and invaded the building of plaintiff, the cement floor of which was from four to six inches above the grades so established;

"It is true that thereafter said basin and plaintiff's building continued to flood at the time of heavy showers of rain until the year 1916, at which time defendant constructed a 30 inch drain westward from said intersection on Hill street, for the purpose of more effectively draining away said flood waters concentrating in said basin; that the drainage thus provided did not wholly relieve the flood conditions in said basin, and the said basin continued to flood at the time of heavy showers of rain from one to three times every wet season thereafter; that said floods continued to invade the premises now owned by plaintiff to the depth of 8 or 9 inches in said store building; that the surplus flood waters not so drained off through said 30 inch drain continued to course north on Atlantic avenue through said open drain; that such conditions existed until the year 1925, at which time defendant graded and paved with concrete Atlantic avenue north from said intersection to Burnett street and beyond; *that by such grading and paving a 'hump' was left thereon,* the crest of which was distant 400 feet from said intersection; that the street sloped and drained from the crest thereof down to said intersection; that said 'hump' was of such height that it has ever since caused said surface waters to be imprisoned in said basin from said crest thereof to said intersection; * * * that subsequent to the time of paving Atlantic avenue north of Hill street, the overflow waters at said intersection not drained away through said 30 inch drain coursed on north over said 'hump' on north Atlantic avenue to Burnett street to a drain extending northwestward; *that said grading did change and alter the course and volume of surface water of the area through which said streets extended, and said grading did increase the volume of surface water so concentrating at and about said intersection over that which reached said intersection in a state of nature.*" (Italics added.)

Respondent plaintiff's case appears to rest upon the facts as set forth in the above-quoted findings, namely, that the grading of the streets by the city created a large basin at the intersection of Hill street and Atlantic avenue wherein surface waters collected to a greater extent than in a state of nature. Respondent plaintiff contends that the making of this basin was absolutely unnecessary and constituted an engineering blunder of the "first magnitude".

The chart of surface elevations in evidence reveals the following data: The elevations along Atlantic avenue in the block directly south of Hill street reach a high point of 21.2 on the west side and 20.8 directly opposite on the east side. This is in the middle of the block or about 300 feet south of Hill street. From there, on the west side of Atlantic avenue the elevation drops to 20.2 at the south line of Hill street, and on the east side of Atlantic avenue the elevation drops to 20.4 at the said south line. The elevation on the west side of Atlantic avenue then rises from 20.2 on the south line of Hill street to 20.7 on the north line thereof; and on the east side of Atlantic avenue the elevation rises from 20.4 on the south line of Hill street to 20.8 on the north line thereof. North of Hill street, the elevation along the east side of Atlantic avenue continues at 20.8 for the next hundred feet, dropping to 20.3 in the second hundred feet, to 20.2 in the third hundred, and to 20.1 400 feet from the north line of Hill street. The elevation along the west side of Atlantic avenue north of Hill street runs from 20.7 at the north line of Hill street to 20.3 100 feet north of the said line, to 20.4 at 200 feet, to 20.0 at 300 feet and to 20.1 400 feet north of the said line of Hill street. The elevation along the south line of Hill street, from the west line of California street, four blocks east of Atlantic avenue, to the east line of Atlantic avenue, drops from 21.5 to 20.4; and along the north line of Hill street between the same points, the elevation drops from 22.2 to 20.8. West of Atlantic avenue, the elevation along the south line of Hill street drops irregularly from 22.3 at the east line of Elm avenue, three blocks west of Atlantic, to 20.2 at the west line of Atlantic avenue; and along the north line of Hill street, between Elm and Atlantic avenues, the elevation drops irregularly from 21.9 to 20.7. It should be noted that about 500 feet west of Atlantic avenue the elevation on the south line of Hill street is 22.2 and on the north line thereof 22.0.

Thus, the elevation chart shows that the intersection of Hill and Atlantic marks a low point in the natural elevation along these two streets. Also, it would appear that a depression was formed by a rise in the land of about 1 foot 300 feet south of the intersection, a more or less abrupt rise of about 6 inches immediately north of the intersection, a somewhat gradual rise of about 1 foot to the east, with a sharper rise of about 2 feet to the west.

When the elevations given on the chart are coupled with testimony that rain waters tended to collect at the intersection of the streets in question before the same were graded, the only reasonable conclusion to be drawn is that the area was subject to flooding before the streets were graded.

[4] From the profile charts in evidence it may reasonably be estimated that after the grading of Hill and Atlantic, the rise along Atlantic avenue to the south was changed to approximately 8 inches in 300 feet, and the abrupt rise to the north of about 6 inches was changed to a uniform rise of about 8.4 inches in 400 feet; the grading of Hill street changed the rise to the east to 2 feet over the distance to California street, with a uniform rise to Elm avenue on the west of approximately only 9 inches, rising only about 3 inches over the first 500 feet west of Atlantic avenue. It would therefore appear that the grading of these streets had a tendency to flatten or broaden the depression previously existing. It is of course a natural phenomenon that the level of a given quantity of water will be lowered by spreading the water out over a broader area, all other things being equal. In any event, when the depression shown to have existed before the grading of the streets is compared with that existing after grading, it cannot properly be said that no appreciable depression existed before grading and therefore the court's finding to this effect is not supported by the evidence.

Respondent complains that in establishing the grades of Hill street and Atlantic avenue the level of the streets was lowered 16 inches. It should be pointed out that in so far as the creation of a depression at the intersection is concerned the factor to be considered is not the level to which the streets were lowered, but the slope or grade at which the streets approached the intersection. The level of the intersection may have been considerably lowered, and yet, in so doing, the city might have been enabled to establish a more gradual approach. From all that appears in the record, this was the situation in the instant case.

[5] Moreover, in the absence of convincing evidence to that effect, it may not be said that the establishment of a street grade so as to remove a "hump" of 6 inches occurring directly at an intersection, and to replace that hump with a gradual rise of a little over 8 inches to a point 400 feet from the intersection, constitutes an engineering blunder of the first magnitude. It should be stated that the only expert engineering testimony offered in this case was that on behalf of the defendant and that the same stands generally uncontroverted by any other evidence. It should also be pointed out that at the point in question 400 feet north of the intersection, the grade of Atlantic avenue, according to the profile chart heretofore referred to, is little if any above the natural elevation at that point. In other words, the grade at that point closely approximates the natural elevation of the land.

In view of the conclusions reached with regard to the findings heretofore noted and their lack of support by the evidence, the decisive question remains, namely, do the other findings support the judgment? Stated otherwise, the question is whether, upon the facts shown, plaintiff is entitled to any relief in the premises as a matter of law.

The instant action was instituted and the cause apparently tried upon the theory of nuisance. It appears to be the contention of respondent plaintiff, and it was so found by the court, that the flooding of the intersection in question after the grading of the streets constituted a private nuisance as to plaintiff for which the appellant city was responsible and which appellant city was bound to abate. Although the court found that the nuisance was created "through the negligence of defendant in failing to remedy said conditions caused by said usual heavy rains", such a finding is not supported by any evidence of negligence upon the part of the city in establishing the grades of the streets in question, or in the work of grading or paving the same, or in the construction and maintenance of drains; and must rest, if at all, upon a duty imposed on appellant city to eliminate the flooded condition caused by the collection of surface waters at the intersection.

An extensive note on the rights and duties of municipal corporations with respect to surface water is found in 65 L.R. A. 250, 1904, wherein, as to the duty to keep water off abutting property, it is said, at page 252:

"Steps for the improvement of a highway cannot proceed far before natural conditions are changed, and the surface water from the street becomes a more serious burden upon the abutting owner; and the question then arises as to the duty of the municipality with respect to it. In the natural condition of the highway, the surface water flows naturally to the lowest level, and the burden rests where it falls, either on the highway, or on the adjoining property. Neither the public, nor the abutting owner, is under any obligation to care for the water for the benefit of the other.

"The mere existence of a highway does not make it the duty of the town or city where the highway is to keep the water flowing in it from overflowing on the adjoining lands. Such a duty devolves on a town or city only when it has done something to increase the volume of the water, or to accumulate it in unusual quantities at some particular point of the highway. Smith v. Tripp, 13 R.I. 152.

"A village is not liable for the overflow of private property resulting from the inadequacy of its drains constructed for the purpose of carrying off the surface water from its streets, where such property was the natural depository of all the waters discharged thereon. Dudley v. Buffalo, 73 Minn. 347, 76 N.W. 44. * * *

"It is not the duty of a municipal corporation to prevent the flow of water from its streets onto the lands of abutting proprietors. Montgomery v. Gilmer, 33 Ala. 116, 70 Am.Dec. 562. A municipal corporation is not liable for failure to take steps to prevent surface water from a large area of territory from flowing in its natural course, so as to flow and accumulate upon the land of a particular individual. Beals v. Brookline, 174 Mass. 1, 54 N.E. 339. * * *

"The fact that a city, after notice that drains constructed to carry off street surface water are insufficient, fails to use ordinary diligence to make them serve the purpose intended, does not render the city liable for an overflow of private property by surface water from the street, where it did not accelerate the flow of water, or collect the same, and discharge it on such property otherwise than it would naturally have been discharged thereon, when it was not negligent either in devising or adopting the plan of the drains. Knostman & P. Furniture Co. v. Davenport, 99 Iowa, 589, 68 N.W. 887.

"But the action of the surface water is a serious menace to the safety of the highway, and one of the first steps for its improvement is the adoption of means to relieve it of such menace. This may be accomplished by raising the grade so as to prevent the water from settling on the street, by making the surface more impervious, to prevent the water from saturating the roadway, and by the construction of drains to carry it to some other point. All of these proceedings have more or less effect on the adjoining property. The general rule is that so far as the circumstances of the case and public necessities will permit, the same rules concerning injuries to private property by the overflow of water should be applied to municipal corporations in the management and improvement of their streets as would be applied to private individuals in the management and use of their property. McClure v. Red Wing, 28 Minn. 186, 9 N.W. 767; Pye v. Mankato, 36 Minn. 373, 31 N.W. 863 [1 Am.St.Rep. 671]."

And in the same annotation, at page 253, et seq., it is stated:

"A town is not liable for allowing water to flow from a highway onto the land of another, where it appears that the water would naturally flow from the highway upon the land; and in such a case an action will not lie for the results of such usual changes of grade as must be presumed to have been contemplated and paid for at the lay-out of the highway. Wakefield v. Newell, 12 R.I. 75, 34 Am.Rep. 598.

"Authority to establish grades for streets, and to graduate them accordingly, involves the right to make changes in the surface of the ground which may affect injuriously the adjacent property owners; but, where the power is not exceeded, there is no liability unless created by statute, and then only in the mode and to the extent provided, for the consequences of its being exercised and properly carried into execution. The owner of the property may take such measures as he deems expedient to keep surface water off from him, or turn it away from the premises onto the street; and, on the other hand, the municipal authorities may exercise their power in respect to the gradation, improvement, and repair of streets, without being liable for the consequential damages cause by surface water to adjacent property. Allen v. Paris, 1 White & W.Civ.Cas.Ct.App. § 885, p. 506. * * *

"Very few cases present the simple fact of changing the grade so that the course of the water between the adjacent land is merely altered. In addition to this, additional facts usually exist, such as the gathering of the water, or the change of outlet for a flow coming from an extended territory. Either of these facts would give a right of action against a private individual (see note to Gray v. McWilliams (Cal.), 21 L.R.A. 593), and there is no reason why it should not do so against the municipality. In the cases in which the courts have denied the right of action, the full effect of the principles involved does not seem to have been considered. In many instances a street improvement consists, in part, at least, of the hardening of the surface so as to make it impervious to water. The effect of this hardening, together with the slope given to the surface, is to accumulate the water at the edge of the street and cast it in a body on the land of the abutting owner. The principal reason at the bottom of the rule that there is no liability for altering the grade of land so as to interfere with the flow of surface water is that most of the water coming from rain and melting snow finds its way immediately into the ground, and there is no great quantity to flow along the surface. The hardening of the surface of the street interferes with this natural condition as much as the placing of a building on the land with a roof extending over its entire surface. And no one contends that a private owner can place such a building on his land, and allow the eaves to cast the water immediately on his neighbor's land, without making any provision for caring for it. Another element which is involved in the improvement of a highway is the bringing of the surface to uniform grade over long stretches of territory, the effect of which is to cause the water to flow along the street for a considerable distance, thereby changing its natural course and gathering it in a body; and, when it is in that condition, no private owner can cast it immediately on his neighbor's land without liability. The rules governing the rights with regard to surface water, as between individuals, would make the municipality liable for its acts in either case if it did not make some provision to care for the water so accumulated and concentrated. Few of the courts, however, have considered these principles, but have regarded the street improvement merely as a change of grade, which was held to cast no liability upon the municipality for its acts. When these principles have not been considered, and the courts have decided that there was no liability on the ground that the injury was consequential, or for some other equally evasive reason, the decision can be regarded as of little value, upon the principle of jurisprudence involved; and such decision is practically worthless as a precedent whatever its effect may be on the rights of the parties to the litigation. Therefore, in determining the correctness of any decision denying the liability of the municipality, the question must be kept in mind, whether it did anything more than merely alter the grade so as to change the direction of flow of the surface water between the highway and the adjoining land. If it did, on principle it is liable.

"A municipal corporation is not liable for damage to private lands in consequence of changes in a highway pursuant to authority of law, as where more surface water is thrown on adjoining lands by the paving of the road. Field v. West Orange Tp., 46 N.J.Eq. 183, 2 A. 236.

"But in California it was held that a city is bound to provide means for conducting away surface water in a street, the accumulation of which is the necessary consequence of the paving of the street; and is liable for damages to the adjoining premises at grade with the street, caused by its failure to provide such means. Stanford v. San Francisco, 111 Cal. 198, 43 P. 605."

An annotation on the right to hasten by improvement of street or highway the flow of surface water along natural drainways is found at 5 A.L.R. 1530, supplemented in 36 A.L.R. 1463. In the original note it is stated: "The well-settled rule that the flow of surface water along natural depressions or drainways may be hastened and incidentally increased by artificial means, so long as the water is not diverted from its natural flow, has been applied in the improvement of streets and highways by municipal authorities."

In Lessenger v. City of Harlan, 184 Iowa 172, 168 N.W. 803, also reported at 5 A.L.R. 1523, and to which the annotation above referred to is appended therein, the situation involved the discharge by a city of surface water upon the lands of the plaintiff by means of a sewer. It appeared that in so doing the city was making use of a natural water course. The city was held not liable. Pertinent language is found in that case (at 184 Iowa 172, 168 N.W. 805, 5 A.L.R. 1527), as follows: "Where a city has authority * * * to do a particular thing, through its properly constituted officers, it cannot be held liable to a citizen for consequences that follow the doing, in the absence of some showing of negligence in the manner of the doing. A natural person has the right to a proper and profitable use of his own land, and if, in the exercise of such right, without fault or negligence, loss unavoidably occurs to his neighbor, the neighbor is without remedy. Cities and towns as such certainly are invested with as much immunity in the exercise of rights over their property as individuals. If in the doing of these things, which it has the right to do under the law, for the public good, and for the proper and profitable use of its own territory, it causes, without negligence, injury to a citizen, the citizen is without remedy. If we should hold the city liable to individuals for consequential damages resulting solely from the improvement of the city in the grading, guttering, and paving of its streets, done properly and in strict accordance with the requirements of the statute, upon a simple showing that injury occurred from the doing, without any showing of negligence in the manner of the doing, we would be going a long way in preventing any improvement. If we should hold that the city is liable to a citizen for consequential damages, upon the simple showing that the city, in the lawful exercise of its right, without negligence in the manner of the doing, graded its streets, paved and guttered them, and, as an incident thereto and a consequence thereof, the surface water was diverted from the course it pursued in the state of nature, we would throw in the way of public improvement insurmountable stumbling blocks."

In Stanford v. San Francisco, 111 Cal. 198, 43 P. 605, cited in the above quotation taken from L.R.A., the city of San Francisco had paved a blind street, the surface waters on which had formerly all been absorbed by the unpaved sandy surface. The street sloped toward the plaintiff's premises, and after the paving of the street, the waters which were formerly absorbed collected on the surface at the termination of the street, broke over the curbing and ran into plaintiff's basement. No provision had been made for draining the water when the street was paved. The city was held liable therefor upon the proposition that there was a legal obligation resting upon the city to provide means for conducting away surface water, the accumulation of which was the necessary consequence in paving the street.

The Stanford case may be distinguished from the instant case upon the facts. In the instant case it does not appear that the accumulation of water was caused by the paving or grading of the streets. On the contrary, it appears that surface waters always collected to some extent at or near the intersection in question and that there had always been a drainage problem in the vicinity. In the Stanford case it is to be noted that the waters were precipitated upon plaintiff's premises solely because of the paving of the streets without means of drainage. In the instant case, from the evidence offered by respondent plaintiff it appears that the proximate cause of flooding was the excavation and grading down of plaintiff's lot for the purpose of erecting the brick building thereon. Furthermore, it does not appear that had said building been erected and the property excavated prior to the grading of the streets the same flooded condition would not have prevailed in times of heavy rain. From all that appears, had the property at that time been graded down to what was then the street level any building standing thereon might have been flooded. It is apparent, therefore, that the grading and paving of the streets contributed little, if anything, to the conditions which caused plaintiff's property to be flooded after the excavation and grading of the property for building purposes. The civil engineer who testified on behalf of appellant stated that water could not invade respondent plaintiff's lot as it stood at the time of trial if the lot had not been excavated below the natural level thereof.

The Stanford case is closely analogous to the situation in which the roof of a house extends over the entire surface of a lot, allowing the eaves to cast water immediately upon neighboring land without making any provision for caring for it, as mentioned in the quotation above. It is thus seen that in the Stanford case the act of the city in causing the surface waters to flow upon the plaintiff's premises constituted a direct trespass. But in the instant case there has been no direct causal connection established between the flooding of plaintiff's property and the paving and grading of the streets.

The same distinction may be drawn between the instant case and that of Dick v. City of Los Angeles, 34 Cal.App. 724, 168 P. 703, and of Farrell v. City of Ontario, 36 Cal.App. 754, 173 P. 392, both decided upon authority of the Stanford case. In both of these cases last cited the liability of a city for damages caused to real property was based upon the fact that it had graded its streets in such a manner as to cause surface water, *which theretofore had not flowed there,* to accumulate in unusual quantities and to be turned upon the land of the plaintiff. Both of these cases were decided upon a theory of trespass, as was the Stanford case.

[6] In Lampe v. San Francisco, 124 Cal. 546, 57 P. 461, 1001, a municipal corporation was held not liable for damages resulting from the construction of an embankment in the grading of a street, which caused the surface water upon an adjoining lot situated below the level of the graded street to accumulate thereon, instead of flowing freely therefrom, as before the street was graded. It did not appear that the water flowed from the lot in well-defined channels. At page 549 of 124 Cal., at page 462 of 57 P., it is said: "In this case there is no allegation that the grading of the street caused surface waters to accumulate in unusual quantities, and that such surface waters were turned upon the lands of plaintiff." Of this last quoted language it is said in Dick v. City of Los Angeles, supra, 34 Cal.App. at page 731, 168 P. at page 706: "The plain inference is that, if such allegation had been made, the complaint would have stated a cause of action." It should be noted that had such an allegation been made the theory of trespass would have entered the case. As stated in the quotation above given from the annotation in L.R.A., the question must be kept in mind, whether the city did anything more than merely alter the grade. In other words, the test of the city's liability should be whether in the conduct of its work the city committed an act of trespass upon the adjoining property, or was guilty of an act of negligence which proximately caused damage thereto.

Since in the Lampe case it was held that a city was not liable for raising the grade of a street, thereby preventing surface waters from flowing off property below the grade, it is difficult to see how, in the instant case, the city could be held liable for lowering the grade merely because the plaintiff thereafter lowered the level of the lot, bringing the surface of his property beneath that of waters accumulating on the street. Here there was no proof that the grading of the street caused surface waters to accumulate in unusual quantities, and that such surface waters were turned upon the lands of plaintiff. It should be emphasized that the evidence in the instant case fails to establish that the condition existing at the intersection in question was created or caused by appellant city.

[7] In White v. City of Santa Monica, 114 Cal.App. 330, at 332, 299 P. 819, at 820, it is said: "Surface waters are largely regarded by the law as a common enemy, and, where damage results solely as a consequence of the proper execution of a legal power of the municipality, there is no implied liability therefor." While the criticism of a doctrine of "consequential damage", as appears in the above quotation from L.R.A., should be borne in mind, nevertheless, the characterization of surface waters as a common enemy serves more clearly to reveal the position of appellant city in the instant case. Appellant city was here confronted with a difficult drainage problem in a low lying area, and in the effort to combat flood waters and to solve the problem the city, in the light of the authorities, could not be held strictly accountable merely because it failed to completely remedy the existing condition.

[8] Respondent plaintiff contends that had the city followed a plan such as respondent undertakes to outline, the problem would have been solved. But it must be pointed out that the city cannot be held liable because it chose to put into execution one of a number of plans. The plan adopted cannot be attacked merely by showing that some other plan might have been more feasible; and, as a matter of fact, it does not even appear that respondent's proposed plan would be more feasible.

[9, 10] It is not contended that there was a statutory duty imposed upon appellant city to do more than it did in seeking to remedy the condition at the intersection; and, as already pointed out, there is no evidence of actual negligence or direct

trespass in connection with the construction and maintenance of the drains in question. Any liability of appellant city with regard to the drainage must therefore be predicated upon a duty to provide adequate drainage. But it would appear that no civil liability attaches for failure to provide adequate drainage under the circumstances of the instant case. See the article on Municipal Corporations, 19 R.C.L. 1089, 1091, 1102. While the authorities are not in harmony upon the subject, liability of a municipal corporation for failure to provide adequate drainage, aside from specific statutory liability, appears to be based upon a theory of either negligence or direct trespass. In an extensive annotation upon the duty and liability of a municipality with respect to drainage at 61 L.R.A. 673, 1903, it is stated at page 684: "The true distinction is well stated in Tate v. St. Paul, 56 Minn. 527, 58 N.W. 158 [45 Am.St.Rep. 501], as follows: To determine when, and upon what plan a public improvement shall be made, is, unless the charter otherwise provides, left to the judgment of the proper municipal authorities, and is in its nature legislative; and, although the power is vested in the municipality for the benefit and relief of property, error of judgment as to when or upon what plan the improvement shall be made, resulting only in incidental injury to the property, will not be ground for the action. But, for the direct invasion of one's right of property, even though contemplated by, or necessarily resulting from, the plan adopted, an action will lie; otherwise it would be taking private property for public use without compensation." See also case note in 1 L.R.A.,N.S., 952, 1906, and note in 70 A.L.R. 1347.

[11, 12] The question here being one solely of the duty of appellant city to provide adequate drainage, and it appearing that there was no absolute duty imposed upon appellant to do any more than it had done under the circumstances, and there being no evidence of negligence or trespass on the part of the city, or of the condition having in any manner been caused by the city, it follows that the trial court was not justified in finding upon the evidence presented that the condition complained of existed through the negligence of appellant city in failing to remedy the same.

[13, 14] Moreover, although conceding for the sake of argument that the flooded condition of the intersection plainly constituted a nuisance, the appellant city was in no way shown to have created it or maintained it and should not therefore be subject to a civil suit compelling its abatement. Nor can the inadequacy of the drains themselves be considered a nuisance. "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Section 3482, Civil Code.

The record in the instant case reveals the injuries to plaintiff's property to have been caused by a set of unfortunate natural circumstances for which the law provides no remedy. It is not necessary, therefore, to consider the question of possible negligence on the part of plaintiff's predecessor in grading his lot to the level of the street under the conditions existing; and since it appears that plaintiff is not entitled to any remedy against the city upon the record presented it will not be necessary to consider here the appeal taken by plaintiff from a portion of the judgment.

The judgment is reversed for the foregoing reasons, with directions to the trial court to enter judgment for defendant.

We concur: YORK, P. J.; WHITE, J.

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45 Cal.App.2d 726

ROSEBROOK et al. v. UTZ.

Civ. 11675.

District Court of Appeal, First District, Division 2, California.

July 7, 1941.

1. Easements 🔑16

Where owner of two tenements sells one, or owner of entire estate sells part thereof, purchaser takes the tenement or part sold with all benefits and burdens apparently belonging to it at the time, as between it and the property retained by the owner.

2. Easements 🔑16

So long as there is unity of ownership of two tracts of land, an easement across one tract for the benefit of the other tract does not exist, but the moment a severance occurs by the sale of one tract, the right of the owner to redistribute the properties of the respective portions ceases, and easements or servitudes are created corresponding to benefits and burdens mutually existing at time of sale.

3. Easements ⚷16

In determining whether easement exists on sale of portion of land, parties are presumed to contract with reference to condition of land at time of sale, and neither has the right by altering arrangements then openly existing to change materially the relative value of the respective parts.

4. Easements ⚷17(1)

Where easement over six-acre parcel in favor of owner of seven-acre parcel was extinguished by conveyance of six-acre parcel to owner of seven-acre parcel, and thereafter owner conveyed six-acre parcel to third person, and road running over six-acre parcel was then being openly, visibly and continuously used for purpose of ingress and egress between seven-acre parcel and highway, an "implied" or "quasi easement" was created appurtenant to seven-acre parcel. Civ.Code, §§ 805, 811.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Easement" and "Quasi Easement".

5. Appeal and error ⚷790(2)

An appeal from judgment would be dismissed where judgment was vacated and set aside by trial court in the order granting a new trial.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Peter H. Rosebrook, and others, against Rose E. Utz to quiet title to a right of way, and for an injunction to restrain the defendant from interfering with plaintiffs' use and enjoyment of such right of way. From the judgment of October 28, 1937, and the judgment of March 19, 1938, the defendant appeals.

Judgment of March 19, 1938, affirmed, and appeal from judgment of October 28, 1937, dismissed.

C. H. White and Hazel Utz, both of San Francisco, for appellant.

Woolsey & Huovinen and B. H. Dean, Jr., all of Oakland, for respondents.

SPENCE, Justice.

Plaintiffs sought to quiet title to a right of way over the land of defendant and also sought an injunction to restrain the defendant from interfering with plaintiffs' use and enjoyment of said right of way. A judgment was entered in favor of plaintiffs on October 28, 1937. Thereafter defendant made a motion for a new trial, which motion was granted upon the sole issue of the description of the right of way and was denied upon all other issues, the trial court including in its order an order that the judgment previously rendered be vacated and set aside. A trial was thereafter had solely upon the issue of the description of the right of way. Following said trial, the trial court signed new findings of fact and conclusions of law and a new judgment was entered in favor of plaintiffs on March 19, 1938. Defendant filed a notice of appeal from the judgment of October 28, 1937, and also filed a notice of appeal from the judgment of March 19, 1938.

The contention of defendant on this appeal is that the evidence was insufficient to sustain a judgment in favor of plaintiffs, it being claimed that there was no evidence to show an easement by grant, or to show an implied easement or quasi-easement, or to show an easement by prescription. We shall therefore briefly summarize the evidence in so far as it may be pertinent to this discussion.

Plaintiffs are owners of a seven-acre parcel of land which adjoins a six-acre parcel owned by defendant. Since the year 1915, there has been a graveled road leading across the six-acre parcel which has been continuously used by the owners of the seven-acre parcel and the tenants of said owners as a means of ingress and egress between said seven-acre parcel and a public highway known as Kelly avenue. The trial court found that the use thereof was open, notorious, peaceable and under claim of right, communicated and known to defendant and her predecessors in interest. The trial court further found that the alleged easement was an "open, visible and obviously apparent easement or right of way" during all of said time. The six-acre tract was conveyed to defendant in 1927 and, in 1936, defendant barricaded the right of way and put up signs indicating that anyone using the same would be shot. Plaintiffs then commenced this action.

There were many transfers of both the seven-acre parcel and the six-acre parcel between 1915 and the time of the commencement of this action. In 1915, Koenig was the owner of the six-acre parcel. He conveyed said six-acre parcel to Johnson, reserving the easement or right of way over the six-acre parcel. About one month later Koenig conveyed the easement or right of way to Carleton, who was then the owner of the seven-acre parcel. At about the same time, Carleton became the owner of the six-acre parcel as well as the seven-acre parcel and remained the owner of both parcels until April 26, 1917.

On said April 26, 1917, Carleton conveyed the six-acre parcel to Koenig without specifically mentioning the easement or right of way over said six-acre parcel. On the following day, April 27, 1917, Koenig conveyed said six-acre parcel to Dickman, subject to said easement or right of way which was described by metes and bounds. The two last mentioned deeds were both recorded on April 30, 1917. Carleton remained the owner of the seven-acre parcel until May 1, 1918, when Carleton conveyed the seven-acre parcel, together with the easement or right of way describing it by metes and bounds, to Cobellero.

There were other conveyances of the seven-acre parcel thereafter and each of the deeds contained an express conveyance of the easement or right of way over the six-acre parcel. There were likewise several conveyances of the six-acre parcel thereafter and, with one exception, each of the deeds, including the deed to defendant, contained an express provision showing that said six-acre parcel was subject to said easement.

The parties discuss many questions in their briefs but it appears to us that the judgment may be sustained upon the ground that the evidence was sufficient to show at least an implied or quasi-easement. We may assume, as contended by defendant, that the original easement over the six-acre parcel reserved by Koenig and thereafter conveyed to Carleton became extinguished when Carleton became the owner of both the six-acre parcel and the seven-acre parcel. Civ.Code, §§ 805, 811. The fact remains that Carleton then became the owner of the entire thirteen-acre tract and thereafter conveyed a portion thereof, namely, the six-acre parcel over which ran the road which had been and was then being openly, visibly and continuously used for the purpose of ingress and egress between the seven-acre parcel and Kelly avenue. Under the authorities hereinafter referred to, an implied or quasi-easement was thereby created appurtenant to the seven-acre parcel.

[1-3] A leading case on the subject and one frequently quoted in the authorities in this state is Lampman v. Milks, 21 N.Y. 505. The court there said at page 507 of 21 N.Y.: "The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts."

The rules stated in that case have been consistently followed in this jurisdiction. Quinlan v. Noble, 75 Cal. 250, 17 P. 69; Jones v. Sanders, 138 Cal. 405, 71 P. 506; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 P. 593; Cheda v. Bodkin, 173 Cal. 7, 158 P. 1025; Southern Pacific Company v. Los Angeles Milling Company, 177 Cal. 395, 170 P. 829; Silveira v. Smith, 198 Cal. 510, 246 P. 58; Kallenburg v. Long, 39 Cal.App. 731, 179 P. 730; Nay v. Bernard, 40 Cal.App. 364, 180 P. 827; Palvutzian v. Terkanian, 47 Cal.App. 47, 190 P. 503. As was said in Nay v. Bernard, supra, 40 Cal.App. at page 368, 180 P. at page 829: "If the deed from

Holmes to Foote had contained no reservation whatever of a right of way for a road, a quasi easement for that purpose would have been created in favor of, and as an appurtenance to the land retained by the grantor, which is now the Nay property."

[4, 5] It therefore appears that the evidence was sufficient to sustain the judgment of March 19, 1938, and that said judgment should be affirmed. It further appears that the judgment of October 28, 1937, was vacated and set aside by the trial court in the order granting a new trial and that the appeal from said judgment should be dismissed.

The appeal from the judgment of October 28, 1937, is dismissed. The judgment of March 19, 1938, is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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45 Cal.App.2d 740

REISS v. REISS (REISS, Intervener).

Civ. 2647.

District Court of Appeal, Fourth District, California.

July 7, 1941.

Hearing Denied Sept. 3, 1941.

1. Appeal and error 🔑1009(3)

In action to cancel deed to realty and assignment of securities, where evidence with respect to mental capacity of grantor and assignor when she executed deed and assignment was sharply conflicting, question of such mental capacity was in the first instance for trial court.

2. Appeal and error 🔑996

A judgment will not be reversed for lack of evidence to support trial court's finding, where there is substantial evidence supporting such finding, although different inferences rationally might have been drawn therefrom.

3. Appeal and error 🔑1009(2)

Trial court's finding that grantor and assignor was mentally competent when she executed a deed and assignment, and that she was not acting under the undue influence of grantee and assignee, would not be overthrown on appeal unless such finding totally lacked the support of substantial evidence.

4. Appeal and error 🔑931(1)

In determining whether trial court's findings totally lacked the support of substantial evidence so as to warrant reversal, the evidence, in so far as it was subject to opposing inferences, must be regarded in the light most favorable to support of the judgment.

5. Appeal and error 🔑1010(1)

Where there was substantial evidence supporting trial court's finding that decedent was mentally competent at time she executed deed conveying to her son as trustee for her benefit her interest in land held in joint tenancy with husband, who was stepfather of grantee, and, at the time she executed assignment of securities to same trustee, such finding was binding on appellate court.

6. Trusts 🔑49

In determining whether mother was acting under undue influence of her son when she executed deed conveying to son as trustee for her benefit mother's interest as joint tenant in land and also executed assignment of certain securities to same trustee, "confidential relationship" existing between parent and child requires trial judge to weigh evidence with the utmost scrutiny in order to determine the matter in accordance with equity and fair dealing.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relationship".

7. Trusts 🔑49

Where conveyances of land and securities to grantor's son were made in trust for the benefit of the grantor, the fact that a "confidential relationship" of parent and child existed between grantor and grantee did not raise presumption of undue influence so as to cast upon grantee the burden of negativing the existence of such undue influence, since grantee under the circumstances did not benefit unduly from the transfers.

8. Trusts 🔑49

In action to cancel deed whereby decedent conveyed to her son, in trust for her benefit, decedent's interest in land held in joint tenancy with husband, who was stepfather of trustee, and to cancel assignment of securities to same trustee, evidence disclosing that grantee had the opportunity to influence his mother, coupled with desire to terminate a joint tenancy in order that mother might be free to dispose of property as she desired, would not sustain finding of "undue influence".

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

9. Cancellation of Instruments ⚷47

In order to establish "undue influence" inducing execution of an instrument, so as to warrant cancellation thereof, it was not sufficient to prove circumstances consistent with the exercise of undue influence, but circumstances inconsistent with voluntary action of person executing such instrument must be established.

10. Appeal and error ⚷1009(2)

Where the voluntary nature of execution of deed whereby deceased conveyed to her son, in trust for deceased's benefit, her interest in land held in joint tenancy with husband, who was stepfather of grantee, was disclosed by evidence of deceased's desire to terminate joint tenancy, which had been declared in presence of husband, trial court's finding that deceased in executing deed was not acting under undue influence of grantee was binding on appellate court.

11. Trusts ⚷11(1)

Since the repeal in 1927 of statute under which only such trusts could be created as were permitted by statute, express trusts may now be created for any purpose for which persons may lawfully contract. Civ. Code § 857.

12. Trusts ⚷35(1)

A trust to convey property is valid, and a grant upon a trust to convey creates an "express trust".

See Words and Phrases, Permanent Edition, for all other definitions of "Express Trust".

13. Trusts ⚷21(2)

Where declaration of trust disclosed that property was conveyed in trust for the purpose of reconveying the property at the request of the trustor, the property was identified by deed and assignment executed by trustor, the conditions of trust were accepted by trustee in writing, and the duration of the trust was limited to lifetime of the trustor, trust was not void for uncertainty.

14. Joint tenancy ⚷5

A joint tenancy may be terminated by the transfer without condition to a third party of one joint tenant's interest in property.

15. Joint tenancy ⚷1

Joint tenancies were favored at common law, but California by statutes, defining joint tenancy and tenancy in common, have adopted an opposite rule. Civ.Code, §§ 683, 686.

16. Joint tenancy ⚷3

In order to create a "joint tenancy" under statute, it is necessary that there be present the four unities of interest, of title, of time, and of possession. Civ.Code § 683.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancy".

17. Joint tenancy ⚷5

An estate in joint tenancy may be terminated by destroying one or more of the four unities of interest, of title, of time, and of possession necessary to the creation of such estate. Civ.Code, § 683.

18. Husband and wife ⚷14(5)

Where grantor's interest in land and securities held in joint tenancy by grantor and her husband was conveyed in trust to grantor's son to be reconveyed to grantor or otherwise encumbered upon demand of grantor, for the express purpose of securing to grantor the control and right of disposition of her half of property, the joint tenancy in property was terminated by such conveyance and was succeeded by a "tenancy in common". Civ.Code, §§ 683, 686.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenancy in Common".

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Max Reiss, as guardian of the estate of Rosa Reiss, against Moses Reiss for declaratory relief, for the rescission or cancellation of conveyances, and to quiet title to realty, wherein Max Reiss as special administrator of the estate of Rosa Reiss, deceased, was substituted as plaintiff, and wherein Max Reiss filed a complaint in intervention claiming title to the property as the sole survivor of a joint tenancy. From a judgment in favor of defendant, plaintiff and intervener appeal.

Judgment affirmed.

Swaffield & Swaffield, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for intervener and appellant.

Mark F. Jones and Sydney Tannen, both of Los Angeles (W. L. Engelhardt, of Los Angeles, of counsel), for respondent.

CONWAY, Justice pro tem.

This is an appeal from a judgment against plaintiff and intervener in an action seeking declaratory relief, the rescission or cancellation of conveyances and to quiet title.

Max Reiss and Rosa Reiss were married and had lived together for more than twenty-five years prior to Rosa's death in January, 1936. They accumulated considerable real and personal property during their married life. They held title to this property as joint tenants with the right of survivorship.

Moses Reiss and Bernard Reiss are the sons of Rosa Reiss and the stepsons of Max Reiss.

In December, 1933, Rosa suffered a paralytic stroke which impaired her mental and physical capacities. These disabilities continued up to the time of her death.

In January, 1935, Rosa went to her son Moses, telling him that her husband Max had told her to get out of their home and stay away. She stayed with Moses at his home for several days. Rosa and Moses went to the office of an attorney. She told him she desired to break the joint tenancy in the property existing between Max and herself. The attorney prepared a deed conveying Rosa's interest in the real property to Moses and also assignments of her interest in their securities. She also signed a letter addressed to Moses asking him to accept and hold title to the property in trust for her. Moses accepted the trust in writing. Rosa also executed a will which left $1 to her husband Max and the balance of her property equally to her two sons, Moses and Bernard. It was there stated: "I am only leaving my husband a dollar, because in my judgment he has plenty, as he has his interest in our property acquired since my marriage to him." The will had been prepared in August, 1934, as a result of her former visit to the office of the same attorney, but it was not executed until January, 1935.

Max, as guardian ad litem of Rosa, filed this action on January 28, 1935, attacking these conveyances made by Rosa. Max was appointed and qualified as the guardian of the estate of Rosa on March 4, 1935, and was substituted in the action as such guardian in the place and stead of the guardian ad litem. Rosa died on January 12, 1936, and Max was appointed as special administrator of her estate. He was substituted as such plaintiff in the action. He also filed a complaint in intervention which followed closely the allegations of the complaint and in which he also claimed title to the property as the sole survivor of the joint tenancy.

Moses came to California in 1926, at which time he learned of the joint tenancy in the property of Max and his mother. He took his mother to interview various attorneys when means of dissolving the joint tenancy were discussed and Mrs. Reiss was informed of the various methods of accomplishing this result. Moses is accused of undue activity in this regard and with the attempt to unduly influence his mother to break the joint tenancy, so that he and his brother could profit from the property at the expense of the husband, Max. Moses, of course, maintains that he was merely helping his mother carry out her freely formed intent and expressed desire of permitting her sons to benefit from her part of the accumulations of herself and her husband.

The first ground urged for a reversal of the judgment is lack of evidentiary support of the findings that (1) Rosa was mentally competent in January, 1935, when she executed the deed and assignments, and (2) that she was not acting under the undue influence of Moses at that time.

The evidence on the mental capacity of Rosa is sharply conflicting. It is undisputed that although uneducated she was mentally keen and vigorous prior to her paralytic stroke. There is rather strong evidence that thereafter she was mentally incompetent and unable to understand the nature and effect of her acts. On the other hand, there is other evidence that while she was not as mentally alert as she had been, she possessed sufficient mentality to comprehend the nature and effect of her acts and to form her own opinions and to act upon them.

[1] This sharp conflict in the evidence was addressed to the trier of fact in the first instance. He alone is permitted to weigh the evidence, determine the effect of the conflicts and judge the credibility of the witnesses. The trial judge resolved

these conflicts in the evidence in favor of defendant and there is substantial evidence in the record supporting his findings on this issue.

[2, 3] A judgment will not be reversed on the first ground urged where there is substantial evidence supporting the findings although different inferences rationally might have been drawn therefrom. MacDermot v. Hayes, 175 Cal. 95, 170 P. 616. Findings of the character involved here may be overthrown on appeal only in those cases where they totally lack the support of substantial evidence. Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L.R.A.,N.S., 818, Ann.Cas.1913B, 1230.

[4] Further, as said by the Supreme Court in Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 213 P. 42, 44, 26 A.L.R. 123: "In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45."

[5] As there is substantial evidence in the record supporting the findings of the trial court to the effect that Rosa Reiss was mentally competent at the time she executed the documents in question here, those findings are final and conclusive and may not be disturbed on this appeal.

[6, 7] It is next claimed that the findings of the trial court to the effect that Rosa was not acting under the undue influence of Moses are not supported by the evidence. The confidential relationship which existed between parent and child required the trial judge to weigh the evidence with the utmost scrutiny in order to determine the matter in accordance with equity and fair dealing. Cox v. Schnerr, 172 Cal. 371, 156 P. 509. Appellant cites numerous authorities to the effect that where the grantor is old and infirm and the grantee is a child who is in a position to exert undue influence upon the grantor, and who profits from the transaction, the burden is upon the grantee to negative the existence of undue influence. In the present case the child, Moses, held the bare legal title to the properties and they were transferred to him as trustee for the benefit of the grantor, Rosa Reiss. Since the entire beneficial interest under the conveyances remained in the grantor and the grantee did not unduly benefit from the transfers to him, the conclusion naturally follows that no presumption of undue influence should be indulged in here.

The evidence clearly establishes that Rosa wanted her half interest in the property vested in her and that she distinctly understood the conveyances were made to her son for the express purpose of breaking the joint tenancies. Respondent cites a conversation between Rosa Reiss and her former attorney in the presence of appellant from which it convincingly appears that she had a clear conception of the nature of the transactions and comprehended the nature and character of the conveyances. She stated that she wanted her half of the property in her name and that she realized the joint tenancy was broken for this purpose. It is significant that appellant was present during this conversation and knew of her wishes and when directly asked if her interest in the property should go to her sons upon her death, replied, "that's up to her."

[8-10] The most that may be said of the evidence respecting undue influence is that Moses Reiss had the opportunity to influence his mother, coupled with a desire to break the joint tenancy in order that she might be free to make any disposition of her property she desired. This will not sustain a finding of undue influence. In re Estate of Fleming, 199 Cal. 750, 251 P. 637. It is not sufficient to prove circumstances consistent with the exercise of undue influence but the circumstances must be inconsistent with voluntary action on the part of a testator or grantor. In re Estate of Presho, 196 Cal. 639, 238 P. 944; In re Estate of Morcel, 162 Cal. 188, 121 P. 733. The voluntary nature of the execution of the instruments by the deceased clearly appears from the evidence, and the findings of the trial judge thereon cannot be disturbed on appeal.

Appellant contends that the court erred in refusing to quiet title to the properties in plaintiff for the reason that the deed and assignments passed no title, having been made pursuant to a void trust. He contends the instruments were inoperative and void because of the indefiniteness and uncertainty of the trust. The trust receipt, or letter, signed by the deceased and addressed to her son, Moses, bitterly complained of her treatment by appellant and recited her desire to break the joint tenancy. The instrument recited: "I am deeding you all of my property, and I am asking you to accept it in Trust for my benefit, and if I ask you to deed it back to me, or to otherwise convey it, or incumber it for my benefit or let me do it, then I want you to do it. If you will accept this deed (which I have told my attorney to draw) to you this day, under these conditions, and will not charge me for accepting the deed, or doing this, then I will ask you to accept this deed, under these express conditions". This letter had attached to it the acceptance of the trust by Moses Reiss wherein he stated he accepted delivery of the deed and the assignments, "under the above conditions".

[11-13] Appellant contends the trust is void for the reason that it is vague and uncertain as to the duties of the trustee, the duration of the trust and the purpose or object of the same. He cites several authorities in support of this contention. Many of those cases arose prior to 1929 when only such trusts could be created as were permitted under section 857 of the Civil Code. Express trusts may now be created for any purpose for which persons may lawfully contract. It seems clear that the property was to be held by Moses in trust for his mother and that he was to convey the property to her or to whomever she selected at any time upon her demand. A trust to convey property is now valid and a grant upon a trust to convey creates an express trust. Therefore, the declaration of trust met the requirements of the statute when it showed that the property had been conveyed in trust for the purpose of reconveying the same at the request of the trustor. This purpose was stated in the instruments constituting the trust agreement and the property was identified by the deed and assignments, and the conditions were accepted by the trustee. It is also clear that the duration of the trust was limited to the lifetime of the trustor.

[14] Appellant, finally, contends that the court erred in concluding that the conveyances in question terminated the joint tenancies. It is admitted that a joint tenancy may be terminated by a transfer without condition to a third party but appellant maintains that a joint tenancy may not be terminated by a transfer by one joint tenant to a trustee for the use and benefit of the grantor.

[15] The trustee, while required to exercise no active duties, was obligated to reconvey the property to the grantor upon demand or to otherwise incumber it for the benefit of the grantor. No California case has been cited holding that a transfer of the legal title under the precise circumstances here presented fails to break the joint tenancy. Appellant cites the English case of Edwards v. Champion, 1853, 43 Eng.Reprint 80, which holds that a conveyance to the use of the will of another would be ineffective to terminate a joint tenancy but the chancellor expressly withheld an opinion on the precise problem presented upon this question on this appeal by the following language: "It is unnecessary for me to give an opinion upon the question whether a surrender by a joint tenant to the use of his will effects a severance". Joint tenancies were favored at the common law but California has adopted an opposite rule. Secs. 683 and 686, Civil Code; Swartzbaugh v. Sampson, 11 Cal. App.2d 451, 54 P.2d 73.

[16-18] For the lawful creation of a joint tenancy it is necessary that there be the four unities of interest, of title, of time and of possession. Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003. "An estate in joint tenancy can be severed by destroying one or more of the necessary unities * * *." Swartzbaugh v. Sampson, supra [11 Cal.App.2d 451, 54 P.2d 75]. It seems clear that two or more of these unities were destroyed by the conveyance and assignments and the creation of the trust. It should follow that the joint tenancy was thereby destroyed and that a tenancy in common succeeded it.

We are of the opinion that the clearly expressed desire of Rosa Reiss to terminate the joint tenancy arrangement was effectively accomplished by the transfer of the legal title to her son for her expressed specific purpose of having the control and the right of disposition of her half of the property.

The judgment is affirmed.

We concur: BARNARD, P. J., MARKS, J.

45 Cal.App.2d 748

JONES et al. v. UNIVERSAL PICTURES CO., Inc.

Civ. 2758.

District Court of Appeal, Fourth District, California.

July 7, 1941.

Hearing Denied Sept. 3, 1941.

1. Principal and agent 🔑177(1)

Knowledge on the part of an agent must be imputed to his principal.

2. Reformation of instruments 🔑45(2)

Evidence sustained decree reforming provision of contract for distribution of motion pictures, that distributor should expend and "advance" such sum that it might deem necessary for advertising and that it might deduct $5,000 for each picture furnished by producer, as the distributor's advertising charge, so that distributor was entitled to deduct only amounts actually expended and not the fixed $5,000 charge for each picture, on ground that the provision was ambiguous, that producer was mistaken concerning terms set forth in contract, that distributor had known producer was laboring under mistake, and that true meaning of contract was that cost of advertising only should be charged against producer.

3. Contracts 🔑161

Each provision of a contract should be given a meaning if possible.

4. Reformation of instruments 🔑25

Alleged knowledge on part of motion picture producer's agent, that provision of contract with distributor relating to amount to be deducted by distributor from proceeds of each picture for advertising costs was ambiguous, did not preclude court from granting reformation of provision so as to conform with true intention of the parties.

5. Limitation of actions 🔑197(2)

Evidence sustained finding that first knowledge that motion picture producer had that distributor was claiming a flat charge of $5,000 per picture for advertising in lieu of actual costs thereof was in 1937, so that producer's action to reform provision of contract between producer and distributor relating to advertising costs, brought in 1938, was not barred by 3-year limitation. Code Civ.Proc. § 338, subd. 4.

6. Limitation of actions 🔑96(2), 100(11)

Where provision of contract between motion picture producer and distributor relating to deductions for advertising costs was ambiguous and distributor for number of years deducted only amounts actually expended for advertising, producer had no duty to take any steps which might lead to discovery of any fraud or mistake in the contract in regard to such provision, and hence 3-year limitation period began to run on cause of action for reformation of the provision on date that producer first obtained knowledge that distributor claimed to be entitled to a fixed charge for advertising in connection with each picture instead of amounts actually expended. Code Civ.Proc. § 338, subd. 4.

7. Appeal and error 🔑1071(6)

Where action for reformation of contract was not barred by limitation, the failure of the trial court to make a direct finding on that issue was not prejudicial. Code Civ.Proc. § 338, subd. 4.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Buck Jones and another against the Universal Pictures Company, Inc., for reformation of a contract. From an adverse judgment, the defendant appeals.

Affirmed.

Loeb & Loeb, of Los Angeles (Herman F. Selvin, of Los Angeles, of counsel), for appellant.

Sherman & Sherman and Glenn M. Still, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment decreeing the reformation of a written contract. The parties stipulated as to the amount due to the plaintiff if reformation was granted and the only question here raised is as to the validity of the decree granting reformation.

The action which was filed on July 8, 1938, relates to a contract dated March 31, 1934, and to a renewal thereof dated about March 1, 1935, extending the arrangement for another year. Both of these agreements were assigned by Buck Jones to Buck Jones Productions, but, for convenience, we will refer to Buck Jones as the respondent.

Shortly prior to March 31, 1934, the respondent and his agent, a Mr. Vincent, had certain negotiations with Mr. Henigson, an authorized representative of the appellant, which led to the execution of the original contract in question. During these negotiations it was agreed that the respondent, during the ensuing year, would produce from six to eight motion pictures, that the appellant would distribute these pictures, that the respondent would be paid a fixed sum per picture and also a percentage of the net profits, and, among other things, it was agreed that the appellant might deduct the actual cost of its advertising in connection with each picture produced, with the maximum fixed at $5,000 per picture. A contract was then prepared by the appellant and submitted to Vincent to whom the respondent left the details of the transaction. When the respondent was asked to sign the contract he asked Henigson if it was "the contract as we talked it over," and being assured that it was he signed the document without reading it. About a year later the contract was renewed for another year. At the expiration of that year the relationship was continued for a third year by the execution of a new contract. During all of this time and up to October 30, 1937, the appellant accounted to the respondent monthly, each statement listing the amounts actually expended by the appellant for advertising purposes. On October 30, 1937, after the relationship between the parties had been severed as far as the production of any more pictures was concerned, the appellant sent the respondent a statement covering the entire period and making a flat charge against the respondent of $5,000 for advertising in connection with each picture produced and distributed.

Paragraph 8 of the original contract dated March 31, 1934, so far as material here, reads as follows: "All advertising, publicity and/or exploitation in connection with each photoplay shall be handled by Universal. Universal shall expend and advance such sums as it may deem necessary for trade paper, billboard, magazine, cuts, campaign book and/or advertising of the photoplays to be produced and distributed hereunder, and shall be entitled to deduct and retain for its own benefit from the gross proceeds to be derived from said photoplays the sum of Five Thousand Dollars ($5000.00) per photoplay as its advertising charge."

The decree appealed from ordered this provision reformed so as to provide that the appellant might deduct its actual cost of advertising, not exceeding $5,000 for each picture.

The record discloses the following evidence material to this controversy: The respondent testified that he had a conversation with Mr. Henigson, at which Vincent was present, some three weeks before March 31, 1934; that Henigson stated that only the actual cost of advertising would be charged against each production and that he told Henigson that was all right; that he left the details of the contract to Vincent; that Henigson later phoned him and asked him about signing the contract; that he asked Henigson whether the contract "is the contract as we talked it over"; that Henigson said it was and he replied "That is good enough for me"; and that he then signed the contract without reading it. With reference to the execution of the original contract Mr. Muhl, a representative of the appellant, testified that the original draft of the contract which was submitted contained the same provision regarding the costs of advertising which appears in the contract as finally executed, that an attorney acting for Vincent wanted this provision clarified as to whether the appellant would deduct a flat sum of $5,000 or the actual cost of the advertising not exceeding $5,000, and that he took this up with Henigson who said "that we did not want to give it if we did not have to; but if we had to give it in connection with the closing of the contract it would be o. k. to do so". He further testified that he later discussed the terms of the contract with Vincent and his attorney, and that he could not recall any discussion as to the charge for advertising but that "it was not changed, however". He then testified that at the time the respondent signed the contract there was no discussion as to its terms and no one read it. The attorney who represented Vincent testified that when he read the first draft of the contract he told Vincent that the provision as to advertising charges was ambiguous, and that when he went over the redraft of the contract he made a note to the effect that the ambiguity still existed and that he thought it might be construed as permitting the appellant to deduct $5,000 for advertising services. There is evidence that this note was sent to Vincent's office but there seems to be no evidence that he read it.

It appears without contradiction that the appellant sent monthly statements in which the cost of advertising only was charged against the respondent. The respondent testified that in 1935 the appellant asked him about a renewal of the contract on the same terms, to which he agreed, and that the appellant wrote him a letter which appears in evidence. This letter refers to the original contract and provides for an extension of one year with a few changes which are not material here.

The respondent testified that in 1936, when the question of another agreement came up, his attorney, Mr. Sherman, who had taken over his business, called his attention to the fact that the provision of the original contract relating to the charge for advertising did not agree with what the respondent had told him the agreement was, and that he instructed him to straighten the matter out. Mr. Sherman testified that about the first of March, 1936, he took this matter up with Mr. Muhl telling him that the advertising provision in the original agreement was ambiguous, that the respondent had understood that it was to be the actual cost of advertising with a maximum of $5,000, that the appellant had been accounting on that basis at all times and that he wanted that provision "clarified", that Muhl replied that he did not see any objection to that, that this was his understanding, that the appellant had been accounting on the basis of actual cost of advertising, and that Muhl further stated he would like to discuss the matter with his superior, Mr. Koenig. Shortly thereafter, Muhl wrote a letter with reference to the new contract in which he said: "We shall clarify that the cost only of advertising may be charged to each picture but not in an amount exceeding $5000." Mr. Sherman testified that a little later he had a talk with Mr. Koenig in which he told him the original contract was "a little ambiguous on whether $5000 for a picture should be charged for advertising against Mr. Jones' production, or whether it should be the actual cost of advertising with a limitation of $5000," and that Mr. Muhl had agreed to clarify the situation, to which Koenig replied that this was satisfactory. The new contract then entered into contained a paragraph relating to the cost of advertising which follows the exact language of the one used in the original contract except that the latter part thereof provides that the appellant may retain the amount actually expended by it for advertising, not exceeding the sum of $5,000 in connection with each picture. The appellant continued making monthly statements in which the actual cost of advertising only was charged to respondent, not only in connection with pictures produced under the new contract of 1936, but also in connection with those which had been produced under the original contract and its renewal in 1935. This continued until October 30, 1937, when production under all contracts had ceased, at which time a demand upon the respondent for a flat charge of $5,000 for advertising in connection with each picture produced under the first two contracts was for the first time made.

[1] There is little, if any, conflict as to the facts. The appellant's main contention is that the court's finding that there had been a mistake is not supported by the evidence since it appears that Vincent was the agent of the respondent and that Vincent was aware of the contents of the contract before it was signed. It relies upon the well-established principle that knowledge on the part of an agent must be imputed to his principal, and contends that no mistake appears in view of the agent's knowledge.

[2] In spite of the rule relied upon this result does not follow under the circumstances here appearing and a large part of the evidence supports the court's findings to the effect that an ambiguity existed, that the respondent was mistaken as to the terms set forth in the written contract, that the appellant at least knew that he was laboring under that mistake, and that the true meaning of the contract, as agreed upon by the parties, was that the cost of advertising only should be charged against the respondent.

[3] There can be little doubt that the provision of the contract in question was ambiguous. It is first provided therein that all advertising is to be handled by the appellant and that the appellant shall expend "and advance" such sums as it may deem necessary for that purpose in connection with pictures to be produced and distributed. It is then provided that the appellant may deduct from the gross proceeds the sum of $5,000 for each picture as its advertising charge. While the latter provision, standing alone, would establish a fixed charge of $5,000 for advertising in connection with each picture, to accept that as its meaning would do away with the

necessity for any other provision, and would render largely meaningless the first and larger part of the provision in question. This violates the well-established rule that each provision of a contract should be given a meaning where possible. Moreover, if a fixed charge was intended no reason appears for providing that the appellant might expend for advertising such sums as it deemed necessary, and no reason for referring to the money thus spent as an "advance." Not only does it in fact appear that this provision was ambiguous but it was so considered by the attorney for Vincent, by Mr. Sherman when he was brought into the matter and by Mr. Muhl, who pointed out that they had been interpreting the contract upon the basis of charging for the actual cost of the advertising.

[4] If we assume that the respondent's agent, Vincent, had read the contract and knew the terms therein used, and if we further assume that his attorney had advised him that this provision was ambiguous, such facts are not conclusive here. There is nothing to show that he knew the exact meaning of the language used and the ambiguity still existed in spite of such knowledge as he possessed. There can be no question of the intention of the parties. Muhl testified that his superior told him to yield the point only if he had to, and that there was no further discussion of the matter between that time and the signing of the contract. On the other hand, the respondent, before he signed the contract, took it up with Mr. Muhl's superior, with whom he had made the agreement, and was assured that the written agreement was in accordance with the terms of the oral agreement. Relying upon that assurance the respondent signed the agreement as written.

Under such circumstances, the interpretation placed upon the contract by the parties is most important. For three and one-half years thereafter the appellant accounted monthly to the respondent, charging him only with the actual cost of the advertising and paying him his share of the profits on that basis. The appellant argues that these monthly accounts are without significance, that money was continually coming in from the distribution of the pictures, and that there was no reason for charging the respondent the full amount of $5,000 on each picture until there was a final accounting. This ignores the plain provision of the contract that the respondent was to share only in the net profits after certain charges were paid and deducted. Under appellant's view of the matter the respondent would be entitled to no part of such profits until the entire $5,000 had first been deducted. In view of the actual situation, the accounting to the respondent from month to month on the basis of the cost of the advertising, and the corresponding payments to him of his share of the net profits, are most significant as to the interpretation placed upon this clause of the contract by the appellant itself. Moreover, when the ambiguity in the original contract was pointed out by the respondent's attorney in March, 1936, in connection with a renewal arrangement, the appellant called attention to the fact that it had been accounting on the basis of the cost of the advertising, and all parties talked of clarifying the matter rather than of changing it only for the future. The general circumstances disclosed by this evidence strongly indicate an intention on the part of all parties to clarify the matter with respect to the original contract and its first renewal, as well as in connection with the new contract which was then being entered into, and it seems quite probable that this was done with a view of inducing the respondent to enter into that new contract.

The findings of the court in this connection, and the reformation of this contract in order to conform with the real agreement of the parties, are sufficiently sustained by the evidence under the decisions in this state, only a few of which need be cited. Sullivan v. Moorhead, 99 Cal. 157, 33 P. 796; First National Bank v. Bowers, 141 Cal. 253, 74 P. 856; Kales v. Houghton, 190 Cal. 294, 212 P. 21; Union Sugar Co. v. Hollister Estate Co., 3 Cal.2d 740, 47 P.2d 273; Siem v. Cooper, 79 Cal.App. 748, 250 P. 1106; Robinson v. Arthur R. Lindburg, Inc., 140 Cal.App. 669, 35 P.2d 1057.

Under the views above expressed it becomes unnecessary to consider the appellant's further contentions that the court's findings of fraud justifying a reformation of the contract and of estoppel as against the appellant are not sustained by the evidence and the existing facts. We may add, however, that we are far from convinced that the judgment could not be supported on one or both of these grounds.

Appellant's final contention is that the cause of action was barred by the statute of limitations and that the court erred in failing to make a direct finding on that issue. It is argued that the mistake or fraud relied upon took place on March 31, 1934, and March 1, 1935, the dates on which the first and second contracts were executed, and that the three-year limitation provided by section 338, subd. 4, of the Code of Civil Procedure had expired when this action was begun on July 8, 1938. It is further argued that no excuse could exist for a later discovery of the mistake since the means and opportunity for discovering it were always available to the respondent in that he could have read the contract at any time.

[5] The court found that on October 30, 1937, the appellant presented a claim for the difference between the actual cost of the advertising and the sum of $5,000 per photoplay, and that this was the first notice or knowledge that the respondent had that the appellant was seeking or endeavoring to claim a flat charge of $5,000 per picture for this purpose in lieu of the actual costs thereof. The appellant argues that this finding is not supported by the evidence since the respondent himself testified that his attorney called the matter to his attention in March, 1936, just prior to the execution of the third contract. It would make no difference here, so far as the statute of limitations is concerned, if discovery was actually made in March, 1936. However, the court's finding is amply sustained by the evidence. While in March, 1936, respondent's attorney called his attention to the fact that an ambiguity in this regard existed in the contract, he then requested his attorney to straighten the matter out. A representative of the appellant at that time stated that his understanding was that the charge was to be upon the basis of the actual cost, that returns had been made on that basis, and that they would be glad to clarify the matter. The matter was not only clarified in the third contract, but the appellant continued thereafter to make returns under the first and second contracts on the basis of the actual cost of the advertising. It was not until October 30, 1937, that any different course was pursued and the court correctly found that at that time the respondent first obtained notice or knowledge that the appellant had any intention of charging for the advertising on any other basis than that of its actual cost.

[6, 7] Under the circumstances here appearing, including the ambiguity in the contract and the conduct of the appellant in connection therewith, no duty rested upon the respondent to take any steps which might have led to the discovery of a fraud or mistake. Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 86 P.2d 102; Tarke v. Bingham, 123 Cal. 163, 55 P. 759. It follows that the action was not barred by the statute of limitations, and that the failure to make a direct finding on that issue was not prejudicial to the appellant. City of Los Angeles v. Dawson, 139 Cal. App. 480, 34 P.2d 236; Woodham v. Cline, 130 Cal. 497, 62 P. 822; Reiniger v. Hassell, 216 Cal. 209, 13 P.2d 737.

The judgment is affirmed.

We concur: MARKS, J.; KELLY, Justice pro tem.

45 Cal.App.2d 668

CALIFORNIA EMPLOYMENT COMMISSION v. ARROW MILL CO. et al.

Civ. 6543.

District Court of Appeal, Third District, California.

June 30, 1941.

Rehearing Denied July 30, 1941.

1. Appeal and error 🔑907(3)

Where an appeal is taken upon the judgment roll alone, it is conclusively presumed that the evidence adduced before the trial court is sufficient to sustain the findings of fact.

2. Appeal and error 🔑544(2)

Where an appeal is taken upon the judgment roll alone, the only subject of review is whether the findings are consistent and support the judgment.

3. Appeal and error 🔑907(3)

Where an appeal is upon the judgment roll alone, the only recourse of the appellate court for the facts of the case is to the findings.

4. Statutes 🔑164

The general rule is that an amendment of an act operates as a repeal of its provisions to the extent that they are changed by and rendered repugnant to the amendatory act.

5. Taxation ⚷59

Where original unemployment insurance act was based on theory that employer must be engaged in business for at least 13 weeks before he is subject to the tax and the amendment fixed period at 20 weeks, it must be assumed that legislature did not intend to impose a tax upon the pay roll where the employer had not been engaged in business less than 13 weeks in the one case and 20 weeks in the other. St.1935, p. 1228, § 9(b) (2); St.1937, p. 2055, § 9(a).

6. Statutes ⚷273, 276(1)

The repeal without a saving clause or provision of a statute imposing a license tax or fee takes away the right to collect an unpaid tax which is due even though a suit to collect the tax is pending.

7. Statutes ⚷273, 275

By the repeal of statutes which authorize the making of assessments and the collection thereof, not only the remedy for the collection of an assessment but also the lien or right is taken away, although expenses have been incurred on the faith of such assessment.

8. Statutes ⚷276(1)

Nothing less than a plain exception of existing cases or claims from the operation of the repealing act or a continuance of the same system of taxation under new regulations will save pending cases or claims from a repeal of statute authorizing the making of assessments and the collection thereof.

9. Taxation ⚷59

Where original unemployment insurance act was based on theory that employer must be engaged in business for at least 13 weeks before he is subject to the tax and employer began business on August 16, 1938, or some eleven days prior to time when amended unemployment insurance act became effective which required that employer be engaged in business for 20 weeks before being subject to tax, employer was subject to no tax for year 1938. St.1935, p. 1228, § 9(b) (2); St.1937, p. 2055, § 9(a).

10. Appeal and error ⚷907(3)

Where appeal was upon judgment roll alone, contention contrary to express findings of trial court and contention based on matters of which findings make no mention would be overruled.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by California Employment Commission against Arrow Mill Company and others to recover unemployment insurance taxes. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Earl Warren, Atty. Gen., John J. Dailey and Albert F. Zangerle, Deputy Atty. Gen. (Maurice P. McCaffrey and Glenn V. Walls, both of Sacramento, of counsel), for appellant.

T. F. Peterson, of Fortuna, for respondent.

TUTTLE, Justice.

This action was brought to recover the sum of $669.61, and interest, on account of taxes due under Unemployment Insurance Act, Stats.1935, Chap. 352, p. 1226. Findings and judgment were in favor of defendants. Plaintiff appeals from the judgment roll alone.

The defendant, Arrow Mill Company, is a corporation organized and existing under and by virtue of the laws of the state of Illinois, having its principal place of business in the city of Chicago, county of Cook, state of Illinois. On or about August 16, 1937, the corporation, having been authorized to do business within the state of California, opened a branch office in the city of Eureka, county of Humboldt, and from that date continuously employed workers in this state. For eighteen weeks and no more prior to January 1, 1938, the corporation employed four or more workers for at least one day a week in and about its branch office in Eureka.

The above mentioned act provided in section 9 thereof—(quoting the pertinent portion thereof):

"(2) All the parties specified and not excluded in paragraph 1 of this subdivision having the following record: As to such party, *on each of some thirteen days during the calendar year, each day being in a different calendar week,* the total number of individuals who were in his employ for some portion of the day, whether or not at the same moment of time, was four or more. There shall be included in computing the persons thus employed by the employer, all persons thus employed and all of any several places of employment maintained by the employer, except that where some of such persons are employed within the State and others are employed without the State, the tax levied by this act shall apply only as to such employees employed within the State, or the greater part of the work of which is performed within the State." (Italics ours.)

On August 27, 1937, an amendment to said section became effective, St.1937, p. 2055. It defines those subject to the payment of a tax as follows:

"(a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, *in each of twenty different weeks,* whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; provided, that prior to January 1, 1938, employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day; * * *." (Italics ours.)

[1-3] As the appeal is taken from the judgment roll alone, the following general rules govern the scope of our inquiry:

It is elementary to say that in an appeal upon the judgment roll alone, it is conclusively presumed that the evidence adduced before the trial court is sufficient to sustain the findings of fact. (Sepulveda v. Sepulveda, 77 Cal. 605, 20 P. 145; Rosewarn v. Washington Gold Mining Co., 84 Cal. 219, 23 P. 1035; Woodmen of the World v. Rutledge, 133 Cal. 640, 65 P. 1105.) Upon appeal from the judgment roll, the only subject of review is whether or not the findings are consistent, and support the judgment. (People v. Pacific Grove High School District, 11 Cal.App. 209, 104 P. 586; O'Connell v. Behan, 19 Cal.App. 111, 124 P. 1038.) Where an appeal is upon the judgment roll alone, the only recourse of the Appellate Court for the facts of the case is to the findings. (Turner & Dahnken v. Bauer, 28 Cal.App. 311, 152 P. 308.)

It is the contention of plaintiff that section 9 of the original act mentioned was in force during the entire year of 1937. If this be the law, then the facts found show that defendant is subject to the tax. On the other hand, defendant and respondent contends that the said amendment to the act applied to it only upon and after the effective date thereof—August 27, 1937. If this be the law, then no tax is due, as the findings show that, at no time during said year, was it an employer according to the terms of said amendment.

While the findings do not indicate the precise date when respondent commenced to do business in this state, they do state that it was operating for "eighteen weeks and no more next preceding the first day of January 1, 1938". Respondent states that it commenced business on August 16, 1938, and appellant also uses that date. We will accept this construction of the findings. It thus appears that respondent was engaged in business some *eleven days* prior to the time when the amendment went into effect.

[4, 5] It is the general rule that "An amendment of an Act operates as a repeal of its provisions to the extent that they are changed by, and rendered repugnant to, the amendatory Act." 25 R.C.L., p. 923, § 173. The repugnancy between the original act and the amendment consists in the fact that in the former the tax is computed upon the basis and theory that the employer must be engaged in business for at least *thirteen* weeks before he is subject to the tax, while in the latter, such period is fixed at *twenty* weeks. There is no method of computation fixed for a shorter period in each case, hence it must be assumed that the legislature did not intend to impose a tax upon the pay roll where the employer had not been engaged in business less than thirteen weeks in the one case, and twenty weeks in the other.

[6-8] It is also the general rule that: "The repeal, without a saving clause or provision, of a statute imposing a license tax or fee takes away the right to collect an unpaid tax which is due even though a suit to collect the tax is pending. By the repeal of statutes which authorize the making of assessments and the collection thereof, not only the remedy for the col-

lection of an assessment but also the lien or right is taken away, although expenses have been incurred on the faith of such assessment. And nothing less than a plain exception of existing cases or claims from the operation of the repealing act or a continuance of the same system of taxation under new regulations will save such cases or claims from the effect of the repeal." 25 R.C.L., p. 944, § 193.

[9] Appellant relies upon certain cases in this state dealing with inheritance taxes, such as In re Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788, and Trippet v. State, 149 Cal. 521, 86 P. 1084, 8 L.R.A.,N.S., 1210. Taking the latter as typical of the others, it appears that Jacob Gruendike died April 8, 1905. An amendment to the Collateral Inheritance Tax Law (Stats. 1893, p. 193) went into effect on July 1, 1905, St.1905 p. 374. Said act provided at all times (section 4), that all taxes imposed by the act should be "due and payable at the *death of the decedent*". The question to be decided was whether the tax should be imposed under the said act as it read at the time of death, or at the time when the said amendment became effective. The court held that at the time of death, the right of the state to the tax had become a vested one, and that the subsequent amendment had no application to the situation. The court quoted the section of the act mentioned above, and based its conclusions upon the fact that the law expressly provided for such vesting. No authority has been called to our attention, covering the general subject of taxation, which holds that the state has a vested right to a tax where such right has not *accrued*. Here respondent had only been in business for eleven days. No right to a tax arose until after respondent had been conducting its business for at least thirteen weeks. The authorities mentioned are therefore not in point.

It may be pointed out that it would have been a simple matter for the legislature to have inserted a "saving clause" in said amendment, and provided that, as to those who were in business prior to August 27, 1937, the original act was still in force. It is not contended by appellant that *any tax whatever* could be imposed upon one who commenced business after August 27, 1937. As to them, there could be no argument based upon vested rights, and there were not twenty weeks remaining in the taxable year.

[10] Appellant contends that, irrespective of the foregoing, respondents came under the provisions of the act by virtue of subdivision (a) of section 9 of the original act, which provides: "'Employer' means: (a) Every individual, trust or estate, partnership, association, joint stock company or corporation, subject to a pay roll tax levied by the United States government, if the tax levied by this act, or any portion thereof, may be credited against such pay roll tax."

The point is without merit, as the findings of the court are directly to the contrary. It was found that respondent, while it paid the federal tax, the state did not give credit for such payment. Appellant argues that it has construed the act in question to the effect that an employer subject to a pay roll tax under title IX of the Social Security Act, 42 U.S.C.A. § 1101 et seq., was also subject to the contributory provisions of the Unemployment Reserves Act for the years 1936 and 1937 if it had one or more workers in California, and that the amendments of 1937 to section 9 did not have the effect of destroying a liability already vested. The answer is that the findings make no mention of such rulings. They are not before us in any form. Furthermore, as appellant's authorities show, such rulings are matters of evidence for the consideration of the trial court, and are not controlling.

We do not consider it necessary to discuss estoppel against the state, which is urged by respondent.

The judgment is affirmed.

We concur: **PULLEN, P. J.; THOMPSON, J.**

45 Cal.App.2d 736

WHITTIER UNION HIGH SCHOOL DIST. v. BECK.

Civ. 12484.

District Court of Appeal, Second District, Division 1, California.

July 7, 1941.

1. Appeal and error ⚷428(2)

A notice of appeal, which was filed within 60 days from entry of judgment of dismissal appealed from, was filed in time.

2. Eminent domain ⚷259

Where record disclosed that plaintiff had obtained dismissal of proceeding in eminent domain because the property, the subject of the proceeding, had been acquired by purchase and that thereafter defendant obtained a judgment of dismissal on ground that plaintiff had abandoned the action, the bill of exceptions was not subject to objection that it did not contain all of the pleadings, evidence, papers and files upon which judgment of dismissal was based. Code Civ. Proc. § 581, subd. 1, and § 1255a.

3. Eminent domain ⚷259

Where record on appeal from judgment dismissing proceeding in eminent domain on ground that plaintiff had abandoned proceeding disclosed facts sufficient to present to appellate court question of law involved, objections that affidavits in opposition to motion for judgment of dismissal were not "by plaintiff" because made by witnesses on behalf of plaintiff and that bill of exceptions, which stated that it was "true and correct", contained no recital that it was "full and complete" were immaterial. Code Civ.Proc. § 1255a.

4. Eminent domain ⚷265(5)

The statute, providing for an award of attorney's fees and necessary expenses to a defendant in proceeding in eminent domain upon abandonment thereof by plaintiff, applies only where there has been an actual abandonment, express or implied. Code Civ. Proc. § 1255a.

5. Eminent domain ⚷265(5)

The fact that plaintiff in eminent domain proceeding procured a dismissal of the proceeding after plaintiff had acquired by purchase the property therein sought to be condemned did not constitute an "abandonment" of the proceeding within meaning of statute providing for an award of attorney fees and necessary expenses to defendant in eminent domain proceeding upon abandonment thereof by plaintiff. Code Civ.Proc. § 581, subd. 1, and § 1255a.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

6. Eminent domain ⚷197

Abandonment is not sole ground on which condemnation suit may be dismissed, notwithstanding such ground is sole ground specified in statutory provisions relating to eminent domain, since provisions relating to dismissals of civil actions are also applicable to eminent domain proceedings. Code Civ.Proc. § 581, subd. 1, and § 1255a.

7. Eminent domain ⚷197, 265(5)

Where eminent domain proceeding was dismissed at plaintiff's request after plaintiff had acquired by purchase the property therein sought to be condemned, and such order of dismissal was never appealed from, vacated nor set aside, court erred in entertaining defendant's subsequent motion for dismissal on ground that plaintiff had abandoned action and in awarding to defendant her attorney's fees. Code Civ.Proc. §§ 473, 581, subd. 1, and § 1255a.

◆

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Proceeding in eminent domain by the Whittier Union High School District against Frieda Margaret Beck, which was dismissed with prejudice by the clerk at plaintiff's request after answer had been filed. From a judgment granting defendant's subsequent motion to dismiss the proceeding and awarding defendant her costs, including attorney's fees, plaintiff appeals.

Judgment reversed.

J. H. O'Connor, County Counsel, and Douglas De Coster, Deputy County Counsel, both of Los Angeles, for appellant.

William H. Brawner and Caryl Warner, both of Los Angeles, for respondent.

DORAN, Justice.

The plaintiff in a proceeding in eminent domain appeals from a judgment dismissing the proceeding on motion of the defendant.

The motion for dismissal was made pursuant to section 1255a of the Code of Civil Procedure on the ground that the proceedings had been abandoned by the plaintiff. The motion was granted and the defendant was accordingly awarded her costs and disbursements, including attorney's fees.

The appeal is taken upon a bill of exceptions and it appears therefrom that on July 13, 1938, plaintiff's complaint in eminent domain was filed herein and answered by respondent, one of the defendants, and that thereafter, on February 21, 1939, plaintiff filed with the clerk of the court a request for dismissal with prejudice, pursuant to section 581, subdivision 1, of the Code of Civil Procedure; and the dismissal was accordingly entered by the clerk. No appeal has been taken from the said order of dismissal, nor has any motion to set the same aside been made under the provisions of section 473 of the Code of Civil Procedure, and the said order of dismissal has never been set aside or vacated. Subsequently, on March 10, 1939, respondent made her motion for dismissal as above noted.

In opposition to respondent's motion for dismissal appellant plaintiff filed two affidavits, which are set forth at length in the bill of exceptions, and from which it appears that appellant's reason for requesting a dismissal of the proceeding under section 581, as above noted, was because appellant had acquired by purchase the real property which was the subject of the proceeding in eminent domain.

[1-3] Appellant specifies as error the judgment of dismissal and the awarding of attorney's fees to respondent. Respondent contends that an eminent domain action cannot be dismissed by an ex parte filing of a request for dismissal with prejudice under section 581, Code of Civil Procedure, subdivision 1, and that the filing of such a dismissal operated as an abandonment and properly supported a subsequent motion for dismissal by defendant under section 1255a, Code of Civil Procedure; and cites Silver Lake Power & Irrigation Co. v. City of Los Angeles, 32 Cal.App. 123, 162 P. 432, as directly passing upon the point here involved. Respondent also contends that the bill of exceptions does not contain all of the pleadings, evidence, papers and files upon which the motion to dismiss was made and upon which the judgment of dismissal was based; and also contends that the notice of appeal herein was not filed in time. There is no merit in either of the latter contentions of respondent. The notice of appeal is shown to have been filed within sixty days from the entry of the judgment of dismissal appealed from; and it would appear that respondent does not seriously press the point. The bill of exceptions contains a statement to the effect that at the hearing on defendant's motion to dismiss the action there was no evidence introduced other than the affidavits by plaintiff in opposition to said motion, the files, papers, pleadings, and minutes; and respondent has stipulated that the bill of exceptions is true and correct. It would appear, therefore, that the bill of exceptions contains a sufficient statement of the facts pertaining to the question here presented. Respondent's argument that the affidavits are not "by plaintiff" because they are by witnesses on behalf of plaintiff, and that while the bill of exceptions recites that it is "true and correct" it contains no showing or recital that it is "full and complete", amounts to little more than quibbling. The record here contains sufficient facts to reveal that plaintiff had requested and obtained a dismissal of the action under section 581, Code of Civil Procedure, subdivision 1, because the property, the subject of the suit, had been acquired by purchase; and that thereafter defendant obtained a judgment of dismissal under section 1255a, Code of Civil Procedure, on the ground that plaintiff had abandoned the action. The question of law involved is squarely presented by the record.

[4] That section 1255a of the Code of Civil Procedure, providing for an award of reasonable attorney fees, necessary expenses, etc., to a defendant in a proceeding in eminent domain on abandonment thereof by plaintiff, and for the manner in which the said proceeding may be dismissed, applies only in instances where there has been an actual abandonment, express or implied, is too plain to require discussion. The language of the section itself plainly indicates its proper application and the authorities on the point are in accord therewith. See Pacific Gas, etc., Co. v. Chubb, 24 Cal.App. 265, 270, 141 P. 36; City of Bell v. American States Water Service Co., 10 Cal.App.2d 604, 52 P.2d 503; People v. Southern Pac. R. R. Co., 17 Cal.App.2d 257, 61 P.2d 1184; and note in 121 A.L.R. at p. 92 et seq.

[5, 6] The sole question properly presented by this appeal, therefore, is whether the dismissal of the action by the plaintiff after the purchase of the property constituted an abandonment of the proceedings within the meaning and application of section 1255a. Obviously, there was no such abandonment. The property in question had been acquired by purchase, plaintiff had achieved the purpose of the suit, the matter had been settled out of court and there was no further necessity of a judgment of condemnation. Plaintiff having acquired the property which formed the subject of the proceeding in eminent domain could hardly be said to have abandoned its efforts to acquire the same. The question is answered by the apparent purpose for which section 1255a was enacted, namely, "to meet certain abuses arising out of resort to the action without seriously intending to prosecute it to a conclusion". Pacific Gas, etc., Co. v. Chubb, supra, 24 Cal.App. at page 270, 141 P. at page 38. Certainly, plaintiff's good faith in the instant case was shown when the property was actually purchased. There can be no question that in cases other than abandonment, there being no provision therefor found under the title "Eminent Domain" (title VII) in part III, Code of Civil Procedure, a proceeding in eminent domain may be dismissed as elsewhere provided by the said code, as under section 581, subdivision 1, in the instant case. People v. Southern Pacific R. R. Co., supra, 17 Cal.App.2d at pages 263, 264, 61 P.2d 1184, provides a complete answer to the question here presented, and distinguishes the Silver Lake Power & Irrigation Co. case, supra. Also see City of Bell v. American States Water Service Co., supra, wherein dismissal of a proceeding in eminent domain under section 583, Code of Civil Procedure, was upheld.

[7] It follows that under the circumstances the trial court erred in entertaining respondent's motion for dismissal under section 1255a, Code of Civil Procedure, in entering judgment of dismissal pursuant thereto and in awarding respondent her attorney's fees.

The judgment appealed from is therefore reversed.

We concur: YORK, P. J.; WHITE, J.

45 Cal.App.2d 804

PEOPLE v. VAN METER et al.

Cr. 3462.

District Court of Appeal, Second District, Division 1, California.

June 26, 1941.

Criminal law ⚷1001

The probation granted upon conviction of violation of Corporate Securities Act was properly revoked on subsequent conviction of another violation of Corporate Securities Act. Gen.Laws 1937, Act 3814.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

G. R. Van Meter, L. McWhorter and others were convicted of violating the Corporate Securities Act, and from a judgment of conviction and from an order revoking probation granted in a former case the last named defendant appeals.

Affirmed.

Robert E. Ford, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

WHITE, Justice.

On May 26, 1938, an information was filed by the district attorney of Los Angeles county in which appellant and his codefendants were accused in seven counts of violation of the Corporate Securities Act (Stats.1917, p. 673, and amendments thereto; Deering's Gen.Laws, Act 3814), by reason of the issuance and sale of certain securities without first having obtained a permit so to do from the commissioner of corporations of the state of California. Following pleas of guilty in that case to counts 3 and 6 of the information, appellant was sentenced to a term of one year in the Los Angeles county jail on both counts to which he entered a guilty plea, and it was directed that the sentences run concurrently. Execution of such sentences was thereupon suspended and appellant placed on probation upon condition that he serve the first six months of the sentences in the county jail as a term of probation.

On September 11, 1940, another information was filed against appellant herein, resulting in his conviction upon two counts thereof charging violation of the Corporate Securities Act. As a result of such convictions, appellant was on March 12, 1940, sentenced to imprisonment in the state prison at San Quentin for the term prescribed by law. From such judgment of conviction appellant duly perfected an appeal.

When the court pronounced the sentence just mentioned he also made the following order, revoking the probation granted in the former case: "* * * because of the conviction suffered in case No. 82090 the court now revokes probation in this case No. 72361, and orders the defendant committed on the sentence imposed in case No. 72361. * * *"

The sole ground upon which this appeal was taken is that in the event the judgment in the second prosecution should be reversed, then the order revoking the probation granted in the former case, and which order was made contemporaneously with the pronouncement of judgment in the latter case, should also be reversed. Appellant concedes that should the judgment of conviction in the second prosecution be upheld, then the order revoking probation in the first case should be sustained.

Since we have this day filed a decision affirming the judgment in the second case (People v. Stowell, 114 P.2d 614), the judgment and the order revoking probation from which this appeal was taken are, and each is, affirmed.

We concur: YORK, P. J.; DORAN, J.

45 Cal.App.2d 734

SUPPLE v. LUCKENBACH et al.

Civ. 11687.

District Court of Appeal, First District, Division 2, California.

July 7, 1941.

1. Appeal and error 🔑635(2)

Where notice of appeal recited that defendant appealed from an order denying defendant's motion to vacate judgment but record did not disclose that such judgment was ever made and a copy of judgment was not set forth, the transcript was insufficient. Code Civ.Proc. § 951.

2. Appeal and error 🔑113(1)

Order denying motion to vacate judgment was not an "appealable order". Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

3. Appeal and error 🔑782

Purported appeal from order denying motion to vacate judgment did not confer jurisdiction on the appellate court. Code Civ.Proc. § 473.

Appeal from Superior Court, San Francisco; Benjamin C. Jones, Judge.

Action by David F. Supple, etc., against Edgar F. Luckenbach and others. From an order denying defendant's motion to vacate a judgment, defendants appeal.

Appeal dismissed.

Phillip Barnett and Samuel Vartan, both of San Francisco, for appellants.

Leo A. Cunningham, of San Francisco, for respondent.

STURTEVANT, Justice.

[1] As written on the cover of the transcript this is an appeal from an "order denying motion to vacate the judgment filed and entered on July 12, 1938". The transcript purports to set forth: Notice of Motion to Vacate Judgment; Memorandum of Points and Authorities in Support of Motion to Vacate Judgment; Affidavit in Support of Motion to Vacate Judgment; Affidavit in Opposition to Motion to Vacate Judgment; Notice of Appeal of Edgar F. Luckenbach; Notice to Prepare Record under Code of Civil Procedure, § 953a; and Clerk's Certificate to Clerk's Transcript on Appeal. It does not purport to set forth any order or judgment. The notice of appeal recites the defendant appeals "from the order heretofore made herein denying said defendant's motion to vacate the judgment filed and entered on or about July 12, 1938 and each and every part thereof". As the record does not show that such an order was ever made, nor set forth a copy thereof, the transcript

is insufficient. Code Civ.Proc., sec. 951. The defect in the record has not been called to our attention by the plaintiff by a motion to dismiss. 2 Cal.Jur. 763. Assuming solely for the purposes of this decision that this court has no power to dismiss of its own motion, we will proceed to further examine the record.

[2, 3] An earlier appeal was taken by defendants and was decided against them. Supple v. Luckenbach, 12 Cal.2d 319, 84 P.2d 52. We refer to that case for a statement of the facts therein recited. After the judgment dated July 12, 1938, was entered the defendants did not appeal from it. They made a motion under Code of Civil Procedure, section 473, to set it aside. That motion, we understand from what is said in the briefs, was denied and later the defendants filed a purported appeal therefrom. It is that purported appeal which we understand is before us. However, it is patent that the defendants could have appealed from that judgment. That they have not done, but they have attempted to appeal from the order refusing to set aside said judgment. Clearly the order appealed from was not appealable. 2 Cal.Jur. 164-166, "Appeal and Error", sec. 30; Lawson v. Guild, 215 Cal. 378, 379, 10 P.2d 459. As it was not appealable, the purported appeal does not confer jurisdiction on this court. It follows that the purported appeal should be dismissed. 2 Cal.Jur. 752.

The appeal is dismissed.

We concur: NOURSE, P. J.; SPENCE, J.

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